

APPEAL NO. 030501
FILED APRIL 7, 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 16, 2003. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first through sixth quarters.

The claimant appealed, reiterating testimony from the CCH and in some cases adding information not before the hearing officer. The claimant, although arguing that his doctor has told him not to work, claims entitlement based on a good faith effort to obtain employment commensurate with his ability to work. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

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). The parties stipulated that the claimant sustained a compensable back injury on _____; that the claimant has an impairment rating of 15% or greater; that impairment income benefits have not been commuted; and that the relevant qualifying periods are from April 21, 2001, through October 18, 2002.

The facts in this case are a bit unusual. The claimant is the owner (or co-owner with his wife) of (employer). The employer is authorized to bid on certain federally-funded clean-up projects pursuant to a class-action lawsuit. The claimant testified that before his injury he bid on the jobs and actually performed some of the physical labor himself but that after his injury, while he could still bid on jobs, his injury prevented him from meeting the strict deadlines that the federally-funded jobs required. How that was is unclear because the claimant testified that he hired work crews (and in some cases supervisors) who performed most of the physical labor. In addition, the claimant testified that after his injury he also bid on other jobs (other than the federally-funded jobs) that he personally performed and which did not have strict deadlines to meet. The claimant submitted extensive documentation including calendars which showed where he was and what he was doing each day of the six qualifying periods. Some days were marked "Back" which meant that the claimant was unable to work those days because of his injury. In evidence were several Work Status Reports (TWCC-73) taking the claimant off work completely, but it was the claimant who determined whether he could, or could not, work on a particular day. The hearing officer determined that the claimant had "returned to work in a position roughly equal to his abilities."

Section 408.142(a)(2) and Rule 130.102(b)(1), as part of the eligibility criteria, requires that the claimant has earned less than 80% of the employee's average weekly

wage (AWW) as a direct result of the impairment from the compensable injury. The fatal flaw in the claimant's case is that there is no evidence what the claimant's preinjury AWW was or what his total post-injury earnings may have been. The claimant gave figures on draws that he took from the employer to pay certain expenses and in some cases provided figures on income from the other jobs that he had performed outside of the employer-authorized bids. In no case are figures available regarding how much the claimant's company earned from the federally paid jobs or how much the claimant's preinjury AWW was. The claimant's position is that his compensable injury caused an "inability to work to [his] full potential thus causing underemployment" and that he "earned way less than 80% of [his] pre-injury wages."

The hearing officer commented;

[T]he claimant's documentation of the income he received during the relevant time period consists almost entirely of a record of his "draws" against his business funds; as he conceded, nowhere does he provide documentation of the actual funds received by the business from customers (nor the business expenses, for that matter) during the relevant period with the exception of some checks made directly to the claimant for some "individual" jobs he performed. His tax return likewise shows only the amount of his "draws", with no specific detailing of income and expenses. The state of the claimant's documentation calls into question the threshold issue of whether the claimant was, in fact, underemployed for the time period in issue, a situation aggravated by the fact that there was no evidence presented as to the amount of his pre-injury income. As the fact of "underemployment" cannot be determined, it follows that the direct cause of such underemployment cannot be ascertained. To the extent that the evidence might suggest that the claimant earned less than this pre-injury income during the time period in issue here, the lack of documentation of his self-employment efforts would prevent a finding that the income disparity was a direct result of the impairment from his injury.

The hearing officer determined that although the claimant had returned to a position relatively equal to his abilities (see the good faith requirement of Rule 130.102(d)(1)), to "the extent that the claimant had [earned] less than his pre-injury income during the qualifying periods. . . the deficiency was not a direct result of the impairment from the compensable injury." The hearing officer concluded that the claimant was not entitled to SIBs for the claimed quarters.

After review of the record before us and the complained-of determination, we have concluded that there is sufficient legal and factual support for the hearing officer's decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly the hearing officer's decision and order are affirmed.

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

**BOB KNOWLES
5205 NORTH O'CONNOR BLVD.
IRVING, TEXAS 75039.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Terri Kay Oliver
Appeals Judge