APPEAL NO. 022655
FILED NOVEMBER 25, 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 September 18, 2002. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the sixth and seventh quarters.

The appellant (carrier) appeals the decision, arguing that the claimant "does not qualify" for SIBs for the sixth quarter and that the claimant's underemployment is not a direct result of her impairment from the compensable injury. The claimant responds, agreeing that her earnings during the sixth quarter qualifying period brought her above 80% of her preinjury wage and otherwise urges affirmance.

DECISION

Affirmed as reformed.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue in this case is whether the claimant's earnings were less that 80% of her preinjury average weekly wage (AWW) as a direct result of her impairment as set out in Section 408.142(a)(2) and Rule 130.120(b)(1).

The carrier first makes the argument that the claimant was paid a Christmas bonus of $4,146.00 during the sixth quarter qualifying period and that bonus, together with the claimant's other wages during the sixth quarter qualifying period, exceeds 80% of the claimant's preinjury AWW. The claimant responds agreeing that the bonus during the sixth quarter "brought her earnings for that qualifying quarter above the 80% cut off for SIBs eligibility." We note that the bonus is listed on the claimant's Application for [SIBs] (TWCC-52) however, we also note that this argument was not made to the hearing officer but was raised for the first time on appeal. We do not normally consider matters raised for the first time on appeal unless those matters qualify under the standard set out in Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ) and we decline to hold that the hearing officer erred in failing to ferret out a defense not raised by the carrier. On the other hand, the claimant concedes that she is not entitled to SIBs for the sixth quarter and we will therefore reform the hearing officer's decision to conform to the evidence by holding that the claimant has withdrawn her request for entitlement to SIBs for the sixth quarter.

Regarding the seventh quarter, the claimant's preinjury employment was in heavy duty capacity on an auto assembly line. The claimant injured her left arm and neck and had two surgeries. The parties stipulated that the claimant had a 31% impairment rating (IR) and that the qualifying period for the seventh quarter was from March 3 through June 1, 2002. It is undisputed that the claimant received computer

training through the Texas Rehabilitation Commission and was employed as a receptionist for a construction company until she was laid off on April 15, 2002. The claimant began employment with a bank as a credit clerk on April 29, 2002 and continued in that employment through the seventh quarter qualifying period.

The carrier's argument centers around the fact that the claimant does not have medically documented restrictions for the quarter at issue, that one medical report (dated August 3, 2000) indicated that the claimant voluntarily restricted her range of motion (although assessing a 31% IR) and that claimant's position is not relatively equal to her ability to work. Both parties cite various Appeal Panel decisions to support their contentions. We would note that all the cases cited point out that in assessing factual determinations the hearing officer is the sole judge of the weight and credibility that is to be given to the evidence and that the hearing officer's determinations on factual issues will be overturned only if they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Applying that standard to this case we find the hearing officer's decision to be supported by the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant contends that adjudication of a prior SIBs quarter on the same evidence should be "res judicata" on a subsequent quarter citing a dissenting opinion in Texas Workers' Compensation Commission Appeal No. 021922, decided August 29, 2002. The argument whether another fact finder could have reached a different result on exactly the same facts or was bound by a prior CCH decision will not be addressed because in this case another hearing officer had found entitlement in the prior quarter and we need not speculate what might have happened had the prior hearing officer reached a different conclusion.

Accordingly, the hearing officer's decision and order regarding the seventh quarter of SIBs is affirmed and the decision and order is reformed to delete the order involving SIBs for the sixth quarter.

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

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

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

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Michael B. McShane
Appeals Panel
Manager/Judge