

APPEAL NO. 120441
FILED MAY 9, 2012

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 January 26, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the sole issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter, October 19, 2011, through January 17, 2012.

The claimant appeals the adverse determination, contending that the hearing officer erred in determining that the claimant was required to make five minimum weekly work search efforts and failed to make a finding whether a "good cause" exception existed when the weekly work search requirements were not met. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded as reformed.

The parties stipulated that: the claimant sustained a compensable injury on [date of injury], which resulted in an 18% impairment rating (IR); the claimant has not commuted any portion of his impairment income benefits; the qualifying period for the first quarter was from July 7 through October 5, 2011; and during the qualifying period the claimant worked and earned less than 80% of his average weekly wage.¹

We also note that in the stipulations there is a typographical error in that the dates of the first quarter of SIBs are from "[October 19, 2011], through [January 17, 2012]," rather than "[October 19, 2011], - [January 12, 2012]." We reform that date to reflect the correct date as stipulated to by the parties.

The carrier, in its response asserts that the claimant's appeal was not timely filed but our calculations show it was timely filed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) states that the Texas Department of Insurance, Division of Workers' Compensation (Division) commissioner by rule shall adopt compliance

¹ We note in the decision, the hearing officer failed to include that the parties stipulated that [Employer], the employer, had workers' compensation insurance with Service Lloyd's Insurance Company. Further, the hearing officer incorrectly noted in his decision that there was no witness for the claimant. The record reflects that the claimant testified at the CCH.

standards for SIBs recipients. 28 TEX. ADMIN. CODE §§ 130.100-130.109 (Rules 130.100-130.109) effective July 1, 2009, govern the eligibility of SIBs.

The claimant's theory of entitlement to SIBs for the first quarter is an active work search effort documented by job applications. Rule 130.102(d)(1) provides in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

* * * *

- (D) has performed active work search efforts documented by job applications.

Rule 130.102(f) provides:

- (f) Work Search Efforts. As provided in subsections (d)(1)(C) and (D) of this section regarding active participation in work search efforts and active work search efforts, an injured employee shall provide documentation sufficient to establish that he or she has, each week during the qualifying period, made the minimum number of job applications and or work search contacts consistent with the work search contacts established by [the Texas Workforce Commission (TWC)] which are required for unemployment compensation in the injured employee's county of residence pursuant to the TWC Local Workforce Development Board requirements. If the required number of work search contacts changes during a qualifying period, the lesser number of work search contacts shall be the required minimum number of contacts for that period. . . .

The parties also stipulated that the claimant's county of residence was [County 1]. The hearing officer failed to note this stipulation in the decision and order.

The hearing officer in the Background Information commented that the "work search requirement for [County 1] is five (5) minimum weekly work search efforts." The claimant, in his appeal, asserts that the TWC's list of required number of work search activities by county updated as of July 1, 2011, for [County 1] was three. The claimant attached, as an exhibit for the first time on appeal, the "Current List of Required Number of Work Search Activities by County[,] Last Updated [July 1, 2011]," which shows the required number of work search activities for [County 1] to be three.

During closing argument, the hearing officer had asked the parties if they could stipulate on the number of job searches required in this case. The claimant noted that the Application for [SIBs] (DWC-52) stated that the minimum work search efforts for [County 1] was listed as five but he was unable to verify that number and therefore could not stipulate to it. The hearing officer noted that since the parties had failed to stipulate to the minimum number of job searches required by [County 1], he would take notice of the state requirement by TWC on the number of job search requirements for [County 1]. The hearing officer did not make a finding of fact on this point nor indicate how he arrived at the number of five for the minimum job searches required for [County 1].

As a general rule, the Appeals Panel has refused to consider new evidence presented for the first time on appeal. See *generally*, Appeals Panel Decision (APD) 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See APD 051405, decided August 9, 2005.

In this case, the hearing officer commented in the Background Information that the work search requirement for [County 1] (during the qualifying period) was five. The claimant, in his appeal, presented evidence that the minimum work search activities during the qualifying period beginning July 1, 2011, was three. We note that the DWC-52 in evidence listed the number of minimum weekly work search efforts for [County 1] as five. We also note that Rule 130.102(f) provides that if the required number of work search contacts changes during a qualifying period, the lesser number of work search contacts shall be the required minimum number of contacts for that period.

The claimant's DWC-52 indicated that he made at least five job searches each week during the qualifying period except for week two (July 14 through July 20, 2011), when he only made four job searches. The hearing officer, in the Background Information, commented that the claimant "made a meticulous record of work search efforts" and based his denial of SIBs entitlement on the fact that the claimant only documented four work searches for week two of the qualifying period. Therefore, whether the required number of job searches for [County 1] was three or five is highly material and if it is three would probably result in a different decision. The chart submitted by the claimant on appeal, is certainly not cumulative of other evidence in the record.

Rule 130.103(b)(5) provides that if the Division determines that the injured employee is entitled to SIBs for the first quarter, the notice of determination shall include: “(5) an Application for [SIBs], filing instructions, a filing schedule, and a description of the consequences of failing to timely file.” In this case, the Division made a “Determination of Entitlement to [SIBs] Quarter # 1.” The form lists the beginning and ending dates of the first quarter but does not indicate the number of job searches required by [County 1]. As previously noted, the DWC-52 application indicates the county of residence as [County 1] and the number of minimum weekly work search efforts for the claimant’s county of residence as five. There are several Appeals Panel Decisions which hold that if the carrier (for quarters after the first quarter) provides inaccurate information on the dates of the qualifying period the carrier is precluded from benefitting from having done so. APD 010815-s, decided June 6, 2001, cites APD 010617-s, decided May 15, 2001, stating:

It is axiomatic that accuracy on the part of the carrier in providing information is required. Where, as here, the carrier provides inaccurate dates, we hold that the carrier is precluded from benefitting from having done so. A carrier will not be permitted to attempt to defeat a claimant’s good faith showing by arguing that the claimant did not document a job search in each week of the qualifying period when the claimant can demonstrate that he or she documented a weekly job search using the dates of the qualifying period the carrier provided on the [DWC-52].

Similarly in APD 92199, decided June 26, 1992, the Appeals Panel determined that it would not impose the five-day, deemed date of receipt provision because the Division failed to mail a copy of the hearing officer’s decision and order to the claimant at the last known address. APD 92199, reasoned that the Division should not impose the requirements of a rule against a party unless the Division has complied with its own duties relative to that rule.

By analogy, the claimant may have been provided incorrect information regarding the number of minimum weekly work search efforts required during the qualifying period for [County 1]. The hearing officer in his decision does not indicate what information he relied on in stating the “work search requirement for [County 1] is five (5) minimum weekly work search efforts” and if that was the requirement during the qualifying period. We note the provision in Rule 130.102(f) that if the required number of work search contacts changes during a qualifying period, the lesser number of work search contacts shall be the required minimum number of contacts for that period.

If the correct number of minimum weekly work search efforts for [County 1] during the qualifying period for the first quarter was in fact three, sending a DWC-52 application to the claimant stating the number of minimum weekly work search efforts for [County 1] was five would require the claimant to make more search efforts than required by Rule 130.102(f) and TWC.

Under the circumstances of this case, we hold that the chart submitted in the claimant's appeal constitutes evidence which may indicate the hearing officer erred in considering that the minimum weekly work search effort for [County 1] was five. The hearing officer's decision and order are reversed and the case is remanded for the hearing officer to take evidence (or obtain a stipulation) on the minimum number of work search efforts required for [County 1] during the first quarter qualifying period. The hearing officer is then to make a determination whether the claimant is entitled to SIBs for the first quarter.

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 Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **SERVICE LLOYD'S INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH KELLY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY NORTH
AUSTIN, TEXAS 78755.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge

