

APPEAL NO. 041136
FILED JUNE 30, 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 April 21, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third and fourth quarters. The appellant (carrier) appeals, contending that the hearing officer's decision is against the great weight and preponderance of the evidence. The claimant asserts 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 parties stipulated that the claimant sustained a compensable low back and left shoulder injury; that he has a 21% impairment rating; that he did not commute impairment income benefits; that the qualifying period for the third quarter was from May 8 through August 6, 2003; and that the qualifying period for the fourth quarter was from August 7 through November 5, 2003. The SIBs criteria in dispute are whether the claimant earned less than 80% of his average weekly wage (AWW) as a direct result of the impairment from the compensable injury and whether he made a good faith effort to obtain employment commensurate with his ability to work during the relevant qualifying periods. It is undisputed that the claimant did not work and did not look for work during the qualifying periods for the third and fourth quarters. The claimant contended that he had no ability to work as a result of his compensable injury during the relevant qualifying periods.

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)(4) 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 been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

In Texas Workers' Compensation Commission Appeal No. 030823, decided May 22, 2003, the Appeals Panel noted that medical evidence from outside the qualifying period may be considered insofar as the hearing officer finds it probative of conditions in the qualifying period, and that in determining whether another record shows that the injured employee is able to return to work, factors such as a worsening of the employee's medical condition and when the other record was prepared in relation to the qualifying period could be considered. In the instant case, it is clear that the hearing

officer was persuaded from the medical evidence that the claimant's medical condition related to his compensable injury had deteriorated since the time the reports relied on by the carrier were made and that those reports understated the nature of the claimant's injury.

The hearing officer found that during the qualifying periods for the third and fourth quarters: (1) the treating doctor provided a narrative report which specifically explained how the claimant's compensable injury caused a total inability to work; (2) no other records showed that the claimant had an ability to work; (3) the claimant had no ability to work in any capacity; (4) the claimant made a good faith effort to obtain employment commensurate with his ability to work; and (5) the claimant's unemployment was a direct result of his impairment from his compensable injury. The hearing officer concluded that the claimant is entitled to SIBs for the third and fourth quarters. Whether the claimant had no ability to work as a result of his compensable injury and whether his unemployment was a direct result of his impairment from his compensable injury were fact questions for the hearing officer to determine from the evidence presented. 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. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision that the claimant is entitled to SIBs for the third and fourth quarters is supported by sufficient evidence and 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 **HIGHMARK CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge