

APPEAL NO. 011811
FILED SEPTEMBER 17, 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 July 10, 2001. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second quarter. The claimant appealed and the respondent (carrier) responded.

DECISION

The hearing officer's decision is 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 (IR) of 15% or greater, and who has not commuted any impairment income benefits (IIBs), 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 (AWW) 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.

It is undisputed that the claimant sustained a compensable injury on _____; that the claimant's IR from the compensable injury is 25%; that the claimant did not commute IIBs; and that the qualifying period for the second quarter was from October 27, 2000, through January 25, 2001. There is no appeal of the hearing officer's finding that during the qualifying period for the second quarter, the claimant made a good faith effort to obtain employment commensurate with his ability to work, which finding was based on the claimant's satisfactory participation in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission. It is undisputed that the claimant earned no wages during the qualifying period.

The claimant appeals the hearing officer's finding that the claimant was not unemployed as a direct result of his compensable injury and the determination that the claimant is not entitled to SIBs for the second quarter. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. The Appeals Panel has held that a finding of "direct result" is sufficiently supported by evidence that a claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. The Appeals Panel has also held that a claimant's unemployment or underemployment must be a direct result of the impairment from the compensable injury, but the impairment from the compensable injury need not be the sole cause of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996.

The claimant testified that he injured his neck and left shoulder on _____, while working as a driver/mover. The claimant did not claim that he had no ability to work during the qualifying period. He testified that he has restrictions from his treating doctor, Dr. F, a chiropractor, on not doing too much lifting and not doing too much moving around. In a Work Status Report (TWCC-73), Dr. F noted that the claimant was unable to work from December 13, 2000, until January 13, 2001, and that it was undetermined when the claimant is expected to be able to return to work without restrictions. An MRI of the claimant's left shoulder done in December 1997 was reported to be normal, and an MRI of the claimant's cervical spine done in August 1999 was reported to show no abnormalities. At the request of the carrier, in February 2000 Dr. K examined the claimant and reviewed the claimant's medical reports, including the MRI reports, and reported that there were no objective findings on physical examination nor on the MRIs to explain the claimant's continuing pain and problems, that the claimant does not require further diagnostic studies in regard to his work injury, and that the claimant may return to regular work activity. As is evident from the foregoing, conflicting evidence was presented at the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. We conclude that the hearing officer's decision that the claimant is not entitled to SIBs for the second quarter, based on his adverse finding on the direct result criterion, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

With regard to the claimant's complaint about the videotape mentioned by the hearing officer in the Statement of the Evidence portion of his decision (and listed as Carrier's Exhibit C), the claimant contends that, while he is shown in the videotape, a portion of the videotape that shows a person washing a car (actually wiping the front windshield) shows his brother and not himself. The claimant has not shown a ground for reversal based on his complaint about the videotape because there was no objection to the videotape when it was offered into evidence. See Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.) (evidence which was admitted without objection could not be complained of on appeal). In addition, the hearing officer had the opportunity to see the claimant at the CCH and thus should have been able to identify the claimant in the videotape. We also note that while the hearing officer refers generally to the videotape in his decision, he does not specifically reference the car washing/windshield wiping activity.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is as follows:

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge