APPEAL NO. 011443
FILED AUGUST 01, 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 was held on June 5, 2001. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first and second quarters.

The appellant (carrier) appeals, citing some of the hearing officer's comments, which appear to be contradictory to his determinations, and asserting that the claimant had failed to prove a self-employed status and that the claimant's underemployment was not a direct result of his disability. The claimant responds in a personal attack on the carrier's attorney.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement 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 of 15% or greater and who has not commuted any impairment income benefits 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 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. At issue in this case is both the direct result and the good faith effort requirements.

The parties stipulated (or the hearing officer made unappealed findings) for the various jurisdictional elements, including that the qualifying period for the first quarter began on October 14, 2000, with the end of the second quarter qualifying period being April 13, 2001. Although there was mention of Texas Rehabilitation Commission courses, the claimant proceeded on the basis that he met the good faith effort criteria by complying with Rule 130.102(d)(1), which provides that a good faith effort has been made if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. The claimant contends that he met that criteria by his self-employment as a broker of telephone and internet services exporting spare parts in the aviation business.

Regarding the direct result criteria, the claimant had been employed in the construction field and sustained a low back and bilateral ankle injury. The claimant had lumbar spinal surgery in 1999 and is pending ankle surgery. The Appeals Panel has long held that the direct result requirement may be met by showing a serious injury with long-lasting effects, which preclude a return to the preinjury employment. It is relatively undisputed that the claimant has standing and lifting restrictions and cannot return to heavy labor in the construction field. The hearing officer made an appealed finding that the

claimant is unable to return to his preinjury work in the construction business because of his restrictions and that the claimant's reduced earnings are a direct result of his impairment. The hearing officer's determinations on this point are supported by the evidence.

A brochure the claimant submitted indicated that another form of the claimant's business began in 1989 and in 1998 they began "exporting parts and spares." In evidence is what purports to be a "Profit and Loss" statement from the claimant's self-employment for the period of October 14, 2000, through January 12, 2001 (roughly the first quarter qualifying period). The parties and the hearing officer discussed this form in some detail. It purports to show gross income of $11,081.00; cost of goods sold of $13,074.00; depreciation of a "load tester" of $10,939.00; and a net loss of $28,196.00 for the period, although fairly clearly this included the claimant's personal living expenses. Also in evidence is a website for the claimant's business, various certificates of training, the claimant's personal unsigned 2000 federal income tax return and business income tax return, and some kind of invoice ledger. The carrier asserts that those documents do not meet the definition required of self-employed individuals as set out in Rule 130.101(1)(D). All the arguments made by the carrier on appeal were presented to the hearing officer, who commented on the evidence and concluded:

> From my review of the evidence, I conclude that the Claimant was making a good faith effort to establish a viable small business. This is not a case of a Claimant going through the motions of trying to turn a hobby or fantasy into a business. Rather, the Claimant has invested a substantial amount of time trying to learn to be a small-business man and trying to make [a] go of his business every work day of every week of the qualifying periods. It is clearly an uphill struggle, but the Carrier's position that he ought to simply give up the effort is not mandated by the 1989 Act or Rules (at least as of the end of the second quarter qualifying period).

The carrier correctly takes issue with the last sentence, stating that it made no such argument. The carrier only contended that the claimant's efforts in his self-employment met neither the good faith nor direct result criteria.

The carrier also cites Texas Workers' Compensation Commission Appeal No. 992932, decided February 11, 2000, for the proposition that "a carrier is not expected to subsidize a business venture." However, the following line points out that "whether a good faith effort is shown is basically a question of fact for the hearing officer and cases tend to become very fact specific in self employment situations." While the claimant's supporting documentation leaves a good deal to be desired, we decline to substitute our judgment for that of the hearing officer or attempt to decree as a matter of law exactly what is or is not acceptable evidence to prove self-employment.

There was conflicting evidence presented at the hearing on the issues. While

different inferences may find some support in the evidence, the hearing officer weighed the credibility and inconsistencies in the evidence, and the hearing officer's determination on the issues is not against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge