

APPEAL NO. 011674
FILED AUGUST 28, 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 13, 2001. The hearing officer held that the appellant (claimant) was not entitled to the first quarter of supplemental income benefits (SIBs).

The claimant has appealed various fact findings as well as the ultimate decision. The respondent (carrier) argues that the decision should be affirmed.

DECISION

We reverse the fact findings that the claimant could return to his previous job, but affirm the determination that he was not entitled to SIBs for this first quarter because he was not underemployed, as set forth in Section 408.142(a) (2) and Rule 130.102(c).

There are few facts in the decision and we will summarize here. The qualifying period ran from December 20, 2000, through March 30, 2001. The claimant had been injured in a roll over collision on _____, while working as a truck driver for his employer. He noted that the job entailed hooking up hoses that could weigh 80 to 100 pounds to the truck. He said that he was now restricted to a 50-pound lifting limit and could no longer sit for long periods of time, which would rule out his ability to drive a truck as he once did. The claimant had worked two jobs during the qualifying period, including a construction job that often paid him more during a week than his preinjury average weekly wage (AWW). For those weeks where he worked fewer hours and was paid less per week than his AWW, he said it was due to rain or holidays and not to the effects of his injury. The construction job was an electrician's helper well within his restrictions and the claimant said that the goal was to work 50 hours a week. He was laid off on March 1, 2001, due to a general layoff.

He was hired as a prison guard as a result of a job contact made during the qualifying period, which entailed standing on his feet most of the day on concrete and he said that he had to resign due to the effects on his back. This job began on March 26 ended within the week after the qualifying period under review. The claimant had undergone a brief preemployment physical, and he agreed he had not disclosed his back injury because he was certain he would not be hired, and he needed the job to feed his family. He said that the five-minute physical entailed having his bend over and talking to him.

A functional capacity evaluation (FCE) performed on May 1, 2001, found that the claimant should not return to his truck driving job and could perform in the light to medium demand level. There was no medical evidence that he had undergone a worsening of his condition since the qualifying period ended a few weeks before that. His treating doctor, Dr. O, wrote out restrictions consistent with the FCE results and said that they were in effect for the qualifying period.

With the evidence in this posture, we agree that the hearing officer erred in fact findings that the claimant could return to his previous employment as the great weight and preponderance of the evidence in this record shows that the effects of his injury continue and in fact preclude a return to his previous employment. We reverse the decision in this regard by striking these fact findings, which are not necessary to the decision in any case, and render a decision that the claimant was not able to return to his prior job. See Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

However, the fact that the effects of his injury did not directly result in his employment is supported by the record and we therefore can affirm the hearing officer's ultimate decision that, for this quarter, the claimant was not entitled to SIBs. The claimant was employed making more than 80% of his preinjury AWW for most of the quarter, and the weather, not his injury, was the cause of weekly wages that dipped below the AWW. Because SIBs entitlement is analyzed on a quarterly, not weekly, basis, the hearing officer could review the work history for the quarter as a whole and consider that the three weeks that the claimant was off work after his work for the construction company was due to an economic layoff rather than his injury.

For the reasons above, we reverse certain fact findings of the decision but otherwise affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge