

## APPEAL NO. 002071

On August 10, 2000, a contested case hearing (CCH) was held in. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second and third quarters. The appellant (self-insured) requests that the hearing officer's decision be reversed and that a decision be rendered in its favor. No response was received from the claimant.

### DECISION

Affirmed.

Eligibility criteria for SIBs are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted any impairment income benefits (IIBs), is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement (MMI) with an IR of 15% or greater; that the claimant did not commute IIBs; that the qualifying period for the second quarter was from November 27, 1999, to February 25, 2000; and that the qualifying period for the third quarter was from February 26, 2000, to May 26, 2000. The second quarter was from March 10, 2000, to June 8, 2000, and the third quarter was from June 9, 2000, to September 7, 2000. The claimant said that he made over \$9.00 per hour at the job where he was injured.

The claimant testified that his compensable injury occurred when he was hit in the head by a log and knocked down. The claimant's treating doctor, Dr. M, diagnosed the claimant as having a traumatic brain injury, sexual dysfunction secondary to the brain injury, a C3-4 herniated disc, an L3-4 herniated disc, a T10-11 herniated disc, chronic pain, cervical facet syndrome, and poly radiculopathy. Dr. M assigned the claimant a 26% IR, consisting of impairment of 8% for the cervical spine, 7% for the lumbar spine, 5% for sexual dysfunction, and 10% for complex integrated cerebral function associated with the brain injury. Dr. M noted that the claimant's job pulling logs was a heavy physical demand level position. The 26% IR assigned by Dr. M is the only IR in evidence. The benefit review officer noted in the benefit review conference report that the parties did not dispute that the claimant reached MMI with a 26% IR. Among other treatments, Dr. M prescribed an aquatic exercise program. Dr. M noted in October 1999 that the claimant was attending an aquatic exercise program.

Dr. M wrote in November 1999 that he had a meeting with the self-insured's case manager and that the case manager had told him that the claimant had met with a counselor at the Texas Rehabilitation Commission (TRC) in October 1999 and that the TRC was considering training the claimant for a position as a self-employed taxi driver. Dr. M wrote that he was concerned about the taxi driving because of the claimant's mild traumatic brain injury and the medications the claimant is on and recommended that the claimant have a repeat driving test, that the TRC monitor the claimant's abilities, that the claimant receive clearance from the claimant's psychologist and another doctor the claimant was seeing, and that the claimant be referred to occupational therapy for a driving evaluation. Dr. M also noted that the claimant's functional capacity evaluation (FCE) of July 1998 revealed that the claimant did not meet the requirements of his previous job and that he was rated in the light physical demand level category. Dr. M noted that the taxi-driving position would be a sedentary-to-light physical demand level.

Dr. S examined the claimant at the self-insured's request in January 2000 and Dr. S reported that the claimant displayed symptom magnification and that the claimant could be employed doing light duties. The claimant underwent an FCE in January 2000 and the occupational therapist noted that the claimant displayed symptom magnification and that the claimant did not meet the physical demands required for his job lifting logs.

Dr. M reported in February 2000 that the claimant was under sedentary physical demand level activity restrictions until further notice. Dr. M also noted in February 2000 that the claimant should continue his aquatic exercise program. Dr. M noted in June 2000 that the claimant continued to attend the aquatic exercise program.

The claimant testified that during the qualifying period for the second quarter he had a "taxi business" and that he also looked for other work. He said that during that qualifying period he had an offer to perform janitorial work but that Dr. M told him that he was not physically able to do that type of work. The claimant said that he drove people places, apparently in his own vehicle, for money. In his Application for SIBs (TWCC-52) for the second quarter, the claimant listed \$460.00 in wages and seven contacts with employers. The \$460.00 was from his taxi business. Receipts from his customers were in evidence. One of the job contacts was with JK.

In his TWCC-52 for the third quarter, the claimant listed 20 job contacts from March 6, 2000, to April 6, 2000. The claimant testified that on April 11, 2000, he was hired by JK to work four hours in the afternoon Monday through Thursday. The claimant said that he attended the aquatic exercise program prescribed by Dr. M in the mornings and would then go to JK and work in the afternoon four days a week. He said that his job at JK involved going for vehicle parts and delivering and moving vehicles. He said that he worked for JK for one month beginning April 11 and that JK then shut down for vacation. He said that after the vacation period, he did not work for JK because of some business problem JK had, but that JK told him that he would have a full-time job with JK in September 2000. The claimant said that when he worked for JK in April and May, he was paid by the day and earned a total of \$400.00. On his TWCC-52 for the third quarter, the claimant listed

the \$400.00 he made at JK and in evidence is a copy of a check from JK to the claimant for \$400.00 for "labor."

The claimant said that the TRC was going to send him to watch repair classes at a junior college in May 2000, but that the course was discontinued.

Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. It is not disputed that the claimant earned less than 80% of his AWW during the qualifying periods for the second and third quarters.

The hearing officer found that during the qualifying periods for the second and third quarters, the claimant was working in a position relatively equal to his abilities and that the claimant's underemployment was a direct result of the impairment from his compensable injury. The hearing officer concluded that the claimant is entitled to SIBs for the second and third quarters.

The self-insured contends that there is no evidence that the claimant's "alleged" brain injury limited his ability to search for and perform certain types of work. The claimant's brain injury is documented in Dr. M's reports and Dr. M assigned the claimant a 10% whole body IR for impairment in complex integrated cerebral functioning, along with impairment for the cervical and lumbar injuries. The hearing officer could consider the impairment from the brain injury in determining the claimant's ability to work.

The self-insured contends that the hearing officer failed to follow Rule 130.102(d) and (e) in reaching his decision. The self-insured asserts that the claimant failed to document work search efforts every week of the qualifying periods.

In Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000, the Appeals Panel held that, if a claimant has returned to work in a position which is relatively equal to the injured employee's ability to work, he does not have to show that he looked for work every week of the qualifying period. Although the hearing officer does not specifically cite Rule 130.102(d)(1), it is clear from his discussion of the evidence and his findings of fact that his decision is based on that rule. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that the hearing officer's decision that the claimant is entitled to SIBs for the second and

third quarters is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Kenneth A. Huchton  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge