APPEAL NO. 012472
FILED DECEMBER 7, 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 September 21, 2001. The hearing officer resolved the disputed issues by deciding that: (1) the respondent/cross-appellant (claimant) sustained a compensable low back injury on _____; (2) the appellant/cross-respondent (carrier) did not have newly discovered evidence which it could not have reasonably discovered earlier on which to reopen the issue of the compensability of the claimant's _____, injury; (3) the carrier waived the right to dispute the compensability of the claimant's _____, injury; (4) the claimant's correct impairment rating (IR) is 16%; (5) the claimant is not entitled to supplemental income benefits (SIBs) for the second quarter; and (6) the claimant is entitled to SIBs for the third quarter.

The carrier appeals the hearing officer's determinations that the claimant sustained a compensable low back injury on _____; that the carrier did not have newly discovered evidence on which to reopen the issue of compensability; that the carrier waived the right to dispute the compensability of the claimant's injury of _____; that the claimant's IR is 16%; and that the claimant is entitled to SIBs for the third quarter. The claimant appeals the hearing officer's decision that the claimant is not entitled to SIBs for the second quarter. Each party filed a response.

DECISION

The hearing officer's decision is affirmed.

COMPENSABLE INJURY ISSUE

The hearing officer did not err in determining that the claimant sustained a compensable low back injury on _____. Section 401.011(10) defines a "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." The claimant had the burden to prove that he sustained an injury during the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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. The claimant's testimony and the reports of the claimant's treating doctor support the hearing officer's finding that the claimant sustained an injury to his low back in the course and scope of his employment on _____. The hearing officer's decision that the claimant sustained a compensable low back injury on _____, 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. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

REOPENING COMPENSABILITY ISSUE

The hearing officer did not err in determining that the carrier did not have newly discovered evidence which it could not have reasonably discovered earlier on which to reopen the issue of the compensability of the claimant's _____, injury. Section 409.021(d) provides that an insurance carrier may reopen the issue of compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. The carrier relies on evidence of the claimant's prior lumbar injury to reopen the issue of compensability. The hearing officer noted that the treating doctor referenced the prior lumbar injury in a January 2000 report. We note that the treating doctor referenced the prior back injury in his initial report of January 15, 1998. The carrier did not provide evidence of when, if ever, it filed a Payment of Compensation or Notice of Refused Disputed Claim (TWCC-21) contesting the compensability of the _____, injury. The hearing officer's determination on this issue 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. Cain, *supra*.

WAIVER ISSUE

The hearing office did not err in determining that the carrier waived the right to dispute the compensability of the claimant's _____, injury. Section 409.021(c) provides, in part, that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. There is no appeal of the hearing officer's finding that the carrier did not dispute the compensability of the claimant's claimed low back injury of _____, no later than the 60th day after first receiving written notice of the injury. The carrier's appeal of the hearing officer's conclusion that the carrier waived the right to dispute the compensability of the claimant's _____, injury is apparently based on its assertion that it should be allowed to reopen the issue of compensability based on evidence of a prior lumbar injury that could not reasonably have been discovered earlier. Since we are affirming the hearing officer's determination against the carrier on the reopening issue, we likewise affirm the hearing officer's decision on the waiver issue.

The carrier also appeals the hearing officer's determination that the claimant's injury of _____, is compensable as a matter of law. Given our affirmance of the hearing officer's decision against the carrier on the issues of waiver and reopening compensability, we conclude that the hearing officer did not err in determining that the claimant's injury is compensable as a matter of law. *See* Texas Workers' Compensation Commission Appeal No. 001652, decided August 22, 2000.

IR ISSUE

The hearing officer did not err in determining that the claimant's IR is 16%. Section

408.125(e) provides that if the designated doctor is chosen by the Texas Workers' Compensation Commission (Commission), the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. The parties stipulated that the claimant reached maximum medical improvement on January 16, 2000. The claimant's treating doctor assigned the claimant a 13% IR. The designated doctor chosen by the Commission assigned the claimant a 16% IR. The carrier's peer review doctor, who did not examine the claimant, reported that the claimant's IR is 14%. The hearing officer found that the great weight of the other medical evidence is not contrary to the report of the designated doctor. The hearing officer's decision that the claimant has a 16% IR 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. Cain, *supra*.

SECOND QUARTER SIBs ISSUE

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the second quarter. 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 IR 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 (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.

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. Rule 130.102(d) 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. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

It is undisputed that the claimant did not work or look for work during the qualifying period for the second quarter. The claimant appeals the hearing officer's findings that during the qualifying period for the second quarter the claimant had some ability to work in some capacity and that the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work during that qualifying period. The treating doctor reported that the claimant was unable to work due to pain. The hearing officer was not persuaded that there was a narrative report from a doctor which specifically

explained how the injury caused a total inability to work. A work capacity evaluation report reflected that the claimant demonstrated a light-to-medium work level, but recommended work hardening. The hearing officer resolved the conflicts in the evidence by finding that the claimant had some ability to work in some capacity during the qualifying period for the second quarter and that the claimant did not make a good faith effort to obtain employment during that qualifying period. The hearing officer concluded that the claimant is not entitled to SIBs for the second quarter. Texas Workers' Compensation Commission Appeal No. 002885, decided January 2, 2001, which the claimant cites, is distinguishable from the facts of the instant case, because in that case the injured employee was in a pain management program for most of the qualifying period, whereas in the instant case, the claimant attended approximately 14 sessions of work hardening during a three or four-week period during the middle of the qualifying period. *See* Texas Workers' Compensation Commission Appeal No. 000337, decided March 23, 2000. The hearing officer's determination that the claimant is not entitled to SIBs for the second quarter 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. Cain, *supra*.

The carrier appeals the hearing officer's finding that the claimant's unemployment during the qualifying period for the second quarter was a direct result of the impairment from the claimant's compensable injury. That finding is supported by the claimant's testimony and by the medical reports and is not against the great weight and preponderance of the evidence.

THIRD QUARTER SIBs ISSUE

The hearing officer did not err in determining that the claimant is entitled to SIBs for the third quarter. The hearing officer found that the claimant had some ability to work in some capacity during the qualifying period for the third quarter. The carrier appeals the hearing officer's findings that during the qualifying period for the third quarter the claimant made a good faith effort to obtain employment commensurate with his ability to work, and that the claimant's unemployment during the qualifying period for the third quarter was a direct result of the claimant's impairment from his compensable injury. The claimant's Application for SIBs (TWCC-52) for the third quarter reflects that he looked for work each week of the qualifying period for the third quarter and that he did not earn any wages during that qualifying period. The claimant testified that as a result of his job search, he obtained employment shortly after the qualifying period for the third quarter ended. The medical reports support the direct result finding. We conclude that the hearing officer's findings on the good faith and direct result criteria for SIBs for the third quarter, and the hearing officer's decision that the claimant is entitled to SIBs for the third quarter are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

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

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge