

APPEAL NO. 032025
FILED SEPTEMBER 16, 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 July 8, 2003. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second and third quarters because the claimant's underemployment was not a direct result of the impairment from the compensable injury and that the respondent (carrier) is relieved of liability for SIBs from April 10 through May 11, 2003, because the claimant failed to timely file an Application for [SIBs] (TWCC-52) for the third quarter. The hearing officer's determination on lack of timely filing the TWCC-52 has not been appealed and has become final pursuant to Section 410.169.

The claimant appeals, contending that his testimony how his injury affected his ability to work "is sufficient evidence to establish his underemployment as a direct result of his injury." The carrier responds urging affirmance.

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 parties stipulated that the claimant sustained a compensable (cervical) injury on _____, that he has a 19% impairment rating and that the qualifying period for the second quarter was from September 27 through December 26, 2002, and the qualifying period for the third quarter was from December 27, 2002, through March 27, 2003. The hearing officer found that the claimant had returned to a job that was relatively equal to his ability to work (satisfied the good faith requirement of Rule 130.102(b)(2)) for the relevant qualifying periods.

It is undisputed that the claimant, a diesel mechanic, sustained a compensable injury on _____, in a motor vehicle accident and subsequently returned to his preinjury job "within a couple of weeks" of his injury. The claimant worked for "two or three months" until his employment was terminated. The claimant subsequently started his own air conditioning and diesel mechanic business in March 2002 doing essentially his preinjury work on a self-employed basis. The claimant offered his TWCC-52 which contained entries of earnings during the weeks of the qualifying periods of the second and third quarters. The claimant admitted he had no documentation how he came up with those figures. The claimant also offered a handwritten list of "operating expenses" for the third quarter qualifying period but, as the hearing officer commented, the claimant "offered no documentation to support his claimed expenses." Rule 130.102(b)(1) provides, as part of the eligibility criteria, that the claimant:

- (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury[.]

The claimant relies on the generality that he had sustained a serious injury with lasting effects and therefore could not return to his preinjury job (see Texas Workers' Compensation Commission Appeal No. 030005, decided February 10, 2003). However, in this case it is undisputed that the claimant had returned to his preinjury job, that his employment had been terminated and that he was now performing his preinjury job, albeit in a self-employment capacity. As the hearing officer noted, the claimant testified that his weekly earnings fluctuated according to how much work he could find and that it "was a risk that he had to take having his own work/business."

The hearing officer did not err in finding that the claimant's underemployment was not a direct result of the impairment from the compensable injury, that her determinations are supported by the evidence, and that the determination are not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly the hearing officer's decision and order are affirmed.

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

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge