APPEAL NO. 012010
FILED OCTOBER 10, 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 August 6, 2001. He determined that the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the first and second compensable quarters and that the appellant/cross-respondent (carrier) did not waive its right to contest claimant's entitlement to SIBs for the second quarter by failing to timely request a benefit review conference(BRC). On appeal, carrier contends that the determination that claimant is entitled to SIBs for the first and second quarters is against the great weight and preponderance of the evidence. In response, claimant urges affirmance with regard to the entitlement determination. In his appeal, claimant contends that the determination that carrier did not waive its right to contest SIBs entitlement for the second quarter is against the great weight and preponderance of the evidence.

DECISION

We affirm.

The evidence reflects that claimant sustained a compensable injury on _____. As a result of the injury, two surgeries have been performed on claimant's cervical spine and the evidence indicates that his impairment rating is 31%. In his applications for SIBs, claimant asserted that he had no ability to work during the qualifying periods corresponding to the first and second compensable quarters, which the parties stipulated ran from November 4, 2000, through February 2, 2001, and from February 3, 2001, through May 4, 2001, respectively.

Carrier contends the hearing officer erred in determining that claimant's unemployment is a direct result of his impairment. A finding of "direct result" may be supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995. Claimant testified that before his compensable injury, he worked for his wife's company as an estimator and engineer. He said the work involved both physical labor and paperwork. There was evidence from Dr. C that claimant is not able to work and this supports the hearing officer's determination in this regard. Carrier contends that the reason claimant cannot work is because of medications that he is taking which are unrelated to the compensable injury. Dr. C did not state that this is the reason claimant cannot work and there is nothing to indicate that the hearing officer based his direct result finding on such evidence. We conclude that the hearing officer's direct result determination is 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, 176 (Tex. 1986).

Carrier contends the hearing officer erred in determining that claimant met the good faith SIBs criterion. We conclude that the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain.

Claimant contends that the hearing officer erred in determining that carrier did not waive its right to contest SIBs entitlement for the second quarter by failing to timely request a BRC. Carrier asserted at the hearing that it was not required to dispute because it had not paid the prior quarter of SIBs. The hearing officer determined that carrier disputed SIBs entitlement within 10 days and there is evidence to support that determination. We note that, even if carrier had not filed a dispute within 10 days, there would still be no carrier waiver in this case. Carrier did not pay SIBs for the first quarter, so Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(e) (Rule 130.108(e)) would not apply to create carrier waiver. Texas Workers' Compensation Commission Appeal No. 001112, decided June 30, 2000. We conclude that the hearing officer did not err in determining that carrier did not waive its right to contest entitlement to SIBs for the second quarter by failing to timely request a BRC.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I reluctantly concur. In addition to the appeal of the hearing officer's direct result determination, the carrier also appeals the good faith requirement of Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). The claimant asserts that he has a total inability to work in any capacity.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The claimant and the hearing officer rely on Dr. C report of October 4, 2000, to provide the narrative which specifically explains how the injury causes a total inability to work. In that report, Dr. C concludes that the claimant "is unable to return to work" (emphasis added), that "he has not reached maximum medical improvement [MMI]," and that he is being referred back to his treating physician for further treatment. It seems rather clear to me that Dr. C is using a disability standard by referring to the fact that the claimant is unable to return to work, meaning he is unable to return to his preinjury employment, a fact that is not disputed. Further, Dr. C concludes that the claimant is not at MMI. Perhaps not but the claimant is obviously at statutory MMI (Section 401.011(30)(B)) or he would not have an impairment rating. I believe that Dr. C used the wrong standard and did not consider whether the claimant was "unable to perform any type of work in any capacity" as required by Rule 130.102(d)(4). However, I suppose the hearing officer, as the fact finder, could interpret Dr. C's report differently and, consequently, I cannot reasonably say the hearing officer's decision is 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, 176 (Tex. 1986).

Thomas A. Knapp
Appeals Judge