

APPEAL NO. 040849
FILED JUNE 8, 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 March 15, 2004. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the eighth quarter.

The claimant appeals the decision, asserting entitlement to SIBs based on a return to work in a position relatively equal to his ability to work and that the hearing officer erred in failing to make findings regarding his satisfactory participation with the Texas Rehabilitation Commission (TRC). The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The eligibility criterion at issue in this case is the good faith criterion of Section 408.142(a)(4) and Rule 130.102(b)(2). The claimant contends that he is entitled to SIBs based on a return to work in a position relatively equal to his ability to work (Rule 130.102(d)(1)) and satisfactory participation in a full-time vocational program sponsored by the TRC (Rule 130.102(d)(2)).

During the applicable qualifying period the claimant was self employed in an internet business selling napkins and together with a long time friend opening and operating a store in a tourist area. Both businesses failed. In Texas Workers' Compensation Commission Appeal No. 970628, decided May 27, 1997, the Appeals Panel held that it is not absolutely mandatory that a claimant who chooses to become self employed seek employment from third persons in order to qualify for SIBs.

Rule 130.102(d)(1) provides that a good faith effort to obtain employment commensurate with the ability to work has been made if the employee "has returned to work in a position which is relatively equal to the injured employee's ability to work" and the Appeals Panel has held that that may include self employment. Rule 130.101(1)(D) sets out information that self-employed individuals should include with their Application for [SIBs] (TWCC-52). There was a good deal of testimony at the CCH regarding the claimant's efforts at self employment and the hearing officer's Discussion comments that the establishment of the internet business and store may have been "commensurate with his *physical* capabilities" but that other evidence convinced the hearing officer that the claimant's efforts toward self employment were not "commensurate with his ability" (which we read was not in good faith). The Appeals Panel has held that a carrier is not expected to subsidize a business venture and it

cannot be used as a subterfuge for a good faith effort to obtain employment. Texas Workers' Compensation Commission Appeal No. 980548, decided May 1, 1998. Whether a good faith effort is shown is basically a question of fact for the hearing officer, and cases tend to become very fact specific in self-employment situations. Texas Workers' Compensation Commission Appeal No. 982820, decided January 11, 1999. The hearing officer apparently found the claimant's explanation of his business dealings and other business ventures to show a lack of good faith in proceeding in this business venture. We hold the hearing officer's determination on this point supported by the evidence.

The claimant also asserts that the hearing officer failed to make a determination whether the claimant satisfied the requirements of Rule 130.102(d)(2) during the qualifying period. Rule 130.102(d)(2) 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 enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period. Although the claimant clearly raised this method of satisfying the good faith criteria in opening and closing statements, testimony and documentary evidence, and submitted evidence in support of this theory, the hearing officer failed to make any findings regarding Rule 130.102(d)(2). However, our review of the evidence concludes that the claimant's own testimony and uncontroverted evidence was that the requirements of Rule 130.102(d)(2) had not been met. In evidence was an Individualized Plan for Employment (IPE) for a period which included the qualifying period, whereby TRC was to pay for tuition and books for certain classes that the claimant was to take. The undisputed evidence was that the claimant, for whatever reason, failed to enroll in the classes and therefore failed to satisfactorily participate in a full-time vocational rehabilitation program sponsored by the TRC. The claimant's responsibilities included training, submission of grades to the TRC counselor, and applying for financial aid. Merely advising the TRC counselor of how he planned to proceed outside of the IPE does not as a matter of law meet the requirements of the IPE. In evidence are the TRC case notes that indicate that on August 6 and November 17, 2003, the claimant told the TRC that he will not need TRC assistance at that time. Although the hearing officer erred in failing to address the claimant's contentions on this theory, we conclude that that failure does not constitute reversible error as there is no evidence that supports compliance with Rule 130.102(d)(2).

As an appellate-reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings 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. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

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

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Veronica L. Ruberto
Appeals Judge