

APPEAL NO. 030555  
FILED APRIL 18, 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 was held on January 14, 2003. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first through sixth quarters; that the claimant has not permanently lost entitlement to SIBs pursuant to Section 408.146(c); and that the respondent/cross-appellant (carrier) did not waive its right to contest entitlement to SIBs for quarters one through four. In his appeal, the claimant asserts error in the hearing officer's determination that the carrier did not waive its right to contest entitlement to SIBs for the first through fourth quarters. Specifically, the claimant argues that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108 (Rule 130.108) conflicts with Section 408.147(b) by distinguishing between situations where the carrier has paid a prior quarter and where it has not. In its response to the claimant's appeal, the carrier urges affirmance of the waiver determination. In its cross-appeal, the carrier argues that the hearing officer erred in determining that the claimant satisfied the requirements of Rule 130.102(d)(4) in the qualifying periods for the first through sixth quarters and, thus, was entitled to SIBs for those quarters. The carrier likewise argues that the hearing officer erred in determining that the claimant had not permanently lost entitlement to SIBs pursuant to Section 408.146(c). In his response to the carrier's appeal, the claimant urges affirmance of the determinations that he is entitled to SIBs for the first through sixth quarters and that he has not permanently lost entitlement to SIBs.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; that he reached maximum medical improvement on March 13, 2000, with an impairment rating of 21%; that he did not commute his impairment income benefits; that the date of the first through sixth quarters of SIBs ran from May 29, 2001, to November 25, 2002; that the relevant qualifying periods ran from February 14, 2001, to August 13, 2002; and that the claimant did not make any job searches in the qualifying periods.

The hearing officer did not err in determining that the claimant is entitled to SIBs for the first through sixth quarters. The hearing officer determined that the claimant satisfied the requirements of Rule 130.102(d)(4) by providing a narrative that specifically explains how the injury causes a total inability to work and no other record shows an ability to work. The issues of whether there is a narrative and whether another record shows some ability to work are factual determinations for the hearing officer. The hearing officer determined that the May 2, 2002, letter from Dr. R satisfied the narrative

requirement of Rule 130.102(d)(4). He also determined that the evidence stating that the claimant could perform some work did not constitute other records that showed an ability to work because those documents were based upon an incomplete understanding of the severity of the claimant's condition, which prevailed in this case before Dr. R obtained diagnostic testing and performed reconstructive spinal surgery on March 19, 2002. The hearing officer articulated a reasonable basis for discounting the purported other records and he was acting within his role as the fact finder in so assessing the weight and credibility to be given to that evidence. The hearing officer's determinations that the claimant satisfied the requirements of Rule 130.102(d)(4) in the relevant qualifying periods are not so against the great weight of the evidence as to be clearly wrong or manifestly unjust; thus, no sound basis exists for reversing those determinations, or the determinations that the claimant is entitled to SIBs for the first through sixth quarters, on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The success of the carrier's argument that the claimant has permanently lost entitlement to SIBs is dependent upon the success of its argument that the hearing officer erred in determining that the claimant is entitled to SIBs for the first through sixth quarters. Given our affirmance of that determination, we likewise affirm the determination that the claimant has not permanently lost entitlement to SIBs pursuant to Section 408.146(c).

Finally, we consider the claimant's argument that the hearing officer erred in determining that the carrier did not waive its right to contest the claimant's entitlement to SIBs for quarters one through four by failing to request a benefit review conference within 10 days of receiving the claimant's Applications for [SIBs] (TWCC-52) for those quarters. The claimant argues that Rule 130.108 conflicts with Section 408.147 by only providing for waiver where the carrier has paid the prior quarter of SIBs. The claimant maintains that Section 408.147 does not provide for such a distinction. We have previously considered and rejected this argument, noting that we declined to hold that a formally promulgated rule of the Texas Workers' Compensation Commission is inconsistent with the 1989 Act and not applicable to the proceedings. Texas Workers' Compensation Commission Appeal No. 001715, decided September 7, 2000; Texas Workers' Compensation Commission Appeal No. 001112, decided June 30, 2000. The claimant's attorney acknowledged at the hearing that he was making the argument to preserve error for purposes of judicial review and indeed, judicial review is where the issue of whether Rule 130.108 impermissibly conflicts with Section 408.147 will ultimately be resolved.

The hearing officer's decision and order are affirmed.

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

**GARY SUDOL**  
**9330 LBJ FREEWAY, SUITE 1200**  
**DALLAS, TEXAS 75243.**

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Terri Kay Oliver  
Appeals Judge