APPEAL NO. 020868
FILED MAY 16, 2002

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 March 6, 2002. The hearing officer held that the claimant had disability for the period from October 18 through December 18, 2001 (disability prior to October 18th was not in issue); that the claimant was not entitled to approval of a change in treating doctor; and that the claimant's earnings from his own business amounted to weekly earnings of $200.38 for the period from May 30 through August 31, 2001; and that the respondent (carrier) was entitled to adjust temporary income benefits (TIBs) for that amount.

The claimant has appealed all points. The claimant argues that the amounts received by his business were not wages, that he had a documented period of disability longer than that allowed by the hearing officer, that the evidence supports the approval of a change in treating doctor. The carrier responds by reciting facts in favor of the decision.

DECISION

Affirmed in part, reversed and rendered in part.

DISABILITY AND CHANGE OF TREATING DOCTOR

We have reviewed the record concerning the findings on change of treating doctor and disability. The hearing officer has explained her reasoning in her decision and we find support in the record for the inferences drawn and consequently do not find reversible error.

POST-INJURY EARNINGS FROM CONCURRENT EMPLOYMENT

The hearing officer has committed an error of law in considering the claimant's post-injury earnings from his consulting business as an amount that may be credited against TIBs. The claimant had been paid TIBs until the period of time in question for disability at this CCH. His unrefuted testimony was that he owned an electrical consulting business prior to working for the employer. He continued to operate his business on a reduced scale after his employment by the employer in January 2000. The claimant testified that his calender year earnings for that business were $4,000 to 5,000 up until the _____, date of injury and no amount for the rest of the year thereafter. The claimant testified that the 2001 calendar year earnings totaled $5,600. The hearing officer found that post-injury earnings were $2,605.00 for the period from May 30 through August 31, 2001. Although the claimant asserted that a business manager was responsible for rendering all services, the hearing officer evidently disbelieved this.

The hearing officer focused on the one customer company for which amounts paid were proven and used this as a measure of computing average weekly earnings that the

carrier could credit against TIBs. Whether or not the same were "wages" paid directly to the claimant (as opposed to another person), the question of whether an offset against TIBs is due is not answered by those questions alone, where the consulting business was not started post-injury but was concurrent employment at the time of the injury.

The Appeals Panel has interpreted the 1989 Act as a whole and determined that where the claimant is concurrently employed at the time of his injury, and is still able to perform the concurrent employment, although not the job on which he/she was injured, earnings from the concurrent employment are not considered post-injury earnings, Texas Workers' Compensation Commission Appeal No. 93343, decided June 14, 1993, unless there is evidence that earnings increased in that business as a result of the claimant's increased availability. *See* Texas Workers' Compensation Commission Appeal No. 990827, decided May 19, 1999; Texas Workers' Compensation Commission Appeal No. 011100, decided July 2, 2001. The record in this case did not include evidence that any increase that may in fact have existed was due to the claimant's increased availability as opposed to the nature of the services paid for.

We accordingly reverse the allowance of a credit against TIBs and render the decision that the claimant's post-injury earnings from his concurrent employment may not be used to reduce TIBs and that the carrier is not entitled to the reduction of $200.38 a week.

In all other respects, the decision is not against the great weight and preponderance of the evidence and we affirm. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

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

C.T. CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge