

APPEAL NO. 001598

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 21, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter.

The appellant (carrier) appeals and argues that the reason that the claimant is not earning as much as he did at his preinjury job is because of the economic conditions where he lives, or out of voluntary desire not to return to his old job. There is no response from the claimant.

DECISION

We affirm the hearing officer's decision.

The claimant was employed by (employer) on _____, when he slipped on some oil and landed in a sitting position. Although not indicated by the employer's name, the work he performed was oil drilling, which he said involved much heavy lifting and pulling. The claimant had back surgery for his injury and received a 23% impairment rating from his treating doctor, Dr. D. Dr. D noted on October 27, 1998, that the claimant had experienced more pain after work hardening but was going to follow through with more.

The claimant went through a "discharge" functional capacity evaluation on July 16, 1999, after completing this course of therapy. The evaluator concluded that the claimant was physically capable of performing his preinjury work demands at the heavy-duty level. Dr. D's reaction to this is recorded in the hearing officer's decision; he essentially cleared the claimant to work regular duty but with the caveat that if he was not able to do it, then his work would have to be modified. Likewise, Dr. D noted that he cautioned the claimant to find something that he knew he could handle.

There was no evidence that the claimant's former job was open, and there was no issue or evidence concerning a bona fide job offer. The claimant went to work as a forklift operator for another employer. Dr. D's report of November 4, 1999, noted that the claimant was starting to have some increasing stiffness and soreness in his back. Dr. D opined that the claimant had developed a tolerance to his analgesics as they were no longer helping so he, Dr. D, prescribed a different type. Dr. D took the claimant off work for a week and told him he could return the following Monday for the other employer.

The claimant said he did so and continued to work through at least the end of the qualifying period. Although the claimant said that he worked five days a week, eight hours a day, for \$5.15 an hour, his biweekly paycheck stubs in evidence for November 11 through December 24, 1999, show a total of slightly more than 160 hours worked for a six-week period. (His hourly wage for the drilling company had been \$5.50 an hour.)

The claimant said he had seen Dr. D the week prior to the CCH and was being evaluated for whether further surgery would be necessary.

According to the worksheet calculated by the Texas Workers' Compensation Commission, the total amount in dispute was \$659.25 for the first quarter of SIBs.

The SIBs statute plainly contemplates that SIBs may be due not just for unemployment, but also when a claimant has returned to work earning less than 80% of the preinjury average weekly wage (AWW). Section 408.142(a)(2). It was undisputed that the claimant earned less than 80% of his AWW during the qualifying period. The legislature did not specify return to work in terms of the number of hours worked. Therefore, we conclude that SIBs can be due in situations where the replacement work obtained is accurately described as "full time." It is, therefore, somewhat circular to argue that because the claimant can actually work, having made a bona fide search for employment, that this breaks the direct result connection between the impairment and underemployment. See Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994.

Whether the claimant's underemployment was a direct result of his impairment was a fact determination for the hearing officer to make. She could interpret Dr. D's return to work as a qualified and guarded one, and the claimant sought within that statement a job, forklift driving, that he felt he could do and that did not entail the heavy work performed on his drilling job. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We cannot agree that this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Robert W. Potts
Appeals Judge