APPEAL NO. 031670
FILED AUGUST 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 April 29, 2003. The hearing officer determined that the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the 12th quarter, and that his weekly earnings to be used in calculating SIBs are $77.09 for the 12th quarter. The appellant/cross-respondent (carrier) appealed, asserting that the claimant failed to establish his gross earnings; that the hearing officer erred in his determination regarding the claimant's operating expenses; that the claimant failed to document self-employment efforts during each week of the qualifying period; and that the claimant failed to establish direct result. The claimant filed a response to the carrier's appeal urging affirmance, subject to his cross-appeal. The claimant cross-appealed the hearing officer's determination that his weekly earnings for purposes of calculating SIBs for the 12th quarter was $77.09. The claimant asserts his weekly earnings should be $0.00. The file does not contain a response from the carrier.

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 is entitled to SIBs for the 12th quarter and what his weekly earnings were during the qualifying period for the 12th quarter.

The parties stipulated that the claimant sustained a compensable injury on _____, with an impairment rating of 32%, and that he did not commute any of his impairment income benefits. They further stipulated that the qualifying period for the 12th quarter was from August 15 through November 13, 2002; that the quarter ran from November 27, 2002 to February 25, 2003; and that the carrier has used $413.50 as the claimant's preinjury average weekly wage (AWW) to compute his benefits. The claimant testified that he was self-employed during the qualifying period running a photography business. 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 in accordance with Rule 130.102(d)(1).

The carrier contended that the claimant's underemployment was not a direct result of his impairment, but rather due to his lack of effort and circumstances unrelated to his compensable injury. The claimant testified that his preinjury job required lifting and setting up equipment, as well as driving substantial distances. Medical records in evidence state that the claimant may be able to work on a restricted basis. The claimant testified that he would not be able to perform his preinjury job due to the extensive driving and lifting it required. 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 made a good faith effort to obtain and retain employment commensurate with his ability to work during the qualifying period for the 12th quarter, and that he was self-employed during each and every week of the qualifying period. 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. However, 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 and maintain 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. Nothing in our review of the record reveals that the hearing officer's good faith determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; thus, no sound basis exists for us to disturb the challenged factual determination. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The carrier points to Texas Workers' Compensation Commission Appeal No. 002863, decided January 25, 2001, to support its position that self-employment must be documented each week of the qualifying period. The carrier asserts that since the claimant showed no earnings during two weeks of the qualifying period, he has failed to meet his burden. Appeal No. 002863 does not speak in terms of documenting earnings, it speaks in terms of documenting activity. The records submitted into evidence by the claimant document business expenditures during the complained-of time periods. The hearing officer found as fact that the claimant was self-employed during each and every week of the qualifying period, and that finding is supported by the evidence.

Finally, both the carrier and the claimant contend that the hearing officer erred in determining that the weekly earnings to be used to determine SIBs rate in this case were $77.09. 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, legitimate 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. The claimant contends that the hearing officer failed to include wages paid to his wife. 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, *supra*.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTEE ASSOCIATION for Reliance Insurance Company, an impaired carrier** and the name and address of its registered agent for service of process is

MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Veronica Lopez-Ruberto
Appeals Judge

_____
Robert W. Potts
Appeals Judge