

APPEAL NO. 033344
FILED FEBRUARY 17, 2004

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 December 4, 2003. The hearing officer decided that: (1) the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the 1st through 12th quarters; and (2) the claimant permanently lost entitlement to SIBs, pursuant to Section 408.146(c). The claimant appeals these determinations on sufficiency of the evidence grounds. The claimant also raises several procedural points of error. The respondent/cross-appellant (carrier) urges affirmance, but filed a conditional cross-appeal of the hearing officer's "direct result" determination. The claimant did not file a cross-response.

DECISION

Affirmed as reformed.

The hearing officer did not err in determining that the claimant is not entitled to 1st through 12th quarter SIBs. Section 408.142 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) establish the requirements for entitlement to SIBs. At issue is whether the claimant had an ability to work and whether he returned to work commensurate with his ability to work. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Ins. Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer considered the evidence and essentially found that the claimant failed to meet his burden of proof on these issues. In view of the applicable law and the evidence presented, we cannot conclude that the hearing officer's 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).

With regard to the carrier's cross-appeal, we have consistently held that an injured employee need only establish that the impairment from the compensable injury is a cause of his underemployment and that the "direct result" requirement is "sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury." Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. We decline to reconsider our prior holdings at this time. Applying this standard, the hearing officer's "direct result" determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

The hearing officer did not err in determining that the claimant permanently lost entitlement to SIBs. Section 408.146(c) provides that an employee who is not entitled

to SIBs for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. In view of our affirmance above, we likewise affirm the hearing officer's determination that the claimant has permanently lost entitlement to SIBs, pursuant to Section 408.146(c).

In his appeal, the claimant complains that he received ineffective assistance from his ombudsman and that he was cut short by the hearing officer when making his closing argument. The claimant requests a rehearing, on this basis, and an opportunity to obtain an attorney. We note that the claimant was informed of his right to obtain an attorney at the hearing below but elected to proceed with the assistance of an ombudsman. We have said that ombudsmen are available only to assist a claimant and it is the claimant who remains responsible for the proper and adequate presentation of his case. The record does not reflect that the claimant was prevented from providing evidence or argument in support of his claim at the hearing below. Accordingly, we decline to reverse the hearing officer's decision.

The claimant also complains that the "Order" paragraph in the hearing officer's decision and order provides an incorrect date of injury. Consistent with the record evidence, we reform the hearing officer's ordering paragraph to provide a date of injury of April 3, 1998.

The hearing officer's decision and order is affirmed as reformed.

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

**LEE F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Edward Vilano
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge