

APPEAL NO. 030553
FILED APRIL 24, 2003

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 January 29, 2003. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the eighth and ninth quarters because she had not made a good faith effort to find employment commensurate with her ability to work and that the claimant's unemployment was not a direct result of her compensable impairment during the relevant qualifying periods.

The claimant appealed, contending that she was not able to work; that she was enrolled in full-time study during the period in dispute; and that her unemployment was "a result of being injured and impaired." The appeal file does not have a response from the respondent (carrier).

DECISION

Affirmed.

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 parties stipulated that the claimant satisfied all the SIBs requirements except for the good faith requirement of Section 408.142(a)(4) and Rule 130.102(b)(2) and the direct result requirement of Section 408.142(a)(2) and Rule 130.102(b)(1) and (c). The parties stipulated that the qualifying periods at issue were from March 25 through September 21, 2002.

The claimant asserts that she has met the good faith requirement by enrollment in a full-time study program sponsored by the Texas Rehabilitation Commission (TRC). Rule 130.102(d)(2) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employer'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. The hearing officer commented that the claimant testified that she was going to school at a junior college during the eighth quarter qualifying period (March 25 through June 23, 2002), approved by the TRC, but that claimant "acknowledged she dropped out of school in April 2002." The junior college transcript, dated February 28, 2002, shows "enrolled" in three courses for Spring 2002 but that no credits had been earned since Fall 2001. The claimant's testimony seemed to suggest that upon review of her transcript the junior college had determined that she had enough credits to graduate without the Spring 2002 courses and awarded the claimant a certificate of completion dated May 11, 2002. We are unable to say that the hearing officer erred in finding the claimant was not enrolled in a full-time study program during the eighth quarter qualifying period.

The claimant contends that she was enrolled at (University) with classes beginning August 24, 2002 (during the ninth quarter qualifying period). In evidence is a letter dated September 27, 2002, from the TRC which states that “[claimant] is an active [sic] client of [TRC]. Plan of services was written on 08/19/99. She is enrolled at [University] & attends full time.” However, the claimant testified on more than one occasion that “doors were closed because I failed the reading portion of the TASP [Texas Academic Skills Program] test.” The claimant submitted evidence of library study in an effort to pass the TASP test. In evidence is an acceptance letter dated July 25, 2002, from the University “temporarily” accepting the claimant for the Fall 2002 semester. However, that letter also states that students who do not have TASP scores on file will not be allowed to attend orientation or register and in bold lettering states that the claimant’s “TASP status is failed.” The hearing officer commented:

Claimant enrolled at [University] in the fall of 2002, but had to drop out because of illness of her mother. It is clear Claimant was not in school full-time and did not complete a full-time course of study during the Qualifying Periods for these disputed quarters.

The claimant, in her appeal responded to the hearing officer’s comment saying:

I did not drop from school in fall of 2002 because of my mother’s illness. She had already passed away. I dropped my classes because I was ill and had to have surgery.

It is unclear to us whether the claimant had passed her TASP test, whether she had ever actually gotten enrolled, and whether she had dropped out after being enrolled. In any event, the evidence was in conflict and we are unable to say that the hearing officer’s determination regarding the claimant’s enrollment, or nonenrollment, is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Although there was some evidence that the claimant enrolled in a “Citizen Police Academy” (Academy) course during the ninth quarter qualifying period, the evidence is clear that this was a voluntary course made available to the public at large at no charge and was not a vocational rehabilitation program under the auspices of the TRC which would meet the requirements of Rule 130.102(d)(2).

With regard to the direct result criteria, Rule 130.102(c) provides that an “injured employee has earned less than 80% of the employee’s average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings.” The hearing officer commented on the employer’s offer of a light-duty job “but the Claimant chose not to explore this opportunity because of circumstances in her personal life,” and determined that the claimant’s unemployment was not a direct result of her compensable impairment. While there were a number of personal factors, such as the claimant’s own health unrelated to the compensable injury, the claimant’s mother’s illness/death, and other factors, the primary reason the claimant refused the light-duty job was because it

was in the city where the claimant had lived in July 2000 before she moved to the city where she now lives and that she did not want to move for a temporary job. The Appeals Panel has held that the "direct result" criteria may be established by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the preinjury employment. Texas Workers' Compensation Commission Appeal 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771 decided June 29, 1995. We have also held that to meet the direct result requirement, one only need prove that the unemployment was a direct result of the compensable injury. See Texas Workers' Compensation Commission Appeal No. 001786, decided September 13, 2000. However, even were we to reverse the hearing officer's determination on this element, we are affirming the hearing officer's decision on the basis of the claimant's failure to meet the good faith effort to obtain employment criterion, and that, therefore, the claimant is not entitled to SIBs for the eighth and ninth quarters.

Accordingly the hearing officer's decision and order are affirmed.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS STREET
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

The majority opinion hints that they would reverse the direct result determination if it mattered to the final decision of the case, but I would specifically find the hearing officer's direct result determination to be so against the great weight and preponderance

of the evidence to be clearly wrong and manifestly unjust. The Appeals Panel has repeatedly held that to meet the direct result requirement, one only need prove that the unemployment or underemployment was a direct result of the compensable injury. See Texas Workers' Compensation Commission Appeal No. 001786, decided September 13, 2000. Undoubtedly, the claimant's inability to accept the offer of a temporary light-duty job was in part because she had already moved, but she still had restrictions placed on her ability to work as well. In Texas Workers' Compensation Commission Appeal No. 022848, decided December 12, 2002, the Appeals Panel reversed the hearing officer's direct result determination and stated, "[k]ey is that the hearing officer did not make a determination that claimant's prior work involved less than medium duty and there is no evidence in that regard." Similarly, in this case, there was no determination that the claimant's prior work involved less than medium duty or that she was capable of performing her prior work. Given the state of the evidence, including a report of the claimant's restrictions to not lift more than 10 pounds for more than two hours a day, I would be hard pressed to say that claimant did not meet her burden to prove that her unemployment was a direct result of her impairment. I would reverse the hearing officer's determination that claimant's unemployment was not a direct result of her impairment and render a new decision that the claimant's unemployment was a direct result of her impairment.

Also at issue in this case is whether the claimant met the good faith job search requirements of Section 408.142(a)(4) by meeting the requirements of Rule 130.102(d)(2), which 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. The hearing officer determined that the claimant "was not enrolled in a full-time study program during the Qualifying Periods for the disputed 8th and 9th quarters." The claimant testified and offered evidence that during the eighth quarter qualifying period, she was enrolled in college, and that, although she dropped out of her classes during the eighth quarter after she spoke with her school counselor, it was determined she had enough credits to complete the course in criminal justice. She was given a certificate of completion during the eighth quarter on May 11, 2002.

The claimant further testified that during the ninth quarter qualifying period, she was attending college at the University and that she also was enrolled at the Academy beginning September 11, 2002. The claimant admits that she attended no classes from August 9 to August 24, 2002, because it was summer break and no classes were offered. As pointed out by the majority, a letter from the TRC, dated September 27, 2002, indicates that the claimant is an active client of the TRC and that she "is enrolled at [University] & attends full time."

Although the claimant did not attend classes every week of the qualifying period, as stated in Texas Workers' Compensation Commission Appeal No. 030471, decided April 4, 2003, (citing Texas Workers' Compensation Commission Appeal No. 001536, decided August 9, 2000), "attendance in a TRC-sponsored program as described in the

rule is not required in every week of the qualifying period, but only 'during' that period." In this case, contrary to the hearing officer's determination, the claimant was enrolled in a full-time vocational rehabilitation program during each qualifying quarter. Our previously established precedent indicates that the claimant need only be enrolled "during" the quarter. In addition, the Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 021247-s, decided July 8, 2002, stated:

As noted in Texas Workers' Compensation Commission Appeal No. 000001, decided February 16, 2000, the preamble to [Rule 130.101(8)] states that any program provided by the TRC should be considered a full-time program. And Texas Workers' Compensation Commission Appeal No. 000677, decided May 17, 2000, stated that this rule superceded previous Appeals Panel decisions that stressed the number of hours spent in class each week. In Texas Workers' Compensation Commission Appeal No. 001563, decided August 14, 2000, we made clear that enrollment in a "full-time" vocational rehabilitation program under the auspices of the TRC did not have to encompass the entire period, nor be a 40-hour work week, to be considered participation "during" the qualifying period, for purposes of Rule 130.102(d)(2).

The majority opinion's analysis, with respect to whether the claimant was enrolled in a full-time vocational rehabilitation program, seems more relevant to whether the claimant satisfactorily participated in the program. The majority cannot get around the fact that the claimant was enrolled in a full-time study program "during" the qualifying quarters as evidenced by the claimant's testimony, the college transcripts, a certificate of completion, the TRC letter, the student's schedule, and the fact that one cannot drop out of that in which they were never enrolled. Even the carrier never argued that the claimant was not enrolled in full-time vocational training during the quarters, but rather that the claimant had "either completed [the training during the quarter] or dropped out of the vocational training program."

I believe the hearing officer's determination that the claimant was not enrolled in a full-time study program is so against the great weight and preponderance of the evidence that I would reverse that portion of the hearing officer's decision. However, because the hearing officer made no finding with respect to whether the claimant satisfactorily participated in the program I would remand the case back to him to determine whether the claimant satisfactorily participated in a TRC-sponsored program.

In summary, I would reverse and render a new decision that the claimant's unemployment was a direct result of her impairment and reverse and remand for the hearing officer to determine whether the claimant satisfactorily participated in the vocational rehabilitation programs sponsored by the TRC.

Roy L. Warren
Appeals Judge