

APPEAL NO. 031243
FILED JULY 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 was held on April 11, 2003. The hearing officer determined that the respondent (claimant) did not have post-injury earnings (PIE) from April 2, 2002, through the date of the hearing and that the claimant had disability beginning September 24, 2002, and that disability had not ended as of the date of the hearing. The appellant (self-insured) appeals this decision. The claimant urges affirmance.

DECISION

Affirmed as reformed.

PIE

The self-insured argues that the hearing officer erred in determining that benefits paid to the claimant through "retirement disability" are not PIE. Specifically, the self-insured contends that because the claimant did not fully pay into the disability retirement plan, it is not "regular retirement," but rather is a disability indemnity program, as provided for by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2(d)(5) (Rule 129.2(d)(5)), which was paid for by the employer. We are not aware of any authority defining retirement pay by the amount of money paid into the plan on behalf of the claimant. Rather, we have previously noted that retirement pay is not tied to the provision of personal services, but is related to *past services* and, therefore, is not considered PIE. See Texas Workers' Compensation Commission Appeal No. 012361, decided November 19, 2001. Additionally, we note that the self-insured introduced no evidence to establish that the retirement disability plan was, in actuality, an indemnity program or that it was paid entirely by the employer. The burden of proving that the earnings in question were PIE was on the self-insured. The hearing officer determined that the self-insured did not meet its burden and that the claimant's retirement disability pay is not PIE. Nothing in our review of the record indicates that the hearing officer's PIE 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). In light of our discussion above, we reform Finding of Fact No. 10 to state:

10. The claimant received disability retirement PIE, which is not PIE.

DISABILITY

The claimant bears the burden of establishing that a compensable injury was a producing cause of her disability. Disability is a factual question for the hearing officer to resolve. A disability determination can be established by the claimant's testimony alone, if believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d

394 (Tex. 1989). Under the facts of this case, we perceive no error in the hearing officer's resolution of the disability issue. However, because a disability ending date cannot be after the date of the hearing, Conclusion of Law No. 3 is reformed to reflect the following:

3. The claimant had continuing disability from September 24, 2002, through the date of the hearing.

PAYMENT OF INCOME BENEFITS

The self-insured complains on appeal that the hearing officer should not have ordered direct payment of previously paid dates under the long-term disability [LTD] policy." We assume that the self-insured is arguing that the claimant should not receive the full amount of accrued but unpaid income benefits because she is also receiving benefits under a LTD plan, which is separate from her retirement disability and, according to the claimant's testimony, subjects workers' compensation benefits to a reduction from the LTD benefits. This issue was not before the hearing officer and was not litigated at the hearing. Therefore we will not consider it on appeal.

The decision and order of the hearing officer are affirmed

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**JAVIER GARZA, WCI MANAGER
201 WEST 7TH STREET
ASH 414
AUSTIN, TEXAS 78701-2981.**

Chris Cowan
Appeals Judge

CONCUR:

Veronica Lopez-Ruberto
Appeals Judge

Edward Vilano
Appeals Judge