

APPEAL NO. 041231-s  
FILED JULY 16, 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 (CCH) was held on April 19, 2004. The hearing officer determined that: (1) the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the seventh quarter; (2) the claimant's weekly earnings during the seventh quarter qualifying period cannot be determined; and (3) the claimant has permanently lost entitlement to SIBs pursuant to Section 408.146(c), because he was not entitled to SIBs for a period of four consecutive quarters. The claimant appeals these determinations on sufficiency of the evidence grounds. The respondent (carrier) urges affirmance.

DECISION

Affirmed.

**SEVENTH QUARTER SIBS**

The hearing officer did not err in determining that the claimant is not entitled to seventh 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 was whether the claimant made a good faith job search commensurate with his ability to work and whether the claimant earned less than 80% of his average weekly wage (AWW) as a direct result of the impairment from the compensable injury. 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 Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). While the hearing officer found that the claimant made an appropriate job search each week of the qualifying period, the hearing officer essentially determined that the evidence failed to establish that the claimant earned less than 80% of his AWW as a direct result of the impairment from the compensable injury. In view of 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).

**PERMANENT LOSS OF ENTITLEMENT**

The evidence shows that the claimant was determined not entitled to fourth quarter SIBs and that determination was affirmed in Texas Workers' Compensation Commission Appeal No. 031466, decided July 23, 2003. The claimant submitted an Application for [SIBs] (TWCC-52) for the fifth quarter on May 19, 2003. The carrier issued a determination of nonentitlement, pursuant to Rule 130.104(a), and requested a benefit review conference on May 22, 2003. The record reflects that the claimant elected not to pursue the matter further to a CCH. With regard to the sixth quarter, the

claimant was determined not entitled to SIBs and that determination was affirmed in Texas Workers' Compensation Commission Appeal No. 033238, decided February 5, 2004. The hearing officer considered the evidence and stated:

It therefore cannot be said that the claimant did not pursue fifth quarter benefits; the best that can be said is that he did not pursue a dispute of the carrier's determination of non-entitlement. It might also be noted that the application for the fifth quarter as submitted here does not, on its face, show entitlement, as it contains job search documentation (indicating a concession of some ability to work) but no documentation of such searches for every week of the [fifth] quarter qualifying period.

The hearing officer found that the claimant was not entitled to four consecutive quarters of SIBs, including the fourth, fifth, sixth, and seventh quarters, and permanently lost entitlement to SIBs.

The hearing officer did not err in determining that the claimant has 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. Rule 130.106(a) similarly provides that an injured employee who is not entitled to SIBs for a period of four consecutive quarters permanently loses entitlement to such benefits. The evidence is clear that the claimant was not entitled to fourth and sixth quarter SIBs. Additionally, under the facts of this case, the carrier's determination of nonentitlement to fifth quarter SIBs is sufficient to establish nonentitlement for that quarter for purposes of Section 408.146(c) and Rule 130.106(a). *Compare* Texas Workers' Compensation Commission Appeal No. 981429, decided July 30, 1998 and cases cited therein (deciding that the claimant did not permanently lose entitlement to SIBs where he applied and was denied benefits for only two of the four quarters at issue). In view of the evidence and our decision above, we affirm the hearing officer's determination that the claimant has permanently lost entitlement to SIBs. Cain, *supra*.

## OTHER MATTERS

The claimant contends that the hearing officer spent 15 minutes alone in the hearing room with the carrier's attorney prior to convening the CCH and that he otherwise demonstrated bias in reaching his decision in this case. In its response, the carrier states:

I sat in the hearing room, by myself, until the claimant, the ombudsman and the hearing officer came into the hearing room and the hearing began. Therefore, the hearing officer and I did not sit in the hearing room for 15 minutes by ourselves and we had no conversation during that time.

We note that the claimant did not raise an objection concerning the alleged *ex parte* communication at the hearing. Additionally, we find no support in the record for the

claimant's contention that the hearing officer was motivated by or in any way demonstrated bias in favor of the carrier. Accordingly, we find no basis to reverse the hearing officer's decision.

The decision and order of the hearing officer is affirmed.

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

**RUSS LARSEN  
860 AIRPORT FREEWAY WEST, SUITE 500  
HURST, TEXAS 75054-3286.**

---

Edward Vilano  
Appeals Judge

CONCUR:

---

Elaine M. Chaney  
Appeals Judge

---

Veronica L. Ruberto  
Appeals Judge