

## APPEAL NO. 001987

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 13, 2000. The record closed on July 28, 2000. The hearing officer determined that: (1) the respondent/cross-appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter; (2) claimant did not meet her burden of proof regarding the good faith and direct result criteria for the third quarter; and (3) appellant/cross-respondent (carrier) is liable for third quarter SIBs because it waived the right to dispute claimant's entitlement to SIBs. Carrier appealed the determination that: (1) there was good cause to add the issue of carrier waiver; and (2) carrier waived the right to dispute SIBs entitlement for the third quarter. The file does not contain a response from claimant. Claimant appealed the determination that she is not entitled to fourth quarter SIBs, on sufficiency grounds. Claimant also appealed the adverse fact findings regarding third quarter SIBs. Carrier responded that the Appeals Panel should affirm the complained-of determinations.

### DECISION

We affirm in part and reverse and render in part.

Carrier contends the hearing officer erred in adding an issue regarding whether it waived the right to dispute claimant's entitlement to SIBs for the third quarter. Claimant had asked to add this issue in her response to the benefit review conference (BRC) report and carrier objected to the adding of the issue. At the hearing, the hearing officer denied the request, stating that there was no good cause to add the issue. In his decision and order, however, he changed his ruling and added the issue. The hearing officer stated that he initially denied the request due to untimely filing of claimant's response to the BRC report, "but while writing the opinion recalculated the dates of receipt of the BRC report and the response and changed [the] ruling." The hearing officer determined that "good cause did exist to add the issue of carrier waiver," but he did not specify what evidence showed good cause.

At the hearing, claimant asserted that she had good cause for her request to add the issue in that her attorney did not add the issue, she is no longer represented by the attorney for that reason, and she had not realized until after the BRC that the issue had been raised. After reviewing the record, we conclude that the hearing officer abused his discretion in adding the issue of carrier waiver. Claimant was still required to show good cause for adding the issue. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7)). Claimant, who was unrepresented at the time she filed her response to the BRC report, did not assert that this issue had been discussed at the BRC. After reviewing the record, we conclude that no good cause was shown to add the issue. A claimant's ignorance of the law and the late-perceived "need" to add an issue does not constitute good cause for adding an issue. We reverse the hearing officer's good cause determination and render a determination that there was not good cause for adding the issue. Because the issue should not have been added, we also reverse the determination on the added issue and strike the determination that carrier waived the right to dispute claimant's entitlement to third quarter SIBs.

In her cross-appeal, claimant contends the hearing officer erred in determining that: (1) her medical problems during the third quarter qualifying period were not related to her compensable injury; and (2) she did not complete her Texas Rehabilitation Commission (TRC)-sponsored course work during the qualifying period for the third quarter.<sup>1</sup> Even though claimant, who filed a pro se brief, did not appeal every fact finding, it is clear from her brief that she is appealing the underlying good faith and direct result fact findings regarding third quarter SIBs. The hearing officer determined that claimant did not meet her burden regarding the SIBs good faith and direct result criteria. Pursuant to the hearing officer's decision, claimant was to receive third quarter SIBs only because of carrier waiver. As stated earlier, we reversed that determination and we now address third quarter SIBs entitlement on the merits.

Claimant testified that in \_\_\_\_\_ she sustained a chemical inhalation injury that caused her to suffer from occupational asthma and breathing difficulties. She said she is still experiencing breathing problems and cannot earn a living. She testified that she cannot work around chemicals or smoke and that she must work in an air conditioned or heated environment that is smoke free.

Regarding the good faith issue, the hearing officer determined that: (1) claimant did not look for work during the third quarter qualifying period; (2) claimant was attending school at the start of the quarter but stopped due to medical problems; (3) claimant did not complete the TRC-sponsored classes; (4) claimant did not make a good faith effort to obtain employment during the qualifying period; (5) claimant's restrictions include staying in a climate controlled environment with no smoking; (6) claimant's medical records indicate that on September 2, 1999, she tested positive for cannabinoids, presumably inhaled; (7) claimant's medical records indicate a normal "O2 saturation level" on her tests; and (8) claimant's inability to obtain employment is not a direct result of her impairment.

Claimant said she attended TRC-sponsored school full time during the third quarter qualifying period, which ran from early November 1999 through early February 2000. The third quarter began on February 18, 2000. The hearing officer found that claimant did not meet the good faith SIBs requirement. However, because the record shows that claimant was enrolled full time in TRC-sponsored classes, we conclude that the hearing officer's good faith determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we reverse it. Rule 130.102(d)(2); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant also appealed the hearing officer's direct result determination. After reviewing the evidence and the hearing officer's other fact findings, we conclude that this determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The direct result determination is a fact issue for the hearing officer. He considered the facts and determined that claimant's unemployment

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<sup>1</sup>Claimant also appealed fact findings in her favor, which we will not address.

during the third quarter qualifying period was not a direct result of her impairment. We further conclude that claimant is not entitled to SIBs for the third quarter.

Claimant contends the hearing officer erred in determining that she is not entitled to SIBs for the fourth quarter. The fourth quarter qualifying period was from February 5, 2000, to May 5, 2000. Claimant asserts that she provided all the information required by carrier and that she had quit school and was actually working within her restrictions during the fourth quarter qualifying period. Claimant's classes taken during the fourth quarter qualifying period were not sponsored by the TRC. The record reflects that claimant indicated on her Application for [SIBs] (TWCC-52) for the fourth quarter that she was not working. The TWCC-52 is dated in April 2000, after claimant returned to work, and claimant said it was mailed to carrier on April 19, 2000. Claimant said she filled out the TWCC-52 before she began working in March 2000, and that is why it indicates that she was not working. The hearing officer determined that claimant did not document a good faith effort to obtain employment. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) and (e) (Rule 130.102(d)(5) and (e)) concern good faith effort and evaluation thereof and state 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 provided sufficient documentation of any job search efforts. The hearing officer determined that claimant did not meet the good faith SIBs requirements. After reviewing the evidence, we conclude that the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain, supra*. We conclude that the hearing officer did not err in determining that claimant is not entitled to SIBs for the fourth quarter.

We affirm that part of the hearing officer's decision and order that determines that claimant is not entitled to fourth quarter SIBs. We reverse the determination that there was good cause for adding the issue of carrier waiver and render a decision that no good cause existed. We reverse the hearing officer's determination that carrier waived the right to dispute third quarter SIBs and, because this issue was not properly before the hearing officer, we strike that determination. We reverse the good faith determination regarding the third quarter and render a decision that claimant made a good faith effort to obtain employment during the third quarter qualifying period. We reverse the implied determination that carrier is liable for third quarter SIBs and render a decision that carrier

is not liable for third quarter SIBs based on the direct result criterion.

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Judy L. Stephens  
Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

CONCUR IN RESULT:

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Thomas A. Knapp  
Appeals Judge