

APPEAL NO. 042145
FILED OCTOBER 14, 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 July 19, 2004. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the sixth quarter and that had the claimant been entitled to SIBs for the sixth quarter, the respondent (carrier) would have been relieved of liability for the period from March 26 to March 31, 2004, because the claimant did not file his Application for [SIBs] (TWCC-52) until April 1, 2004.

The claimant appeals both determinations and includes as attachment "A" information regarding the untimely filing of this TWCC-52 as well as a letter from the Texas Rehabilitation Commission (TRC). Other matters filed with the claimant's appeal appear to be from exhibits admitted at the CCH. The carrier responds, urging affirmance.

DECISION

Affirmed.

Addressing the material submitted by the claimant for the first time on appeal, the Appeals Panel does not generally consider such documents unless they constitute newly discovered evidence. *See generally* 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). The claimant did not show that the material he submits for the first time on appeal could not have been obtained prior to the CCH or that it would probably have resulted in a different decision. The material submitted for the first time on appeal will not be considered.

On the merits, 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 claimant appeals the hearing officer's determination on both the good faith and direct result requirements (see Section 408.142(a)(2) and (4) and Rule 130.102(b)). The claimant, a packaging designer, had returned to work for another employer working one hour a day, five days a week for a monthly retainer of \$200.00 a month doing packaging design. Rule 130.102(d)(1) 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 returned to work in a position relatively equal to the injured employee's ability to work. The claimant contends that he is able to work only one hour a day based on his treating doctor's assessment. Two other doctor's who examined the claimant stated that he could return to work at sedentary work with restrictions greater than one hour a day. A surveillance video, and even the claimant's testimony, would indicate that the claimant had an ability to work more than one hour a day. In any event, whether the claimant was working in a position relatively equal to his ability to

work was a factual determination for the hearing officer to resolve. The hearing officer's determination is supported by the evidence.

The claimant also alleges error in that he was given a wrong address to which to send his TWCC-52's. The circumstances of who gave the claimant the information and the circumstances surrounding why the claimant sent his TWCC-52 for the sixth quarter to a different, and apparently incorrect, address were not fully developed. In any event, those circumstances involved factual determinations for the hearing officer to resolve, which he did. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and the Appeals Panel will not disturb the challenged factual findings unless they are 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 do not find that to be the case here.

The claimant alleges error because the hearing officer allegedly "ignored the TRC report." No TRC report was submitted to the hearing officer and in any event the evidence clearly establishes that while the claimant may have contacted the TRC, the claimant was not enrolled in or satisfactorily participating in a full-time vocational rehabilitation program sponsored by the TRC. See Rule 130.102(d)(2).

Lastly, the claimant asserts entitlement to SIBs based on good faith job searches during the qualifying period. The claimant's TWCC-52 does document 13 job contacts, 1 each week of the qualifying period, however, only 2 job contacts were local while the others were anywhere from Minnesota to California to Virginia. The claimant testified that he contacted these potential employers and asked them if they had openings for a consultant for one hour a day, five days a week. The hearing officer found that the claimant's job search was not a good forth effort to find employment but was done only to qualify for SIBs. See Rule 130.102(e) for factors of a good faith job search.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not incorrect as a matter of law and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *Supra*.

We affirm the hearing officer's decision and order.

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

**MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Gary L. Kilgore
Appeals Judge