

APPEAL NO. 011587
FILED AUGUST 24, 2001

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 June 22, 2001. The hearing officer found that the respondent's (claimant) self-employment constituted a good faith search for employment commensurate with her ability to work during the qualifying period for her fourth quarter of supplemental income benefits (SIBs) and that she was consequently entitled to SIBs for that period.

The appellant (carrier) has appealed, arguing that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(1)(D) (Rule 130.101(1)(D)) makes no provision for acceptance of testimony about items not attached as documents to the Application for [SIBs] (TWCC-52). The carrier states that the claimant failed to prove that she was underemployed as the direct result of her impairment. The carrier argues that the decision of the hearing officer is against the great weight and preponderance of the evidence. There is no response from the claimant.

DECISION

We affirm the determination that the claimant was entitled to SIBs, but reverse and remand for complete information concerning the carrier's agent for service of process.

The qualifying period under review ran from December 7, 2000, through March 7, 2001. The claimant testified as to her physical restrictions from her back and knee injuries, and her efforts at developing a home embroidery business, with the assistance of the Texas Rehabilitation Commission. The claimant worked three to four hours per day maximum, which was within her physical restrictions. She presented receipts from various customers from her business, which had been attached to her TWCC-52 for the period. However, when asked whether she brought with her copies of income and expense information, or sales tax filings, the claimant indicated that she had not and that she had simply turned this information over to her accountant. She testified that similar information had been acceptable to the carrier for the previous quarter and she was paid SIBs.

The hearing officer did not err in determining that the claimant made a good faith search for employment. Rule 130.102(d)(1) provides that good faith may be found if a claimant has returned to work in a position relatively equal to the ability to work. Self-employment can meet this criterion. The evidence showed that the claimant's embroidery business was within the part-time restrictions set out by her doctor. The hearing officer's resolution of conflicting evidence as to her marketing and promotional efforts is supported by the evidence in the record. Because he found that her self-employment was a good faith search, she was not also required to seek employment during every week of the qualifying period.

The carrier argues that there is no provision for supplying any self-employment information through testimony. We disagree. Rule 130.101(1)(D), which sets out information that self-employed individuals should include with the TWCC-52, does not require creation of documents where none may exist. The rule suggests documentation that may (not must) be attached if in existence, "such as" business plans or sales tax registration. A person in a business that did not make taxable sales would not have a sales tax permit and therefore nothing to attach to the TWCC-52. Also, not every business plan is reduced to a formal writing, especially in the case of sole proprietorship, and the hearing officer could accept testimony that assists in determining whether self-employment efforts will meet the bona fide search for employment test. In this case, the hearing officer did not commit error in crediting testimony about the claimant's self-employment. (Because similar evidence had been accepted in previous quarters, this may explain why the claimant did not bring with her documents turned over to her accountant; attachment of such records to future TWCC-52s would be advisable as another fact finder could view the weight of the evidence differently.)

The hearing officer did not err in determining that the claimant's underemployment was the direct result of her impairment. There were no stipulations, or any other evidence, as to what the claimant's preinjury average weekly wage (AWW) was; however, the carrier has not appealed the determination that the claimant is "underemployed" as to the percentage of her AWW that her earnings comprised. The claimant testified as to her physical limitations and the fact that the self-employment allowed her to work intermittently or rest as needed. The determination that the claimant was entitled to SIBs is affirmed.

We must remand for the purpose of obtaining compliance with HB2600, which amended Section 410.164, effective June 17, 2001. Section 410.164 was amended by the addition of subsection (c), which provides as follows:

At each [CCH], as applicable, the insurance carrier shall file with the hearing officer and shall deliver to the claimant a single document stating the true corporate name of the insurance carrier and the name and address of the insurance carrier's registered agent for service of process. The document is part of the record of the [CCH].

In this case, the address provided for the registered agent was a post office box, where service of process cannot be effectuated. Therefore, we remand so that a street address may be provided by the carrier for its registered agent, in order to carry out the purpose of the legislation.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to

Section 410.202 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge