

APPEAL NO. 021367
FILED JUNE 25, 2002

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 May 3, 2002. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the ninth quarter. The claimant appealed and the respondent (carrier) responded.

DECISION

The hearing officer's decision is reversed and a new decision is rendered that the claimant is entitled to SIBs for the ninth quarter.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The only SIBs criterion in dispute is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the ninth quarter, which was from September 20, 2001, to December 19, 2001.

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 Texas Rehabilitation Commission (TRC) during the qualifying period. Rule 130.102(d)(5) 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 provided sufficient documentation as described in subsection (e) of Rule 130.102 to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. That subsection then lists information to be considered in determining whether a good faith effort has been made.

The claimant sustained a repetitive trauma injury in his job as a medical transcriptionist. The parties stipulated that the claimant's compensable injury includes bilateral carpal tunnel syndrome, "de Quervains," and reflex sympathetic dystrophy. The claimant's treating doctor reported during the qualifying period that the claimant has significant restrictions involving his hands. The claimant testified that he has been working with the TRC for over a year and that the TRC gave him a computer with voice-activated software and a printer that he is able to use, and also gave him a table and a chair. The claimant said that he was prepared to do the same type of work he had done in the past, only he would not have to use his hands. He said that the TRC sent him to the (MRS) to help him find a job. He said that during the qualifying period, the MRS

assisted him in his employment search by giving him a list of potential employers each week. He said he also looked for jobs in the newspaper and asked friends and relatives about jobs. He said that the MRS knew about his medical condition and that he told the MRS that he would do any type of work. The claimant listed 130 employer contacts on his typed Application for SIBs (TWCC-52) for the ninth quarter (he indicated that someone else did the typing based on his handwritten TWCC-52, which was also in evidence). The employment contacts cover each week of the qualifying period. The jobs applied for include telemarketer, billing clerk, clerical, office assistant, receptionist, medical transcriber, bookkeeper, sales associate, laboratory aid, cashier, court clerk, greeter, and account representative. An October 15, 2001, report from a psychologist noted that the TRC had provided the claimant with a voice-activated computer and training. A letter from a counselor at TRC dated March 6, 2002, states:

This letter is to notify concerned parties that [claimant] is currently unemployed and being sponsored in a full-time job search program by the [TRC]. He has completed voice-activated equipment training and has been actively seeking employment in his chosen area of expertise. TRC and his job placement vendor will continue to assist him, until he is suitably and gainfully employed.

In a letter dated November 19, 2001, from the (MMH) (given the context of the letter and the claimant's testimony, we believe that MRS is probably part of MMH or vice versa), a worker development specialist wrote:

[Claimant] has been a compliant participant in the job placement assistance program throughout the period September 20, 2001 – December 19, 2001.

We have an established weekly appointment at which time he is provided job leads, applications, and other support in his job search effort. All records of job contacts are provided to [claimant] and maintained by him for permanent file. I am not aware of any employment interviews that he may have had during the period noted above.

The hearing officer wrote in her decision that the claimant did not seek jobs that were commensurate with his ability to work and that it appeared from the evidence that the claimant was trying to qualify for SIBs and was not in good faith in trying to obtain employment. The hearing officer appears to base those determinations on two things.

First, there was testimony from the claimant that after the qualifying period ended he was offered a job with a telemarketing company but did not take that job after one day of training. The claimant explained that he believed that the job he applied for was a supervisory job that did not require the use of a computer, but that the job turned out to be doing the actual telemarketing, which required the use of a computer. He said he told the employer that he could not use their computer, but that he could use his voice-activated computer. He said that the employer would not let him do that because they

were afraid of (computer) bugs. The hearing officer wrote that the fact that the claimant had to turn down a job offer generated from his job search substantiated her finding (that the claimant did not seek jobs that were commensurate with his ability to work). We do not think that this evidence shows that the claimant was seeking jobs that were not commensurate with his ability to work. Basically, the evidence reflects a misunderstanding in the type of job applied for, and an offer by the claimant to use the equipment and training provided by TRC to accomplish the tasks of the actual job.

Second, the claimant testified that he believed he had had three interviews during the qualifying period, but he could not recall the names of the employers with whom he interviewed. The hearing officer noted the claimant's failure of recollection as a reason to determine that the claimant was not in good faith in his job search. The record reflects that on cross-examination the claimant said that he could say whom he interviewed with if he could look at his notes. However, the carrier then showed him his handwritten TWCC-52 and did not repeat the question regarding the names of the employers with whom he interviewed. Later, the hearing officer asked the claimant about his three interviews and, when the claimant said that he would have to look at his notes, the hearing officer told him to look at his notes. The claimant's attorney then said that she was going to hand "you" the carrier's exhibits, as well as certain of the claimant's exhibits, and at that point the hearing officer said, "That's okay, [claimant]. You can take a seat." It is unclear if the claimant ever got to look at his notes, because when the hearing officer then asked the claimant if he did not think it important to write down the employers with whom he had an interview, the claimant said he did, he just could not remember them. We do not think that this evidence supports a determination that the claimant was just trying to qualify for SIBs. We do note that the typed TWCC-52 does not affirmatively note that any offers were made, but does have the "pending" box marked on numerous entries. The handwritten TWCC-52 has several "pending" boxes marked.

While not mentioned by the hearing officer, we note that there are two videotapes of the claimant in evidence; one of October 3 and 4, 2001, and the other of December 19, 2001. These videotapes show the claimant walking, driving, and using his hands for activities of daily life, such as eating and opening doors. Also in evidence is a SIBs application verification report for the ninth quarter compiled by a vocational case manager that was apparently hired by the carrier to verify the claimant's job contacts. This report states that of 165 listed employers, 29 confirmed that the claimant did not apply, and that zero employers confirmed an application. However, many of the entries simply state that incomplete information was provided on the TWCC-52, that the employer could not confirm or deny the application status, or that no response was received from the employer.

Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. In the instant case, the hearing officer's decision that the claimant is not entitled to SIBs for the ninth quarter is based on her finding that during the qualifying period the claimant did not make a good faith effort to seek employment. Given the documentation of the job search that was made during the qualifying period together with the claimant's cooperation with the TRC and the MRS, as evidenced by letters from those entities, we conclude that the hearing officer's determination that the claimant did not make a good faith effort to seek employment during the qualifying period is so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, we reverse the hearing officer's decision and we render a decision that the claimant is entitled to SIBs for the ninth quarter.

The true corporate name of the insurance carrier is **HARTFORD CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Michael B. McShane
Appeals Judge