

APPEAL NO. 001958

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 July 13, 2000. The disputed issues were:

1. Is Claimant [respondent] entitled to supplemental income benefits [SIBs] for the sixth quarter, January 20, 2000, through April 19, 2000?
2. Is Carrier [appellant] relieved of liability for [SIBs] because of Claimant's failure to timely file an application for [SIBs] for the sixth quarter and, if so, for what period?
3. Is Claimant entitled to [SIBs] for the seventh quarter, April 20, 2000, through July 19, 2000?

With regard to those issues, the hearing officer determined that while the claimant was entitled to SIBs for the sixth quarter, the carrier was relieved of liability for SIBs (because the claimant failed to timely file his application) for the sixth quarter and that the claimant was not entitled to SIBs for the seventh quarter. The claimant's nonentitlement to SIBs for the seventh quarter has not been appealed except for the finding on direct result.

Although realistically prevailing on the issues, the carrier nonetheless appeals the hearing officer's findings that the claimant's underemployment for the sixth quarter was a direct result of the claimant's "compensable impairment," the claimant was underemployed during the sixth quarter qualifying period and the conclusion that the claimant was entitled to SIBs for the sixth quarter. The carrier requests that we reverse those findings and conclusion and render a new decision in its favor. The appeal file does not contain an appeal or response from the claimant.

DECISION

Affirmed as reformed.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work.

The background information is accurately recited in the hearing officer's Statement of the Evidence and is recited here to provide the jurisdictional elements and the setting for this opinion.

It is undisputed Claimant was injured in the course and scope of his employment on _____. At that time he was moving a heavy bucket when he injured his back. The Parties stipulated Claimant reached maximum medical improvement on December 10, 1997, with 15% whole body impairment. The Parties agreed the Qualifying Period for the sixth quarter began on October 8, 1999, and ended on January 6, 2000; and the Qualifying Period for the seventh quarter began on January 20, 2000, and ended on April 19, 2000. The Claimant did not commute any portion of his [IIBs].

When the Record was opened the Parties stipulated the Claimant [untimely] filed the TWCC-52 [Application for Supplemental Income Benefits] for the sixth quarter with the Carrier on April 14, 2000.

During the qualifying period for the sixth quarter, the claimant was employed full-time by the trailer park where he lived earning \$680.00 every two weeks plus a 50% reduction in his monthly rent of \$265.00. The claimant quit this job on March 5, 2000 (well into the seventh quarter qualifying period not at issue here) on the advice of his treating doctor, Dr. W, who testified that the claimant continued to have pain from his compensable injury, wore a TENS unit, and received an "intradiscal electrode thermal treatment" (IDET) procedure for his compensable injury. Dr. W recommended that the claimant quit his job with the trailer park because using the riding mower, bending, and stooping were aggravating the claimant's compensable back injury.

Addressing the carrier's contentions that the claimant's underemployment during the sixth quarter qualifying period and the claimant's underemployment and unemployment during the seventh quarter qualifying period were not "a direct result of his compensable impairment," the carrier makes no particular argument what, if anything else, contributed to the claimant's underemployment or unemployment. The claimant's and Dr. W's testimony provided adequate evidence that the claimant had a serious injury with lasting effects and that he could not return to his preinjury job as a millwright. We hold that there is sufficient evidence to support the hearing officer's findings that the claimant's underemployment in the sixth quarter qualifying period and that both the underemployment and unemployment during the seventh quarter qualifying period were a direct result of the impairment from the compensable injury.

The carrier, in appealing the hearing officer's determinations on entitlement to SIBs for the sixth quarter, numerously cites Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b)" (Rule 130.102(b)). Rule 130.102(b)(1) provides, as part of the eligibility criteria, that the claimant:

- (1) has earned less than 80% of the employee's [AWW] as a direct result of the impairment from the compensable injury[.]

The carrier contends that the hearing officer “incorrectly determined the amount of wages earned by the Claimant during the [sixth quarter] qualifying period.” We agree that the hearing officer misstated that the “Claimant earned \$680.00 per month in wages during this Qualifying Period.” The claimant’s testimony and the documentary evidence clearly established that the claimant earned \$680.00 every two weeks and it is further undisputed that the claimant had his \$265.00 a month reduced by half as part of his earnings. Although the carrier’s appeal states “See Attached Calculation Sheet provided with this Appeal,” none was attached to the appeal filed with us and therefore we will do our own calculation.

Claimant’s Exhibit No. 1 (and Hearing Officer’s Exhibit No. 1) establishes that 80% of the claimant’s preinjury AWW was \$371.08. The claimant’s evidence established that he earned \$680.00 every two weeks or \$340.00 a week. The carrier, at the CCH, also notes that the claimant received a \$132.50 rent reduction (one-half of \$265.00 rent) as wages and comments:

If you just take four weeks divided [sic, by \$132.00] 132, divided by four weeks, it puts you around \$38.39 additional value to him. That exceeds the [AWW], 80 percent of the [AWW], 371.08. So our position would be that even taking aside the fact that his failure to timely file should preclude entitlement to SIBs, he was in fact earning more than 80 percent of his [AWW] throughout the qualifying period for the 6th quarter.

We find the carrier’s calculations marginally incorrect. The amount \$132.50 should be divided by 4.34821 (see the TWCC-52 calculation form) to arrive at \$30.47, which should be added to \$340.00 per week the claimant earned, to arrive at a figure of \$370.47 per weekly wage, which is still .61 less than \$371.08. While we agree the hearing officer misstated that the claimant earned \$680.00 a month, our calculations indicate that the claimant still earned less than 80% of his preinjury AWW of \$371.08. In that the claimant failed to timely file, no monetary benefits are due.

We affirm the hearing officer’s decision that the claimant is entitled to SIBs for the sixth compensable quarter while correcting the hearing officer’s misstatement that the claimant earned \$680.00 a month and that the claimant’s earnings were \$812.50 and reform those statements to indicate that the claimant earned \$340.00 a week (plus the rent benefit) or \$1,610.89 per month (\$340.00 plus \$30.47 times 4.34821).

The hearing officer's decision and order on the appealed issues are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge