

APPEAL NO. 030734
FILED MAY 9, 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 February 11, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the third quarter and that the claimant's weekly earnings used to determine the monthly SIBs rate, for the qualifying period from July 6 through October 4, 2002, were \$483.55. The appellant (carrier) appealed, arguing that the determinations of SIBs entitlement and the amount of the claimant's weekly earnings used to determine the monthly SIBs rate were against the great weight and degree of credible evidence. The claimant responded, urging affirmance.

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 is 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 parties stipulated that the claimant sustained a compensable injury on _____, with an impairment rating of 15% or greater; and did not commute any of his impairment income benefits. They further stipulated that the qualifying period for the third quarter was from July 6 through October 4, 2002; that the claimant had no earnings or was underemployed during the qualifying period for the third quarter; and that the claimant's preinjury AWW was \$1,205.38. The claimant was self-employed during the qualifying period repairing cell phones. 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.

The carrier contended that the claimant's underemployment was not a direct result of his impairment but rather his own personal choice to open his own business. The claimant testified that his preinjury job required lifting of up to forty pounds, climbing stairs and ladders, and standing for long periods of time. In evidence was a medical record, which stated that the claimant was released with permanent restrictions of no climbing ladders, and limitations of walking and stair climbing. The Appeals Panel has long held that the direct result requirement may be met by showing a serious injury with long-lasting effects, which precludes a return to the preinjury employment. Texas Workers' Compensation Commission Appeal No. 011443, decided August 1, 2001. The

hearing officer found that the claimant has returned to work earning less than 80% of his AWW as a direct result of his impairment. The hearing officer's determination on this point is supported by sufficient evidence.

The hearing officer also found that the claimant attempted, in good faith, to obtain employment commensurate with his ability to work. In this regard, Rule 130.102(d)(1) provides that a good faith effort has been made if the employee "has returned to work in a position which is relatively equal to the injured employee's ability to work." A carrier is not expected to subsidize a business venture and it cannot be used as a subterfuge for a good faith effort to obtain employment. Texas Workers' Compensation Commission Appeal No. 980548, decided May 1, 1998. The hearing officer noted that the claimant advertised his business and worked at it on a full-time basis. The hearing officer additionally noted that the many of the jobs in the job leads sent to the claimant by the carrier would provide less earnings than the claimant's self-employment.

Whether a good faith effort is shown is basically a question of fact for the hearing officer, and cases tend to become very fact specific in self-employment situations. Texas Workers' Compensation Commission Appeal No. 982820, decided January 11, 1999. The hearing officer apparently found the claimant's testimony credible regarding his endeavors to establish a successful business; that his efforts were commensurate with his ability to work; and that he met the requirements for SIBs with his self-employment efforts. This was a factual determination for the hearing officer to make. Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997.

The carrier contends that the hearing officer erred in determining that the weekly earnings to be used to determine SIBs rate in this case were \$483.55. Section 408.144(b) states that SIBs are to be calculated by "subtracting the weekly wage the employee earned during the reporting period" Rules 130.101 and 130.102 indicate that SIBs are to be calculated by adding actual and offered wages for each week of the filing period. We have said that, in calculating a self-employed claimant's wages during the filing period, business expenses may be deducted to arrive at the earnings. Texas Workers' Compensation Commission Appeal No. 990372, decided April 5, 1999. The carrier contends that some of the expenses allowed by the hearing officer were not necessary and not directly related to advancing the claimant's business.

It is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate-reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge