

APPEAL NO. 010418

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 January 25, 2001. With respect to the issue before him, the hearing officer determined that the respondent (claimant) was entitled to lifetime income benefits (LIBs). The appellant (carrier) appeals, contending that the issue was barred by the doctrine of *res judicata* and alternatively asserts a sufficiency of the evidence argument. The carrier also appeals the hearing officer's decision to add an interlocutory order to his Decision and Order. The claimant responds, urging affirmance.

DECISION

Affirmed.

The claimant was injured when he was assaulted by a coworker in _____. He sustained a hemorrhage in his brain stem area, which has caused his neurological condition to deteriorate over the nine years since the injury. Prior to the issue in this case, another CCH was held to determine the issue "Is the Claimant entitled to [LIBs] as a result of an injury to the skull on _____ resulting in incurable insanity or imbecility?" See Decision and Order, dated May 17, 2000. In regard to that issue, the hearing officer found in favor of the carrier, determining that the claimant did not have "incurable insanity or imbecility as a result of the compensable injury." That decision was not appealed and has become final pursuant to Section 410.169.

A second CCH was held on January 25, 2001, to determine whether the claimant is entitled to LIBs under any other provision of Section 408.161 of the 1989 Act. Prior to the second CCH, the carrier filed a motion to add the additional issue of "Is the characterization of the Claimant's injury as something other than a 'skull' injury barred by the doctrine of *res judicata*?" The carrier's motion was denied on January 17, 2001, and denied again at the CCH. The carrier appeals, claiming that the hearing officer erred in the determination that the claimant is entitled to LIBs and in refusing to find that the doctrine of *res judicata* applied.

Regarding the first CCH, the applicable statute for compensable injuries occurring on or before September 1, 1997, is Section 408.161(a)(6) which provides that LIBs are paid until the death of the employee for "an injury to the skull resulting in incurable insanity or imbecility." See, *generally*, Texas Workers' Compensation Commission Appeal No. 951336, decided September 20, 1995. The issue of whether an injury to the skull resulted in incurable insanity or imbecility was limited to only that determination by agreement of the parties at that CCH.

Regarding the carrier's *res judicata* argument, the Texas Supreme Court has stated that "any cause of action which arises out of the same facts, should if practicable, be litigated in the same law suit." Barr v. Resolution Trust Corp., 837 S.W.2d 627, 630 (Tex. 1992). *Res judicata* precludes a second action on claims that arise out of the same subject

matter which could have been litigated in the first suit. Amstadt v. US Brass Corp., 919 S.W.2d 644 (Tex. 1996). However, in this case, there was no evidence that the same subject matter could have been litigated in the first CCH. There was no evidence offered at the second CCH that the issue concerning “loss of use” could have been litigated in the first CCH. There was no evidence that the claimant had lost the use of his feet at that time. Rather, there was evidence that the claimant’s condition was deteriorating with time. Further, at the first CCH, the carrier agreed to limit the issues. There was no issue concerning a loss of use, nor was it addressed by the first hearing officer; consequently, that issue has not been resolved and is not res judicata.

Section 408.161(a)(2) provides that LIBs are paid until the death of the employee for the loss of both feet at or above the ankle. Section 408.161(b) provides that the loss of use of a body part is the loss of that body part for purposes of subsection (a). The claimant maintains that he is eligible for LIBs because he has lost the use of both of his feet, at or above the ankles, and his right hand, at or above the wrist, as a result of his compensable injury. The carrier asserts that the hearing officer’s decision was in error because “Claimant still maintains some use of his arms and legs.” In Texas Workers’ Compensation Commission Appeal No. 94689, decided July 8, 1994, we stated that the standard for determining whether a claimant is entitled to LIBs under the 1989 Act is the same as it was under the old law. Citing Travelers Ins. Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962), we noted that the test for total loss of use is whether the member (here, the claimant’s feet and right hand) possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the claimant from getting and keeping employment requiring the use of the member. In Texas Workers’ Compensation Commission Appeal No. 952100, decided January 23, 1996, we noted that the Seabolt test is disjunctive and that a claimant need only satisfy one prong of the test in order to establish entitlement to LIBs. See *also* Texas Workers’ Compensation Commission Appeal No. 941065, decided September 21, 1994. Finally, we have stated that the question of whether a claimant has suffered a total loss of use of a member is generally a question of fact for the hearing officer to resolve. Appeal No. 952100, *supra*; Texas Workers’ Compensation Commission Appeal No. 952099, decided January 24, 1996; Texas Workers’ Compensation Commission Appeal No. 941618, decided January 17, 1995.

In his determination that the claimant is entitled to LIBs, the hearing officer determined that “Claimant is unable to use his right hand, at or above the wrist, to obtain and retain employment” and that “Claimant is unable to use either his right or his left foot, at or above the ankle, to obtain and retain employment.”

The hearing officer heard testimony from the claimant that he has problems with his whole body and that he cannot grip things with his right hand. The hearing officer also reviewed the medical evidence. Dr. R opined, in his report dated August 17, 2000, that he does not believe the claimant will improve; that he is wheelchair bound; and that he did not see him returning to employment. Dr. S, a neurosurgeon, in his report dated March 12, 1996, opined that the claimant has total and permanent disability and weakness of both

of his legs. Dr. H opined, in his report dated July 23, 1998, that the claimant is unable to stand on either foot. Dr. C, in his report dated August 20, 1999, noted that the claimant has had neurological problems and that his condition has worsened over the years. It was the hearing officer's responsibility, as the sole judge of the evidence under Section 410.165(a), to resolve the conflicts and inconsistencies in the evidence and to determine whether the claimant had sustained his burden of proving his entitlement to LIBs. Our review of the evidence does not demonstrate that the hearing officer's determination that the claimant is entitled to LIBs is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for reversing the hearing officer's decision on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Finally, the carrier appeals, claiming that the hearing officer erred by adding the interlocutory order to his Decision and Order. Section 410.169 of the 1989 Act provides that “[a] decision of a hearing officer regarding benefits is final in the absence of a timely appeal by a party and is binding during the pendency of an appeal to the appeals panel.” The carrier had a duty to pay benefits within 20 days of receipt of the decision and order since the decision is binding during the pendency of an appeal. See Section 410.208(c). Thus, the addition of an interlocutory order was surplusage.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge