APPEAL NO. 041485
FILED JULY 26, 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 commenced on February 5, 2004, and concluded on May 18, 2004. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 10th, 11th, and 12th quarters.

The claimant appeals, essentially contending that evidence in the record supports his position and attaching two medical reports generated after the CCH closed as well as resubmitting other medical reports from the Claimant's Exhibits C-11 and C-18. Also attached to the claimant's appeal was an undated neuro-psychological evaluation. The respondent (carrier) responds, objecting to new evidence attached to the claimant's appeal and otherwise urging affirmance.

DECISION

Affirmed.

Regarding the attachments to the claimant's appeal, documents submitted for the first time on appeal are generally not considered unless they constitute admissible, newly discovered evidence. The two medical reports generated after the CCH were from doctors whose other reports and records were in evidence at the CCH. The claimant does not explain why he was unable to obtain these reports at an earlier time. We conclude that these attachments to the claimant's appeal do not meet the requirements of newly discovered evidence necessary to warrant a remand. Having reviewed the documents, we conclude that their admission on remand would not have resulted in a different decision. 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 have considered the documents which were included in the exhibits admitted at the CCH.

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). At issue in this case is the good faith effort to obtain employment commensurate with the ability to work requirement of Section 408.142(a)(4) and Rule 130.102(b)(2). The claimant proceeds on a total inability to work in any capacity theory.

The claimant sustained a compensable right ankle and right shoulder injury in a fall from a scaffold on _____. The claimant asserts that his total inability to work is due to cognitive problems. Whether the claimant has the cognitive problems as he alleges and whether those cognitive problems, if any, were related to the compensable injury is in dispute. The hearing officer noted that a brain MRI and EEG

were normal or unremarkable and that IQ testing shortly after the injury and in December 2003 was substantially the same.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the 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. The hearing officer determined that the claimant had some ability to work and commented that the "treating psychologists and doctors upon whose opinions Claimant relied were necessarily basing their opinions largely on what Claimant told them, and as noted above Claimant was not entirely credible." Although not mentioned in the hearing officer's decision, in evidence was a surveillance video which, while taken after the qualifying periods, would certainly support the hearing officer's determination that the claimant had some ability to work. It is further undisputed that the claimant had been gainfully employed by another employer during the 8th and 9th quarter qualifying periods. The claimant stopped working for that employer due to another injury (carpal tunnel syndrome) not at issue in this case.

The hearing officer commented that the claimant had failed to prove the elements required by Rule 130.102(d)(4) or that his cognitive problems were part of the compensable injury. The hearing officer's determinations are supported by the evidence. We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

HOWARD ORLA DUGGER
2505 NORTH PLANO ROAD, SUITE 2000
RICHARDSON, TEXAS 75082.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Margaret L. Turner
Appeals Judge