APPEAL NO. 030319
FILED MARCH 10, 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 January 22, 2003. With regard to the only issue before her the hearing officer determined that the appellant/cross-respondent (claimant) is not entitled to lifetime income benefits (LIBs).

The claimant appeals "each and every determination decided by the hearing officer against the claimant." The respondent/cross-appellant (carrier) in a request for review and a response, both timely filed, asserts that the "Carrier is not a proper party" and that the hearing officer erred in failing to require the Subsequent Injury Fund (SIF) to attend the CCH. There was no response to the carrier's appeal.

DECISION

Affirmed.

The claimant sustained a compensable right knee injury in _____ and a compensable left knee injury in (subsequent date of injury). The claimant testified that he has had total knee replacements for both knees. The claimant also testified, and this testimony is supported by the medical evidence, that he cannot return to work at his preinjury job as a welder for the employer. The hearing officer commented that, "it is apparent that [the claimant] was able to ambulate without use of any type of devices." The claimant received an 11% impairment rating and the hearing officer commented that the claimant "does perform light work around his house, such as maintaining his yard."

The claimant asserts entitlement to LIBs apparently based on Section 408.161(a)(2). Section 408.161(a)(2) provides that LIBs are paid until the death of the employee for the loss of both feet at or above the ankle. Section 408.161(b) provides that the loss of use of a body part is the loss of that body part for purposes of subsection (a). In Texas Workers' Compensation Commission Appeal No. 010124, decided March 6, 2001, citing Travelers Ins. Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962), we noted that the test for total loss of use is whether the member possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the claimant from getting and keeping employment requiring the use of the member. In Texas Workers' Compensation Commission Appeal No. 952100, decided January 23, 1996, we noted that the Seabolt test is disjunctive and that a claimant need only satisfy one prong of the test in order to establish entitlement to LIBs. There was really no evidence that the claimant had lost the use of both feet at or above the ankle and the claimant testified that he walked around the yard doing some yard work and that he was able to drive. As noted, the claimant was able to walk into the CCH without assistance. The hearing officer's findings that the claimant failed to

establish that the combination of both knee injuries results in a condition for which the claimant is entitled to LIBs based on Section 408.161(a)(2) is supported by the evidence.

The carrier argues that because the claimant's claim to LIBs is based on the effects of two separate injuries, the SIF rather than the carrier is the proper party. We note that the hearing officer commented on the record, and this comment is supported by documentary evidence, that the SIF was notified of the time, date, and place of the CCH and declined to attend. Section 408.162 entitled "[SIF] Benefits," provides as follows:

> (a) If a subsequent compensable injury, with the effect of a previous injury, results in a condition for which the injured employee is entitled to [LIBs], the insurance carrier is liable for the payment of benefits for the subsequent injury only to the extent that the subsequent injury would have entitled the employee to benefits had the previous injury not existed.
>
> (b) The [SIF] shall compensate the employee for the remainder of the [LIBs] to which the employee is entitled.

The carrier asserts that it has paid all the benefits to which the claimant is entitled for the 1994 injury and therefore it is not the proper party in this case. However, we also note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 131.3 (Rule 131.3) provides that when an insurance carrier reasonably believes that an injured employee may be eligible for LIBs from the SIF, the insurance carrier shall petition the Texas Workers' Compensation Commission (Commission) for payment of LIBs from the SIF. In Texas Workers' Compensation Commission Appeal No. 990321, decided March 24, 1999, we held that, pursuant to Rule 131.3(a), the carrier has the responsibility to file a written petition with the Commission for the payment of LIBs from the SIF. The carrier apparently did so (Carrier's Exhibit No. 3). However, since no LIBs are due there is nothing for the SIF to pay. The SIF was notified of the CCH and chose not to attend. Under the circumstances of the hearing officer's decision that the claimant is not entitled to LIBs we decline to grant the carrier's request that it be discharged because the claimant's claim should have been brought against the SIF.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are 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, 176 (Tex. 1986).

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

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Robert W. Potts
Appeals Judge