

APPEAL NO. 031846
FILED AUGUST 29, 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 June 11, 2003. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 18th quarter. The appellant (carrier) appeals, contending that the evidence and the law do not support the hearing officer's decision. The claimant responds, asserting that sufficient evidence supports the hearing officer's decision.

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 SIBs criteria in issue are whether, during the qualifying period for the 18th quarter, the claimant earned less than 80% of her average weekly wage (AWW) as a direct result of the impairment from the compensable injury, and made a good faith effort to obtain employment commensurate with her ability to work. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. The hearing officer found that during the relevant qualifying period: (1) the claimant earned less than 80% of her AWW; (2) the claimant's underemployment was a direct result of the impairment from her compensable injury; (3) the claimant returned to work in a position which was relatively equal to her ability to work; and (4) the claimant made a good faith effort to obtain employment commensurate with her ability to work.

With regard to the carrier's assertion that the claimant's earnings during the qualifying period were equal to or more than 80% of her AWW, we note that according to the claimant's pay records from the qualifying period, it was the claimant, and not the employer, who was paying the premiums for the dental insurance and long-term disability insurance and thus there were not employer payments for those benefits to be added to the claimant's earnings as asserted by the carrier. In addition, the hearing officer did not err in finding that the employer's contribution to the claimant's 401(k) plan was not remuneration for the purpose of calculating the claimant's wages during the qualifying period. The claimant's uncontroverted testimony was that the 50% matching contribution the employer makes to her 401(k) plan does not vest until she has worked for the employer for five years. It is not disputed that the claimant has not worked for the employer for five years. The hearing officer's finding excluding the employer's

contribution to the claimant's 401(k) plan from the claimant's earnings during the qualifying period is in accordance with our decision in Texas Workers' Compensation Commission Appeal No. 93683, decided September 24, 1993.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The disputed matters regarding the good faith and direct result criteria for SIBs entitlement presented questions of fact for the hearing officer to resolve from the evidence presented. We conclude that the hearing officer's decision that the claimant is entitled to SIBs for the 18th quarter is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge