

APPEAL NO. 023030
FILED JANUARY 21, 2003

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 October 3, 2002. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first compensable quarter. The claimant appeals this decision. The respondent (carrier) asserts that the claimant's appeal was not timely filed and should not be given consideration. Alternatively, the carrier urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

The carrier asserts on appeal that the claimant's failure to serve a copy of his appeal on the carrier, as well as his omission of the certificate of service portion of the appeal, should effectively invalidate the claimant's request for review and deprive the Appeals Panel of jurisdiction. We have held that an appellant's failure to serve the respondent is not jurisdictional, but does extend the time to respond until 15 days after service is made. See *e.g.* Texas Workers' Compensation Commission Appeal No. 92383, decided October 12, 1992. Our jurisdiction was invoked by the claimant's having timely filed his request for review pursuant to Section 410.202(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 143.3(c) (Rule 143.3(c)). See Texas Workers' Compensation Commission Appeal No. 92080, decided April 14, 1992.

The carrier contends that the claimant's request for review was not timely filed with the Texas Workers' Compensation Commission (Commission). Pursuant to Section 410.202(a), for an appeal to be considered timely, it must be filed or mailed within 15 days from the date of receipt of the hearing officer's decision. Section 410.202(d), amended effective June 17, 2001, excludes Saturdays, Sundays, and holidays listed in the Texas Government Code from the computation of time in which to file an appeal. Rule 143.3(c) provides that an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(c) must be complied with in order for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 94065, decided March 1, 1994.

Commission records indicate that the hearing officer's Decision and Order was mailed to claimant on November 1, 2002. The claimant indicates in his appeal that he received the decision on November 5, 2002. Under Section 410.202, fifteen days from the claimant's date of receipt of the decision was November 27, 2002. The claimant's appeal is postmarked November 20, 2002, was received by the Commission on December 2, 2002, and could have been received as late as December 6, 2002.

Therefore, the appeal was timely.

The claimant has attached various documents to his appeal, the majority of which are contained in the hearing record. However, several documents, including a report from Dr. B, dated February 11, 2002, a report from Dr. D, dated August 29, 2000, a letter from (Technical college), and a letter from the Texas Rehabilitation Commission dated July 2, 2002, are offered for the first time on appeal. In deciding whether the hearing officer's decision is sufficiently supported by the evidence we generally only consider evidence that was submitted into the record at the hearing. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the aforementioned documents that the claimant attached to his request for review and will not consider them on appeal.

Section 408.142(a) outlines the requirements for SIBs eligibility as follows:

An employee is entitled to [SIBs] if on the expiration of the impairment income benefits [IIBs] period computed under Section 408.121(a)(1) the employee:

- (1) has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
- (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
- (3) has not elected to commute a portion of the [IIBs] under Section 408.128; and
- (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(4) states that the "good faith" criterion will be met 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[.]

A finding of no ability to work is a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995. The hearing officer determined that the claimant failed to provide a narrative report specifically explaining how, during the qualifying period, the compensable injury caused a total inability to work. Additionally, the hearing officer found that during the first quarter qualifying period, the claimant had some ability to work, did not conduct or document job search efforts, and was not enrolled in and satisfactorily participating in a full-time vocational rehabilitation program as provided for in Rule 130.102(d)(2) and Rule 130.102(d)(3). The hearing officer concluded that the claimant did not satisfy the good faith requirement for SIBs entitlement and nothing in our review of the record indicates that this decision is 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).

The hearing officer's decision and order is affirmed.

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

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.**

Chris Cowan
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Terri Kay Oliver
Appeals Judge