APPEAL NO. 000677

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 March 2, 2000. With regard to the only issue before him, the hearing officer determined that the respondent (claimant) was enrolled in and satisfactorily participated in a full-time vocational rehabilitation program with the Texas Rehabilitation Commission (TRC) and was entitled to supplemental income benefits (SIBs) for the third quarter. The appellant (carrier) appealed, contending that claimant=s enrollment was not "full time," that claimant was required to seek additional employment and that SIBs "were not intended to be a degree program." Carrier requests that we reverse the hearing officer=s decision and render a decision in its favor. The claimant responded, urging affirmance. The hearing officer=s finding that claimant=s unemployment was a direct result of his impairment has not been appealed and will not be discussed further.

DECISION

Affirmed.

The background facts are not in dispute. Claimant had been employed in a heavy work category and the parties stipulated that claimant had sustained a compensable low back injury on _____. Claimant had spinal surgery (apparently twice) at the L5-S1 level for a recurrent herniated disc. It is undisputed that claimant can no longer do his preinjury job but that claimant is able to do limited work. The parties also stipulated that claimant had a 15% impairment rating (IR), that impairment income benefits (IIBs) were not commuted and that the qualifying period was from August 4 through November 2, 1999. The issue here is whether claimant met the good faith effort requirements of Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102 (Rule 130.102).

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee=s average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

The standard of what constitutes a good faith effort to obtain employment in SIBs cases was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). Rule 130.102(d)(2) (the version then in effect) 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:

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period[.]

In evidence is the hearing officer=s Decision and Order for the second quarter which resulted in Texas Workers= Compensation Commission Appeal No. 992708, decided January 21, 2000. In that case, as in the present case, claimant relied on Rule 130.102(d)(2) to meet the good faith effort requirement. In Appeal No. 992708, the claimant lost, primarily because he had been enrolled and participated in only the first of two summer sessions at (the college), and did not seek employment for the term in which he was not in his retraining program at the college. The fall semester at the college began on August 30, 1999, with the qualifying period beginning on August 4, 1999. Claimant testified that during the period between August 4th and August 29th, he reviewed his summer course materials, registered for the fall term, took a physical and purchased his books. The hearing officer does not discuss or make specific findings for this period although it was discussed. We will infer that the hearing officer considered this period as being part of the school year just as the Thanksgiving or Christmas holidays would have been.

Claimant testified that he was pursuing a radiologic technician program at the college and that he attended classes 12 hours a week plus some laboratory work. Apparently, the laboratory work on Wednesday mornings was required and graded with an instructor present. Another laboratory period on Fridays was apparently optional, with hours mutually set by claimant and his lab partner. Claimant testified that he spent 14 to 16 hours a week in classes and laboratories and that he received seven credit hours for three courses he was taking. Claimant testified that he received two A=s and one B. In evidence is a statement from the college coordinator, stating that claimant was a freshman in the program and that enrollment was as follows:

RADT 1114 - meets from 10:00-11:00A.M. on Mondays

RADT 1310 - meets from 11:00A.M. - 12:00 noon on Mondays and 10:00 A.M. - 12:00 noon on Wednesdays

RADT 1312 - meets from 8:00-11:00A.M. on Tuesday and Thursdays and 1:30 - 3:30 P.M. on Thursdays

He is in class for a total of twelve hours per week. He also must do additional lab time on his own.

In addition, claimant testified that he studied two to three hours a day after class and substantially more on evenings before a test. Carrier=s principal objection is that claimant was not enrolled in the college full time as he was only taking seven credit hours during the fall semester and had failed to make a good faith effort to find part-time work while attending the

college. The heart of the dispute is whether claimant=s enrollment and participation met the definition of a full-time vocational rehabilitation program. (There is no dispute that the program was authorized and funded by TRC.) In evidence is what appears to be the front page of the Individualized Written Rehabilitation Program (IWRP) signed by claimant and TRC. Claimant testified that TRC required that he maintain a 75 score or higher and a C grade in order to stay in the TRC program.

We view this as a case of first impression applying the "new" SIBs rules regarding the "full time" aspect of Rule 130.102(d)(2). Claimant=s ombudsman cited and the hearing officer quoted Rule 130.101(8) which defines "full time vocational rehabilitation program." We will first note that Rule 130.101(8) was effective November 28, 1999, as was noted by the hearing officer, and therefore, technically is not applicable in that the applicable qualifying quarter ended on November 2, 1999. However, it does provide guidance regarding what direction the Texas Workers= Compensation Commission (Commission) is going. The preamble to the "new" SIBs rules, effective January 31, 1999, states that issues regarding what constitutes a full-time program would be reviewed on a "case-by-case basis." *See* Texas Workers= Compensation Commission Appeal No. 000001, decided February 16, 2000, and 24 Tex. Reg. 399 at 401. Claimant testified that were he required to work part time he would risk not meeting the C grade requirement in that his B was a low B which could have easily become a low C or D if he did not have sufficient study time. Rule 130.101(8) provides:

> (8) Full time vocational rehabilitation program[.] Any program, provided by the [TRC] or a private provider of vocational rehabilitation services that is included in the Registry of Private Providers of Vocational Rehabilitation Services, for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. A vocational rehabilitation plan includes, at a minimum, an employment goal, any intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee=s responsibilities for the successful completion of the plan.

In commenting on the proposed rule regarding what constitutes a "full time vocational program" the concept was that it "precludes an insurance carrier from requiring an injured employee to participate in a vocational rehabilitation program provided by TRC . . . and then expect the injured employee to continue to seek employment commensurate with the injured employee=s ability over and above the rehabilitation plan requirements." 24 Tex. Reg. 10339 at 10343. We are unable to determine whether the IWRP agreement in evidence between claimant and TRC meets the vocational rehabilitation requirements described in Rule 130.101(8).

The hearing officer, after quoting Rule 130.101(8) comments, in part, as follows:

> It should be noted that the current definition of "full time vocational rehabilitation program" is not given in terms of hours spent or college credits earned during a qualifying period. The Claimant=s vocational rehabilitation program complies with Rule 130.101 (8). It is also clear that the Claimant is making good progress according to the TRC. (See Claimant=s Ex. 3) Prior to the effective date of the Rule 130.101 and Rule 130.102, SIBS cases were judged, in part, according to the number of hours spent, during each week of the qualifying period, in a retraining program. After further consideration and review of Rule 130.101 (8) (effective November 28, 1999) it appears that the amount of time spent each week is not dispositive.

As the hearing officer notes, Appeals Panel decisions regarding training under TRC auspices prior to the implementation of Rules 130.102(d) and 130.101 have stressed the number of hours spent each week in class or class-related activities, as well as stating that SIBs was not a degree program. We believe that many of those cases have been superseded and overcome by the implementation of specific rules and requirements. We believe that the implementation of Rule 130.102(d)(2) and the guidance of Rule 130.101(8) was to facilitate an injured employee=s ability to complete the appropriate TRC retraining without fear of losing entitlement to SIBs or being required to continue to seek employment and is consistent with Section 408.150 of the 1989 Act which requires the Texas Workers= Compensation Commission (Commission) to refer an injured employee to TRC in certain situations. In that the Commission has chosen to define full-time vocational rehabilitation program in the terminology quoted above, we decline to apply further restrictive provisions.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer=s determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge
CONCURRING OPINION:

I concur in the result. I write separately to note that the evidence shows that for the period of August 4 through August 29, 1999, claimant had no classes; that after August 30, 1999, claimant was in class 12 hours a week; that with some additional time in the laboratory he was in classes or the lab 14 to 16 hours a week; that he was not in classes or the lab on Fridays or, apparently, on the weekends; and that he studied two to three hours a day after class and substantially more on evenings before a test. Excluding the unspecified additional hours of study on evenings before a test, claimant was in the class or lab for a total of 14 to 16 hours, Monday through Thursday, and studied a total of eight to 12 hours a week, Monday through Thursday. These activities total 22 to 28 hours per week. This contrasts with the widely common work week of 40 hours. I further note that the so-called Individualized Written Rehabilitation Program in evidence is a one-page document dated "07/16/1998" which states some "terms and conditions" but which contains no description whatsoever of claimant=s "full-time" vocational rehabilitation program. Although the new Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.101(8) (Rule 130.101(8)) was not in effect during the qualifying period, it apparently does, as the principal opinion states, provide the guidance that "any program" provided by the Texas Rehabilitation Commission that includes "a vocational rehabilitation plan" is considered a full-time vocational rehabilitation program. I cannot say that the hearing officer=s decision is erroneous as a matter of law.

Philip F. O=Neill
Appeals Judge