

APPEAL NO. 021495
FILED JULY 24, 2002

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 May 15, 2002. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first and second quarters and that the respondent (carrier) is relieved of liability for the second quarter SIBs from January 12, 2002, through April 1, 2002, because the claimant failed to timely file his application for second quarter Application for [SIBs] (TWCC-52).

The claimant appealed, contending that the hearing officer erred in applying the wrong standard of proof to the claimant, that a report does show a total inability to work, and that lack of timely filing of the TWCC-52 was due to a change of address. The carrier responded urging affirmance.

DECISION

Affirmed.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue in this case is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) through a total inability to work as set out in Rule 130.102(d)(4). The hearing officer's finding that the claimant's unemployment was a direct result of his impairment has not been appealed and will not be addressed further.

It is undisputed that the qualifying period for the first quarter was from July 1 through September 29, 2001, with the qualifying period for the second quarter being September 30 through December 29, 2001. The carrier presented evidence that the claimant had shoulder surgery on March 3, 2000, and had been released to light duty with certain lifting restrictions on May 22, 2000, by the claimant's then treating doctor.

Rule 130.102(d)(4) provides that an injured employee has made 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 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. The hearing officer determined that the claimant "had some limited ability to work" during the qualifying periods and that determination is supported by the evidence.

The hearing officer, in her Statement of the Evidence, comments that the claimant "did not firmly establish that he had no ability to work" and that certain reports "do not firmly demonstrate or explain." The claimant on appeal argues the "firmly establish" and "firmly demonstrate or explain" language imposes a higher, more

stringent standard on the claimant than by “a preponderance of the evidence” standard. We agree that the hearing officer used an unfortunate choice of words (which sometimes happens when one does not reference the language of the statute or applicable rule) however, at the CCH, the hearing officer, in placing the burden of proof, clearly announced the preponderance of the evidence standard. We do not consider the hearing officer’s choice of words to constitute reversible error. The carrier points out in its response that the Appeals Panel’s in numerous cases has used similar “firmly” terminology. However, we note that the Appeals Panel’s use of the “firmly” language predated the implementation of Rule 130.102 before there was guidance on what constituted good faith.

The claimant appeals the hearing officer’s determination of a lack of timely filing of the second quarter TWCC-52, arguing that the carrier had not mailed the “notice” (application) to the claimant’s current address. The claimant’s argument on this point is raised for the first time on appeal. The claimant’s position at the CCH was that he had timely mailed a complete application to the carrier and that the carrier had apparently lost a portion of the file. In fact the hearing officer specifically asked the claimant if there was a problem with a change of address and whether there was some information that she needed to know about and the ombudsman replied there was not. We decline to consider information or argument, based on evidence outside of the record, presented for the first time on appeal.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ROYAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATE SERVICE COMPANY
800 BRAZOS STREET
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge