

## APPEAL NO. 002378

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 September 19, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter from June 22, 2000, through September 20, 2000. The appellant (carrier) appealed on the grounds of sufficiency of the evidence, contending that the hearing officer erred in finding that the claimant was enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Program [sic] and that he made a good faith effort to obtain employment commensurate with his ability to work. The claimant filed a response contending that the evidence was sufficient to support the determination of the hearing officer and that it should be affirmed. The finding that the claimant had not returned to work as a direct result of his impairment was not appealed and has become final by operation of law. Section 410.169.

### DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury to the cervical and thoracic regions of his spine which later resulted in a 25% impairment rating (IR); that the claimant did not commute any portion of his impairment income benefits (IIBs); and that the qualifying period for the first quarter of SIBs was from March 10, 2000, through June 8, 2000. We infer from these stipulations that the claimant reached maximum medical improvement.

The claimant testified that he did not look for work during the first quarter qualifying period because his doctor had not released him back to work, but acknowledged that other doctors had released him back to work at light to medium duty. The claimant asserted that since January 1998, he had been pursuing a degree in computer network administration/information systems at \_\_\_\_\_ College which was sponsored and paid for by the Texas Rehabilitation Commission (TRC). The claimant explained that he had originally registered for twelve hours during the spring semester which began in January 2000, but dropped out of his three-hour algebra class before it ended in late April or early May because he was failing the course. He admitted that he also failed to complete a computer course, consisting of both classroom work and lab work, for which he received an incomplete grade; which to date, he had not completed because he had not completed two projects or taken the final test.

The claimant contended that his counselor from the TRC, Ms. G, approved dropping the math course before he did so, but admitted that the record from the TRC did not reflect this conversation. The claimant stated that he took the algebra course over again during the summer session, which began in late May or early June, and successfully completed the course despite receiving no funding from the TRC for the summer session. No documentary proof of the completed course and grade received were offered. The

claimant explained that his summer algebra class was not funded by the TRC because it had already paid for the class during the spring semester, and that since he had not passed the algebra course the TRC would not pay for it again, that he had to pay for the course himself.

The claimant testified that after he dropped out of his algebra class, school counselors required him to enroll in a remedial program to keep him “task compliant.” He stated that he enrolled in the program, went to the remedial class in lieu of his algebra class, did what the “State” told him to do and completed the course. The claimant testified that he participated in the remedial class in addition to his other courses.

According to the \_\_\_\_\_ College catalog, remediation is required for students wishing to drop or withdraw from a developmental course number beginning with a zero and clearance to do so must be obtained from the Texas Academic Skills Program (TASP) Advising Office. Failure to actively participate in the program terminates the “TASP liable” student’s right to participate in college-level classes. The term “TASP liable” was not defined by the parties. The catalog also reflects that a student who is enrolled for twelve or more semester hours is considered to be full time. For a less-than-semester length session (summer, flex session), a student who is enrolled for six semester hours is considered to be full time.

A letter from the college dated September 6, 2000, reflects that the claimant was required to attend a Basic Skills Enrichment Program class three hours a week to replace the three hours that he would have spent in the algebra class. The remedial class was a noncredit, noncourse-based remediation.

The claimant’s transcript for the spring semester reflects that the claimant enrolled in four classes and received the following grades:

<u>Class</u>	<u>Grade</u>
CIS _____ Prog Logic & Design	F
CIS _____ Intro Operating Systems	I
Engl _____ Fresh Comp II	C
Math _____ Inter Algebra	W

The claimant was given 3.00 hours credit by the college for successfully completing the English class. No credits were given for the other three classes.

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 the 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 was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)). Rule 130.102(d)(2) 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 been enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period.

Rule 130.101(8) defines "full time vocational rehabilitation program" as follows:

Any program, provided by the TRC . . . 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.

On appeal the carrier contended that there is no evidence from the TRC that the claimant satisfactorily participated in a full-time vocational program sponsored by the TRC; that the letter dated June 8, 2000, from the TRC merely states that the claimant "applied for TRC services on October 30, 1997 and is currently an active client." The carrier argues that the claimant enrolled in a full-time vocational rehabilitation program sponsored by the TRC when he signed up for twelve hours but did not satisfactorily participate in the program because he withdrew from one class, failed to complete a second class and failed a third class. The carrier also argues that the claimant attended only a three-hour course for the summer session when six hours are required to be considered a full-time student during the summer session.

In support of its position the carrier cited Texas Workers' Compensation Commission Appeal No. 000061, decided February 24, 2000. In this decision the Appeals Panel affirmed the hearing officer who denied SIBs to an injured employee because, after registering for twelve college hours, the employee withdrew from one class, failed another class and made a "B" and "D" in the two remaining classes. The carrier argued that Appeal No. 000061 should be given precedential effect. However, that case was decided prior to the implementation of Rule 130.101(8) defining "full time vocational rehabilitation program."

Prior to the effective date of Rule 130.101(8) and Rule 130.102(d)(2), SIBs cases were judged, in part, according to the number of hours spent during each week of the qualifying period in a retraining program. In Texas Workers' Compensation Commission Appeal No. 000677, decided May 17, 2000, the Appeals Panel held that, after further consideration and review of Rule 130.101(8), the amount of time spent each week in class or in a retraining program was not dispositive of the issue and that prior cases using this analysis to determine whether an employee was enrolled in, and satisfactorily completed a full-time vocational rehabilitation program, were superceded and overcome by these rules.

The carrier, in the alternative, contends that the basic skills class the claimant attended in order to remain eligible to attend college-level courses was not a substitute for the course enrollment required to be considered as a full-time student. The carrier asserted that the remedial class was no more than a tutoring aid to enrich a student's basic skills to facilitate class participation and was not intended to qualify as a full-time vocational rehabilitation program sponsored by the TRC. We disagree with that proposition if sufficiently supported with proof from the TRC to the contrary.

The preamble to the "new" SIBs rules, which became effective on January 31, 1999, states that issues regarding what constitutes a full-time program or satisfactory participation should 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. The preamble for the amendment of Rule 130.101, effective November 28, 1999, adding subparagraph (8) to define "full time vocational rehabilitation program," states that the employee has the burden of proving participation in a full-time vocational rehabilitation program, and that he or she should provide evidence of such to remain entitled to SIBs. Rule 130.104(c) requires the employee to file with the carrier applicable documentation along with the Application for [SIBs] (TWCC-52). The preamble authors noted that the TRC, with assistance from the Texas Workers' Compensation Commission, had developed and implemented a form for the purpose of documenting participation in a vocational rehabilitation program which has several blocks that may be checked to indicate the level of involvement, and that other mechanisms may be available to the injured employee to relay the information, such as copies of class grades indicating a passing grade or progress reports from the vocational rehabilitation programs or work hardening programs.

In the present case, the claimant offered no evidence, documentary or otherwise, from the TRC which reflected: (1) that the claimant had set up a plan as part of his vocational rehabilitation program which, at a minimum, included an employment goal, intermediate goals, a description of the services to be provided or arranged by the TRC, the start and end dates of the described services, and the claimant's responsibilities for the successful completion of the plan; and (2) whether the claimant had successfully participated in or completed the program. The letter from the TRC dated June 8, 2000, simply reciting that the claimant was an active client was not sufficient.

The hearing officer noted that Rule 130.101(8) does not restrict participation to a set number of hours; however, he failed to consider the claimant's activities in relation to a vocational rehabilitation program which required a vocational rehabilitation plan. He simply focused on whether the claimant's classroom attendance constituted "participation" without reference to a plan created specifically by the TRC for the purpose of assisting the claimant to return to work. To establish the "good faith" criteria of Rule 130.102(d)(2) a claimant must prove through documentation from the TRC that he or she (1) has been enrolled in, and (2) satisfactorily participated in, (3) a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period as defined by Rule 130.101(8) which includes (emphasis added) a vocational rehabilitation plan.

The claimant, as a matter of law, failed to meet this burden. Therefore, the hearing officer erred in finding that the claimant was enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Program [sic] and that the claimant made a good faith effort to obtain employment commensurate with his ability to work.

We reverse the decision and order of the hearing officer and render a decision that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work and consequently is not entitled to SIBs for the first quarter from June 22, 2000, through September 20, 2000.

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Kathleen C. Decker  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge