APPEAL NO. 002790

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 24, 2000, with the record closing on November 13, 2000. The hearing officer determined that, during the qualifying period for the fifth quarter, the respondent (claimant) made a good faith effort to obtain employment commensurate with his ability to work, and that he did return to work in a position which was relatively equal to his ability to work. Further, the hearing officer found that the claimant timely filed his Application for Supplemental Income Benefits (SIBs) (TWCC-52) for the fifth quarter in November 1999. The appellant (self-insured) appealed the first determination on factual sufficiency grounds. The self-insured argued that the hearing officer should have "considered" a "parsonage" fee earned by the claimant, but did not directly assert that the claimant's application was untimely. The claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

The hearing officer's decision and order is affirmed.

The hearing officer did not err in determining that the claimant's wages were less than 80% of his average weekly wage (AWW). In determining entitlement to SIBs, one must first ask the threshold question of whether the claimant is earning less than 80% of his AWW. Section 408.142(a)(2). Here, the parties stipulated that the claimant's AWW was $538.50. Neither party introduced evidence that the claimant was earning 80% or more than his AWW. The hearing officer apparently did not consider the"parsonage" to be part of the claimant's wages. Her consideration is incorrect. The "parsonage" fee was doubtless a part of the claimant's wages, pursuant to the definition in Section 401.011(43) which states that wages include:

> all forms of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration. [Supp. 1997.]

Thus, in this instance, the claimant's "parsonage" should have been included as wages and it appears the hearing officer mistakenly did not include it. However, if the parsonage is included in determining eligibility, based upon the agreed $538.50 AWW, the claimant's income is still less than 80% of his AWW. Therefore, any error in not including the parsonage in the calculation of income was harmless.

The hearing officer did not err in determining that the claimant made a good faith effort to find work, as required by statute. Section 408.142(a)(4). As stated above, the claimant earned less than 80% of his AWW. Further, sufficient evidence in the record

supports the hearing officer's determination that the claimant made a good faith effort to obtain employment and did obtain employment commensurate with his ability to work. The claimant's part-time work was consistent with the opinion of his treating physician, Dr. N; thus, it was "relatively equal" to his ability to work (10 to 15 hours per week on sedentary or light duty), according to the hearing officer.

The hearing officer did not err in determining that the claimant was entitled to SIBs for the fifth quarter. Section 410.165 reads, in pertinent part: "[t]he hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence." There was conflicting evidence on the issue of the claimant's good faith effort to find work with respect to the number of hours worked per week. However, the hearing officer's determination on this issue is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

While the self-insured failed to expressly preserve the question of the timeliness of the claimant's applying for SIBs for the fifth quarter, we observe that the hearing officer did not err in determining that the claimant timely filed his TWCC-52 for the fifth quarter. The claimant filed information regarding what he believed were his wages. He testified that he did not believe his "parsonage" of approximately $300.00, the only wage information omitted, was to be included on his TWCC-52, as he did not have to file it as income with the Internal Revenue Service. No evidence was presented in the record regarding the claimant's intent to mislead the self-insured or give inaccurate information.

We have found in the past that there are situations where the TWCC-52 is so incomplete, absent, misleading, or inaccurate on the date it was filed that it equaled a non-filing. Texas Workers' Compensation Appeal No. 941629, decided January 20, 1995. However, in other instances, we specifically found that comparing an incomplete TWCC-52 to non-filing should be saved for those cases of "clear and intentional" non-disclosure. Texas Workers' Compensation Appeal No. 970435, decided April 24, 1997; *see also* Texas Workers' Compensation Appeal No. 980153, decided March 11, 1998. In Appeal No. 970435, we specifically decided that lacking a statutory or administrative rule sanction, a filing simply omitting some information advanced at a later date was not tantamount to a non-filing.

For these reasons, we affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge