

APPEAL NO. 011279
FILED JULY 18, 2001

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 May 10, 2001. The appellant (claimant) appeared via telephonically from (state 1). The hearing officer determined the following:

1. The claimant is not entitled to supplemental income benefits (SIBs) for:
 - (a) the first quarter (September 28, 1999, to December 27, 1999);
 - (b) the second quarter (December 28, 1999, to March 27, 2000);
 - (c) the third quarter (March 28, 2000, to June 26, 2000);
 - (d) the fourth quarter (June 27, 2000, to September 25, 2000);
 - (e) the fifth quarter (September 26, 2000, to December 25, 2000);
and
 - (f) the sixth quarter (December 26, 2000, to March 26, 2001);
2. The claimant has permanently lost entitlement to SIBs pursuant to Tex. Labor Code Ann. Section 408.146(c) because he was not entitled to them for twelve consecutive months; and
3. The respondent (self-insured employer) is relieved of liability for the second, third, and fourth SIBs quarters because of the claimant's failure to timely file an application for SIBs.

The claimant appealed the hearing officer's determinations. The self-insured employer did not file a response to the appeal.

DECISION

Affirmed, as reformed.

The hearing officer omitted the word "quarter" from Findings of Fact 1N, O, P, Q, and R. We reform each of those findings by adding the word "quarter" after the word "benefits." The hearing officer erroneously stated the starting date of the third quarter in Conclusion of Law No. 3 and in the Decision paragraph. The date "December 28, 2000" is reformed to "March 28, 2000" in each of those places. The hearing officer also erroneously stated the ending date of the fifth quarter in Conclusion of Law No. 3 and in the Decision paragraph. The date "December 25, 2000" is reformed to "December 25, 2000" in each of those places.

The stipulated dates of the first SIBs quarter are September 28, 1999, to December 27, 1999. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.103(a) (Rule 130.103(a)), the Texas Workers' Compensation Commission (Commission) made the determination that the claimant was not entitled to first quarter SIBs and a notice of non-entitlement was sent to the claimant on November 23, 1999. (Claimant's Exhibit No. 4, page 3.) We note that in the ordinary course of events, the determination should have been made no later than the last day of the impairment income benefits (IIBs) period, September 27, 1999, but this was not done because the claimant's impairment rating (IR) was still in dispute at that time. At the CCH, the parties stipulated that the date of maximum medical improvement was August 24, 1998, with a 19% IR.

The claimant testified that he was misinformed by the Commission that he could not apply for subsequent SIBs quarters until he obtained employment or, in the alternative, attended school on a full-time basis. In August 2000, the claimant enrolled at a college in state 1. The claimant then applied for the fifth SIBs quarter on October 24, 2000, and he applied for the second, third, fourth, and sixth SIBs quarters on March 20, 2001.

Section 408.142(a)(4) provides that an employee is entitled to SIBs if, on the expiration of the IIBs period computed under Section 408.121(a)(1), the employee has attempted in good faith to obtain employment commensurate with the employee's ability to work. The hearing officer found that the claimant did not attempt in good faith to obtain employment commensurate with the claimant's ability to work during the qualifying periods for the first through sixth SIBs quarters.

The claimant asserts on appeal that he made weekly job searches. Rule 130.102(e) provides that 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. The claimant testified that he reconstructed his job searches during the qualifying quarters; however, he was not certain of an accurate date for any of the job searches and he did not include the list of job searches with his SIBs applications. The evidence sufficiently supports the hearing officer's findings that the claimant did not make weekly job searches and he did not document his job searches.

Section 408.146(c) provides that an employee who is not entitled to SIBs for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. The Commission determined that the claimant was not entitled to the first SIBs quarter, and the hearing officer determined that he was not entitled to the first, second, third, fourth, fifth, and sixth SIBs quarters because he did not attempt in good faith to find employment commensurate with his ability to work.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier

of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer's determinations on the issues were 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 (Tex. 1986).

The claimant also asserts on appeal that he does not understand the following: why was venue proper in (city 1); what does the term "compensable injury" mean; and what did he elect to commute. First, the evidence establishes that the parties stipulated that venue was proper in city 1 at the CCH. The claimant did not contest venue at the CCH. Second, Section 401.011(10) provides that a "compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle. Third, Section 401.011(9) provides that "commute" means to pay in a lump sum. The claimant did not elect, or choose, to be paid a lump sum of money for his injury. Had he done so, he would not have met one of the eligibility requirements for SIBs.

In addition, the claimant contends that the Commission's ombudsman did not represent him properly at the CCH. The transcript of the CCH reflects that the hearing officer asked the claimant, "Do you understand that this is a legal proceeding and it has legal ramifications and if you wish to, you have the right to have a lawyer?" The claimant answered, "Okay. Yes, ma'am." (Transcript p. 4.) Also, the claimant was informed that the ombudsman would assist him at no cost. The hearing officer asked the claimant, "Do you wish to proceed at this hearing with her [ombudsman] assistance?" The claimant answered "Yes, ma'am." (Transcript p. 4.) The hearing officer offered the claimant the opportunity to make comments after the ombudsman and the self-insured employer's attorney made closing arguments. The claimant declined the offer. Our review does not show any deficiency in the performance of the ombudsman and we reject the claimant's assertion of error.

We affirm the decision and order of the hearing officer, as reformed.

Michael B. McShane
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge