

APPEAL NO. 042362
FILED NOVEMBER 1, 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 August 19, 2004. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 9th and 10th quarters.

The claimant appealed, principally on sufficiency of the evidence grounds citing instances where she believed the hearing officer had erred and attaching additional information to her appeal. The respondent (carrier) responds, asserting evidence submitted for the first time on appeal should not be considered and otherwise urges 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. One letter, although dated after the CCH, was regarding a functional capacity evaluation which was admitted at the CCH and another was a letter from the claimant's part-time employer which apparently had not been submitted or offered at the CCH. We conclude that the attachments submitted for the first time on 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 contends that she has met the good faith criteria for the 9th quarter by both a good faith job search and by self-employment. Regarding the good faith job search Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3) and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. That subsection then lists information to be considered in determining whether a good faith effort has been made. The claimant in this case made on-line job searches with three independent school districts for a position as a school nurse. (The claimant had been an RN supervisor and the hearing officer commented that she is currently unable to

return to hospital or home health nursing but would probably be able to work as a school nurse.) The hearing officer further commented that although the claimant did seek employment as a school nurse each week of the 9th quarter, that job search “consisted merely of periodic reference to . . . web sites” which was only “minimally time consuming” and had proven unsuccessful in the past. Whether those efforts were in good faith was a factual determination for the hearing officer to resolve. The hearing officer’s determination is supported by the evidence.

The claimant also had a web-based process tracking business. The claimant, in her appeal, complains that the hearing officer erred in stating that two years had passed since the inception of the business but that is exactly what the claimant testified when she said it was “fairly close to two years since I got my first client.” While self-employment can constitute a good faith effort to obtain employment the hearing officer considered the fact that the claimant had been in business for two years, only had three clients, and had failed to show “anything more than a marginal profit” in determining that self-employment did not constitute a good faith effort to obtain employment.

At the beginning of the 10th quarter qualifying period the claimant obtained part-time employment (20 hours a week) as a computer program assistant, testing software. 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. Contrary to the instructions on the Application for [SIBs] (TWCC-52) the claimant did not submit paycheck stubs or documentation of this employment (which was apparently on a letter which was not contained in the exhibits admitted at the CCH). The hearing officer comments even if the employment information is accurate the employment was only part-time and the claimant’s activities are not restricted to part-time employment. The hearing officer determined that during the qualifying period for the 10th quarter the claimant had returned to only part-time work and therefore, had not returned to work in a position relatively equal to her ability to work. The claimant therefore did not meet the requirements of Rule 130.102(d)(1). See Texas Workers’ Compensation Commission Appeal No. 022432, decided October 31, 2002.

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 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 **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY for United Pacific Insurance Company, an impaired company** 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:

Robert W. Potts
Appeals Judge

Edward Vilano
Appeals Judge