

APPEAL NO. 041115  
FILED JULY 5, 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 April 21, 2004. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 11th quarter. The appellant (carrier) appealed, asserting that the hearing officer committed reversible procedural error, and otherwise arguing that the decision is not supported by the evidence. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

At issue in this case is the claimant's entitlement to SIBs for the 11th quarter. Section 408.142 provides that an employee is entitled to SIBs if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment; and (2) has in good faith sought employment commensurate with his or her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.102(d)(1)), relied on by the claimant in this case for SIBs entitlement, provides that the good faith requirement may be satisfied if the claimant "has returned to work in a position which is relatively equal to the injured employee's ability to work." The claimant testified that during the relevant qualifying period, he was employed as a subcontractor; that the number of hours he worked per week varied; and that he was paid in cash by the job, not by the hour. Attached to the claimant's Application for [SIBs] (TWCC-52) are numerous "statements" prepared by the claimant, which purport to reflect the number of hours he worked and amount of pay he received per week during the qualifying period. Each statement was signed by the contractor for whom the claimant worked, and was notarized. Based upon the claimant's testimony and evidence, the hearing officer determined that during the relevant qualifying period the claimant had returned to work at a position which was commensurate with his ability to work, and that he earned less than 80% of his AWW as a direct result of his impairment.

On appeal, the carrier asserts that the hearing officer committed reversible error by denying its request to take a deposition by written questions of the contractor for whom the claimant stated he was working and also denying its subpoena to have the contractor testify at the CCH. We agree. The claimant was basing his entitlement to SIBs on the fact that he had returned to work in a position relatively equal to his ability to work. In support of his position in this regard, the claimant was relying on wage and hour statements which he prepared for the contractor's signature. On April 5, 2004, the carrier submitted a request to depose the contractor by written questions in accordance with Rule 142.13. In its request, the carrier stated its reasoning as to why the deposition was necessary. By April 9, 2004, the hearing officer had not yet acted on the

carrier's request to take the contractor's deposition by written questions, so it filed a request for a hearing subpoena to compel the contractor to appear at the April 21, 2004, CCH in accordance with Rule 142.12. On April 13, 2004, the hearing officer denied both requests on the grounds that it appeared that no good cause had been shown.

The movant has the burden of establishing good cause, and a hearing officer's ruling will be overturned only for an abuse of discretion; that is, when the hearing officer acts without reference to any guiding rules or principles. Morrow v. HEB, Inc., 714 S.W.2d 297 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 931034, decided December 27, 1993. We find that the hearing officer, who offered no explanation why he found that there was no good cause, abused his discretion in denying the carrier's discovery requests. The carrier was entitled to proceed with the case after appropriate discovery so that it could adequately defend in this case. The claimant was basing his SIBs entitlement on the theory that he had returned to work as a "subcontractor," and that position was relatively equal to his ability to work. In such a case, it was reasonable for the carrier to seek information regarding the claimant's employment from the "employer." The carrier was prevented from adequately investigating this case and its lack of information was not due to a lack of diligence, but instead was due to the hearing officer's denial of its discovery requests with no meaningful explanation as to why they were denied. Because we have determined that the hearing officer abused his discretion in denying the carrier's discovery requests, we must also reverse the hearing officer's determination regarding the claimant's entitlement to 11th quarter SIBs and remand the case for further proceedings.

We remand the case back to the hearing officer for further proceedings. The carrier shall be allowed the opportunity to fully develop its case and present evidence at the new hearing. 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.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Colonial Casualty Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MR. MARVIN KELLY  
9120 BURNET ROAD  
AUSTIN, TEXAS 78758.**

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Daniel R. Barry  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge