

APPEAL NO. 031749
FILED AUGUST 20, 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 June 9, 2003. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter. The appellant (carrier) appeals, contending that the great weight of the evidence is contrary to the hearing officer's decision. The claimant responds, requesting affirmance.

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). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted any impairment income benefits, is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work. At issue in this case are the good faith and direct result criteria for SIBs.

Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW 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. 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.

The carrier appeals the hearing officer's findings of fact that during the qualifying period for the third quarter of SIBs, the claimant was enrolled in and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC, and that during the qualifying period for the third quarter of SIBs, the claimant's underemployment was a direct result of her impairment from the compensable injury. The carrier also appeals the hearing officer's conclusion of law that the claimant is entitled to SIBs for the third quarter.

The claimant sustained a repetitive trauma injury to her bilateral upper extremities while working as a customer service counselor for the employer and she had bilateral wrist and elbow surgeries as a result of her injury. The designated doctor

certified that the claimant has a 17% IR. According to the parties, the qualifying period for the third quarter was from September 25 through December 24, 2002. A carrier required medical examination (RME) doctor reported in November 2002 that the claimant is capable of working without restrictions. The claimant's treating doctor reviewed the report of the carrier's RME doctor and reported in November 2002 that he disagrees with the RME doctor's opinion, and that the claimant has restrictions based on carpal tunnel and cubital tunnel surgeries and ongoing weakness in the hands and wrists and intermittent tendonitis. The treating doctor noted that the claimant was attending school full time and doing everything she could do to retrain herself to go back to work.

On August 6, 2002, the employer made the claimant an offer of light-duty work for four hours per day, stating that the offer was within the restrictions given by the treating doctor. A carrier's vocational care manager wrote that he had met with the treating doctor in November 2002 and that the treating doctor had told him that the claimant was physically capable of returning to work within the restrictions given by the treating doctor while also participating in school, that the treating doctor had maintained a limitation of four hours work daily, and that the treating doctor had stated that the claimant should be able to perform the essential duties of her job with the employer. A person who performed a time and motion study for the employer in September 2002 concluded that the tasks of a service counselor do not meet the standard definitions of activities that would place the worker at risk for work-related musculoskeletal disorders.

The claimant did not offer into evidence the original TRC Vocational Rehabilitation Services Individualized Plan for Employment (IPE). However, in evidence is an IPE amendment dated December 23, 2002, which reflects that the amended employment goal is to be a registered nurse and that the amended review criteria are: "Training – 2.0 GPA and 12 credit hours each semester" and "Training – Reports of satisfactory progress."

The claimant testified that pursuant to the light-duty offer she returned to work for the employer working four hours a day on August 19, 2002; that the fall semester at the college started on August 26, 2002; that on or about September 29, 2002, she stopped working for the employer because the employer told her that it was going to put her back on "disability" based on her injury; that her stopping work was solely the decision of the employer; that from August 26 through September 29, 2002, she attended college and worked her part-time work schedule; that she enrolled in four courses for the fall semester; that she made a C in one course, an F in another course, and withdrew from two courses, although she said she continued to attend the courses she had withdrawn from; that due to her work schedule, she was unable to attend the entire class period for the course in which she made an F; that she had attended college for the spring 2002 semester and for two summer sessions in 2002; and that she is a single parent caring for a nine-year old son.

In evidence is the claimant's final grade report for the fall semester of 2002 dated December 17, 2002, and while it is somewhat illegible, it appears to reflect the

claimant's testimony regarding her grades for that semester (a C and an F), and the fact that she withdrew from two courses. The grade report notes that for the 2002 fall semester, the claimant passed four semester hours and had a GPA of 1.14. It also notes in the cumulative section that the claimant had passed 14 semester hours and had a cumulative GPA of 2.23. An "advising report" from the college dated November 5, 2002, notes that the claimant's academic standing at that time was "Good." It appears from the November 5, 2002, advising report that the claimant was still enrolled in all four of her courses as of November 5, 2002.

The carrier contends that the claimant did not meet the direct result criteria for SIBs entitlement because the carrier's RME doctor reported that the claimant could work without restrictions and because the time and motion study concluded that the claimant's job duties are not repetitive. The carrier also contends that the claimant did not meet the good faith criteria for SIBs entitlement under Rule 130.102(d)(2) because the evidence established that the claimant was not satisfactorily participating in the TRC program because she withdrew from two classes and did not maintain the required GPA in her remaining classes.

There is conflicting evidence on the direct result criteria for SIBs. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). According to the treating doctor, the claimant does have work restrictions due to her compensable injury and there is some evidence that the restrictions limit the number of hours the claimant may work. We conclude that there is sufficient evidence that the claimant's impairment from the compensable injury was a cause of her reduced earnings during the relevant qualifying period, and thus we affirm the hearing officer's finding that during the relevant qualifying period the claimant's underemployment was a direct result of her impairment from the compensable injury. Rule 130.102(c).

It is not disputed that during the relevant qualifying period the claimant was enrolled in a TRC vocational rehabilitation program and that she attended college during the qualifying period under that program. The carrier contends that the claimant did not satisfactorily participate in the TRC program. With regard to the good faith criteria for SIBs entitlement, in Texas Workers' Compensation Commission Appeal No. 020713, decided April 17, 2002, the Appeals Panel noted that the good faith requirement per Rule 130.102(d)(2) is met if at any time during the qualifying period for the quarter in dispute, the claimant is enrolled in and satisfactorily participating in a TRC-sponsored program. See *also* Texas Workers' Compensation Commission Appeal No. 020192, decided February 28, 2002. In light of the particular facts of this case where the claimant enrolled in four college courses for the fall semester and the college noted during the relevant qualifying period that the claimant was in good academic standing, we conclude that the hearing officer's determination in favor of the claimant on the good faith criteria for SIBs entitlement under Rule 130.102(d)(2) is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

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

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Chris Cowan
Appeals Judge