

APPEAL NO. 012024  
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 (CCH) was held on July 20, 2001. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 17th quarter. The appellant (carrier) appealed this determination on sufficiency grounds, and requests reversal based on evidence obtained after the hearing. The claimant urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was entitled to 17th quarter SIBs. Sections 408.142 and 408.143 provide, in part, that an employee continues to be entitled to SIBs after the first compensable quarter if the employee (1) has not returned to work or has earned less than 80 percent of his average weekly wage as a direct result of the impairment, and (2) has in good faith sought employment commensurate with his ability to work.

The carrier asserted that the claimant's employment was not commensurate with his ability to work during the qualifying period for the 17th quarter, and he did not make a good faith effort to obtain employment commensurate with his ability to work. Whether the claimant returned to work in a position relatively equal to the injured employee's ability to work is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 011787, decided September 21, 2001. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, the hearing officer could find, as he did, that the claimant was not required to seek additional employment because he was employed at a part-time job and was self-employed commensurate with his ability.

The carrier also asserted that the claimant's underemployment during the qualifying period was not a direct result of his impairment. We have noted that a finding that a claimant's unemployment or underemployment is a direct result of the impairment is sufficiently supported by evidence that an injured employee sustained a serious 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. 960028, decided February 15, 1996. In this instance, there is evidence from which the hearing officer could determine that the claimant's injury resulted in permanent impairment and that, as a result thereof, the claimant could no longer reasonably perform the type of work he was doing at the time of his injury. The hearing officer's determination that the claimant is entitled to

17th quarter SIBs 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 (Tex. 1986).

The carrier requests reversal of the hearing officer's decision in view of evidence obtained after the hearing. The carrier represents that, in a deposition taken three days prior to the CCH, it learned that the claimant maintained a personal bank account in which he deposited wages earned during the qualifying period for the 17th quarter. The carrier subpoenaed copies of the claimant's deposit slips from the banking institution, and received the records on August 21, 2001, after the CCH. The carrier asserts that the claimant's recorded deposition in conjunction with the deposit slips establish that the claimant earned more than 80% of his preinjury wages during the qualifying period for the 17th quarter, thus making him ineligible for SIBs.

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be reversed and remanded for further consideration, we consider whether the evidence came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The evidence offered by the carrier does not meet the requirements of newly discovered evidence necessary to warrant reversal. Specifically, the evidence is not so material that it would probably produce a different result. The claimant indicated in his deposition that the deposits to his personal account during the qualifying period for the 17th quarter included wages from his employment and monies which he borrowed from his mother. The evidence does not indicate how much, if any, was deposited from the claimant's wages and how much was from borrowings. Additionally, our review of the record in this case reveals that the carrier failed to use due diligence in offering the evidence at the CCH. Although the carrier was aware of the existence of such evidence prior to the CCH in this case, it made no request for continuance to obtain the evidence, nor did the carrier request that the record remain open for inclusion of the evidence once it was received, even when asked by the hearing officer whether the amount of the claimant's earnings was at issue. We, therefore, decline to consider the evidence attached to the carrier's appeal.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TRANSCONTINENTAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORP. SYSTEM  
350 N. ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Michael B. McShane  
Appeals Judge