

APPEAL NO. 040363
FILED APRIL 6, 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 January 16, 2004. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 9th, 10th, and 11th quarters, beginning on May 16, 2003, and continuing through February 12, 2004. The claimant appealed the hearing officer's determinations based on sufficiency of the evidence grounds. The claimant also takes issue that she was not afforded the opportunity to rebut the respondent's (carrier) closing argument and that she was at a disadvantage because she did not have legal representation. The carrier responded, 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). At issue in this case is whether the claimant had earned less than 80% of her average weekly wage (AWW) as a direct result of her impairment, as required by Section 408.142(a)(2) and Rule 130.102(b)(1), and whether she had attempted in good faith to obtain employment commensurate with her ability to work, as required by Section 408.142(a)(4) and Rule 130.102(b)(2). It is undisputed that the claimant sustained a compensable injury on _____, that the claimant has an impairment rating of 15% or greater, that impairment income benefits have not been commuted, and that the qualifying periods in dispute began on February 1 and continued through October 31, 2003.

Rule 130.102(b)(1) 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. 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 claimant testified that she underwent a spinal fusion in 1999, and thereafter four other spinal surgeries. The claimant testified that her last surgery, a spinal stimulator implant, was on February 3, 2003, during the 9th quarter qualifying period. The claimant testified that she could not have returned to her preinjury job during the qualifying periods in dispute, since she was released to work at a sedentary level with restrictions. The hearing officer determined that the claimant's underemployment was a direct result of her impairment from the compensable injury sustained on _____. The hearing officer's direct result determination is supported by sufficient evidence.

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. It was undisputed that the claimant was self-employed auctioning items on the internet for the qualifying periods in dispute. The Applications for [SIBs] (TWCC-52) for each of the qualifying periods in dispute reflect that she did not conduct any job searches and that she earned wages from her self-employed business. 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. In this case, the hearing officer apparently found that the claimant's efforts were not commensurate with her ability to work, and that she did not meet the requirements for SIBs with her self-employment efforts. This was a factual determination for the hearing officer to make. Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997. 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 claimant complained that she was not afforded the opportunity to rebut the carrier's closing argument. Our review of the record reflects that both parties had presented their evidence and that the claimant and the carrier rested their cases. The ombudsman made a closing argument in the claimant's behalf followed by a closing argument by the carrier. We note that a closing argument is not evidence but only sums up the evidence that was in front of the hearing officer. We do not consider the failure of the hearing officer to allow the claimant to present rebuttal argument to be reversible error.

The claimant complained that she felt she was at "a disadvantage by not having an attorney" to represent her. Our review of the record indicates that the hearing officer fully advised the claimant of her rights to legal representation, the claimant agreed to proceed with assistance from an ombudsman rather than an attorney, and the ombudsman provided able assistance to the claimant. In this regard we perceive no error.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRANSCONTINENTAL 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Margaret L. Turner
Appeals Judge