APPEAL NO. 012500
FILED NOVEMBER 15, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on September 13, 2001, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter because he did not attempt in good faith to obtain employment commensurate with his ability to work. The claimant has requested our review on evidentiary sufficiency grounds. The respondent (carrier) has filed a response urging the sufficiency of the evidence to warrant our affirmance, and objecting to a document attached to the claimant's appeal.

DECISION

Affirmed.

The claimant offers, for the first time on appeal, a document attached to his request for review, namely, the September 11, 2001, report of Dr. V concurring with the recommendation for surgery for removal or revision of the instrumentation in the S1 vertebra. We do not normally consider evidence offered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 962174, decided December 12, 1996. Where there is a claim of newly discovered evidence, we evaluate the evidence to determine if there is a sound basis to remand for further consideration and development of evidence, and in so doing we look to the Texas case law guidelines. We decline to remand for consideration of this report by the hearing officer. *See* Johnson v. Van Winkle, 660 S.W. 2d. 807 (Tex. 1983); Texas Workers' Compensation Commission Appeal No. 92459, decided October 12, 1992.

On _____, the claimant sustained a compensable low back injury and received an impairment rating of 17%. As a result of his compensable injury, the claimant has undergone two spinal operations. It appears from the record that a third procedure may be undertaken to remove or revise the S1 instrumentation. The qualifying period for the first quarter of SIBs was from February 28, 2001, through May 29, 2001. It is undisputed that the claimant considered himself to have had a total inability to work during the qualifying period in question, and that he made no job searches during that period of time.

The statutory requirements for entitlement to SIBs are provided for in Sections 408.142 and 408.143 of the 1989 Act and in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). 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.

There was conflicting evidence presented on the issue of the claimant's ability to work during the qualifying period for the first quarter. The claimant presented evidence that he had no ability to work during the time in question including a medical record the hearing officer characterized as "arguably" a narrative report satisfying Rule 130.102(d)(4). The carrier presented records that the hearing officer felt showed the claimant had some ability to work. On appeal, the claimant asserts that the carrier's evidence is not credible. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual determinations of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986), In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The claimant also requests the appointment of a designated doctor in the event the Appeals Panel finds the carrier's evidence credible. Rule 130.110 provides for resolution of return to work disputes by designated doctors, and the procedure to be followed.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
COMMODORE I
AUSTIN, TEXAS 78701.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge