

APPEAL NO. 030113
FILED MARCH 4, 2003

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 December 16, 2002. With regard to the disputed issues at the CCH, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the sixth and seventh quarters. The claimant appeals, seeking a reversal of the decision and argues that it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. The respondent's (carrier) response was not timely filed and therefore it cannot be considered.

DECISION

Affirmed.

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 was whether the claimant had earned less than 80% of his average weekly wage (AWW) as a direct result of his impairment, as required by Section 408.142(a)(2) and Rule 130.102(b)(1), and whether he had attempted in good faith to obtain employment commensurate with his ability to work, as required by Section 408.142(a)(4) and Rule 130.102(b)(2). The hearing officer found that the claimant met the good faith job search requirement of Section 408.142(a)(4) and Rule 130.102(d)(1), and that determination has not been appealed. Section 408.142(a)(2) and Rule 130.102(b)(1) require that the claimant must establish that his underemployment (earning less than 80% of his AWW) is "a direct result of the impairment from the compensable injury."

The parties stipulated that the claimant sustained a compensable injury on _____; reached maximum medical improvement on May 17, 1999, with a 30% impairment rating; and did not commute any of his impairment income benefits. They further stipulated that the qualifying period for the sixth quarter began on January 23 and ended on April 23, 2002; that the qualifying period for the seventh quarter began on April 24 and ended on July 23, 2002; and that the claimant's AWW was \$1,537.10. The claimant reopened a construction and remodeling business in the summer of 1999. It is apparent that he was seeking to show that he was entitled to SIBs based on returning to work (self-employment) in a position relatively equal with his ability to work. During the qualifying period for the disputed sixth quarter, the claimant showed gross earnings of \$26,673.76. During the qualifying period for the disputed seventh quarter, the claimant showed gross earnings of \$37,334.33.

The hearing officer found that the claimant had returned to work in a position relatively equal to his ability to work, and that he was not underemployed as a direct result of his impairment from the compensable injury. The claimant submitted what he

called "Profit and Loss Statements" that listed his gross earnings and expenses for the qualifying periods in dispute, along with some documents purportedly supporting the "Profit and Loss Statements." The hearing officer's Statement of the Evidence indicates that she did not find the business expenses asserted by the claimant to be credible, and she found that his earnings during each of the qualifying periods were more than 80% of his AWW, and that the claimant was thus not underemployed.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.), Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In view of the evidence presented, we cannot conclude that the hearing officer's determination 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 (Tex. 1986). This is so, even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

We affirm the decision and order of the hearing officer.

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

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

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge