

APPEAL NO. 000194

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Texas Workers' Compensation Commission Appeal No. 992246, decided November 22, 1999, reviewed a hearing that was conducted on September 9, 1999. It remanded for findings of fact that addressed the new, 1999 supplemental income benefit (SIBS) rules (specifically Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.102(d)(4) and 130.102(e)) in regard to whether SIBS were due for the 15th compensable quarter, whose qualifying period began on February 27, 1999. Appeal No. 992246 did not state that additional evidence should be considered or that another hearing should be held, but merely sought findings of fact based on the evidence which addressed the applicable rule. The hearing officer convened a hearing on January 5, 2000, but states that no evidence or argument was offered. The hearing officer then provided a decision on remand which was signed on January 10, 2000. Findings of fact made included that the respondent (claimant) did not search for work each week of the qualifying period but did document his search, and did attempt in good faith to find work. Appellant (carrier) appeals, stating that claimant did not comply with the applicable rule. Claimant responded that the evidence supports the determination.

DECISION

Reversed; a new decision is rendered that claimant is not entitled to SIBS for the 15th compensable quarter.

Claimant's documentation shows at least one week, and probably three, during the qualifying period in which he did not document that he searched for work. (The documentary evidence listing job inquiries appears to have no entry in the period from March 12 to March 25; from April 9 to April 19; and from May 19 to May 27, 1999--the hearing officer made no findings as to what periods claimant did not document his job search.) In addition, claimant's testimony not only does not address specific weeks in March, April and May, it provided only general observations about the type of jobs he sought and how he went about looking for work during the periods relative to three quarters, the 13th, 14th, and 15th, with no job searches said to have been accomplished that are not on his Application for Supplemental Income Benefits (TWCC-52). (See Rule 130.102(e)(1) to (10) as applicable.) There is no indication that documentation, other than attachments to his TWCC-52, exists indicating at least one job search was performed in each week. The hearing officer commented in his Statement of Evidence as follows:

During the qualifying period for the 15th compensable quarter the claimant did not search for employment and did not document that he searched for employment during each calender [sic] week of the qualifying period, although he made 30 job inquiries throughout the qualifying period.

The above observation is sufficiently supported by the evidence. The hearing officer's Statement of Evidence also includes an extensive argument that the new, 1999 rules are not mandatory.

The hearing officer's findings of fact were worded somewhat differently, but may be interpreted to be consistent with the above comment. He found that during the qualifying period for the 15th quarter claimant did not search for work during each calendar week but that during the qualifying period for the 15th quarter, claimant did document his search. Another finding of fact then said that claimant searched for work in good faith, citing his limited ability and his 30 job inquiries.

Texas Workers' Compensation Commission Appeal No. 000098, decided March 3, 2000, provided some response to an argument that the new, 1999 rules are not mandatory. It said in part:

Claimant, on appeal, states that Rule 130.102(d) only provides "one of the means" to show good faith but is not the "sole means of proving satisfaction of the good faith effort requirements" "The pertinent part of the rule does begin by saying, "employee has made a good faith effort . . . if the employee:" (four methods of satisfying good faith are then provided; they include returning to work, training relative to the Texas Rehabilitation Commission, documentation of the good faith effort, and inability to work). The latter, inability to work, Rule 130.102(d)(3) is made up of three things: inability to perform any work, evidence of a narrative report "specifically explain[ing]" how it is the injury causes an inability to work, and no other records "show[ing]" a return to work is possible. (Emphasis added.) With the detail provided by the new, 1999 rules, with four methods set forth to meet the requirements for good faith, and with no provision indicating that these methods provide examples but that good faith is not limited to these four methods, we are not prepared at this time to say that Rule 130.102(d) merely provides examples of how good faith may be met; we agree that the rule does not use words such as, "employee must meet the following criteria, as relevant, in order to qualify for SIBS."

The Appeals Panel has addressed Rule 130.102(e) as requiring a claimant to look for work every week of the qualifying period in Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999; Texas Workers' Compensation Commission Appeal No. 992346, decided December 1, 1999; Texas Workers' Compensation Commission Appeal No. 992460, decided December 22, 1999; Texas Workers' Compensation Commission Appeal No. 992602, decided January 6, 2000; Texas Workers' Compensation Commission Appeal No. 992872, decided February 7, 2000; Texas Workers' Compensation Commission Appeal No. 992930, decided February 11, 2000; Texas Workers' Compensation Commission Appeal No. 000085, decided February 28, 2000; and Texas Workers' Compensation Commission Appeal No. 000124, decided March 1, 2000. Many of these appeals spoke of Rule 130.102 as setting forth "requirements," or

said that claimant had an "affirmative responsibility" or, in rendering a new decision, stated that claimant failed to seek employment every week "as required" by the rule. Some also addressed the requirement to document the weekly efforts.

Under the facts of this case, with a finding of fact that claimant did not look for work during each week of the qualifying period, the decision and order are reversed. A new decision and order are rendered which state that claimant did not attempt in good faith to obtain work commensurate with his ability and carrier is not liable for SIBS for the 15th quarter.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge