APPEAL NO. 032949
FILED DECEMBER 15, 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 October 28, 2003. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter. The claimant appeals, asserting that the hearing officer's determination is contrary to the great weight of the evidence, as well as the applicable law. The respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

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 relevant qualifying period was from April 13 through July 12, 2003. The claimant asserts entitlement based on the good faith effort provisions of Rule 130.102(d)(2).

It is undisputed that during the qualifying period the claimant was enrolled in a full-time vocational program sponsored by the Texas Rehabilitation Commission (TRC). At issue was the satisfactory participation provision in Rule 130.102(d)(2). In evidence was an Individualized Plan for Employment (IPE) dated March 6, 2001, along with two amendments dated February 14 and April 18, 2003. Also in evidence was a letter from the claimant's TRC counselor dated September 3, 2003, which not only stated that the claimant was in fact satisfactorily participating in the TRC program and "complying with the stipulations set forth in his [IPE]," but also states that the claimant has made "considerable improvement" with regards to his reading comprehension. The claimant's TRC counselor concluded her letter by stating that once the claimant passes his GED exam, she would be working with the claimant to obtain employment suitable to his academic and intellectual abilities.

In determining that the claimant is not entitled to SIBs for the fifth quarter, the hearing officer implicitly found that the claimant was not satisfactorily participating in the TRC program. The hearing officer made the following findings of fact:

5. Claimant attended classes under an IPE with TRC, up to 12 hours per week, in pre-GED training.

6. Claimant has not made satisfactory progress toward his GED.

7. Claimant does not have a specific employment goal upon completion of his IPE.

8. During the qualifying period, [c]laimant was not in compliance with all the responsibilities placed upon him by the IPE.

9. Claimant's attendance at pre-GED classes did not, under all circumstances present, constitute a good faith effort to find employment commensurate with his ability to work.

Review of the hearing officer's statement of the evidence indicates that he does not believe that the claimant's IPE, which was developed by the TRC, contains a realistic plan to help return the claimant to the workforce, nor does it establish a clear employment goal. The hearing officer stated, "[c]laimant's history in the educational process, showing a lot of classroom attendance and very little achievement, indicates that getting a GED may not be a realistic goal, and further, that work requiring a GED may be work that is beyond [c]laimant's reach." The hearing officer further stated that the claimant was not in compliance with his IPE because he failed to attend Alcoholics Anonymous (AA), as was required by the original March 6, 2001, IPE.

The Texas Workers' Compensation Commission (Commission) has the authority to refer injured workers to the TRC for retraining in an effort to expedite a return to the workforce. It is the TRC's obligation, and expertise, to assess the injured worker and develop an appropriate IPE for each individual injured worker. In the instant case, the hearing officer clearly believed that the claimant's IPE, as developed by the TRC, was not appropriate for him. We find no authority which supports the proposition that a hearing officer may substitute his or her own judgment for that of the TRC in determining how to best retrain and return an injured worker to the workforce. Whether or not a rehabilitation plan is reasonable and appropriate for a given injured worker is a matter which has been entrusted to the TRC by the Commission. It is for the TRC, not the hearing officer, to decide whether or not a given plan is appropriate for an injured worker on a case-by-case basis. If the TRC discovers that a particular IPE is not appropriate for an injured worker, it is they, and not the hearing officer, who should amend it.

The question of whether the claimant satisfactorily participated in the full-time TRC program presents a question of fact for the hearing officer to resolve. However, reference to the preamble is instructive on how the issue of satisfactory participation is to be resolved. In response to a comment that the phrase "satisfactorily participated in" should be defined, the Commission noted that the TRC uses a variety of retraining programs, that each of the programs could have different durations and methods to evaluate satisfactory participation; and concluded that based on those differences, it would be difficult to define the phrase in a way that would apply to each situation. The response explained:

> If the injured employee wishes to show that this provision applies, the injured employee can secure information from his or her counselor with the [TRC] to supply to the carrier. If the insurance carrier believes the information provided is not sufficient to meet the requirement of this

> provision, the insurance carrier can dispute entitlement. The decision of whether or not the injured employee has satisfactorily participated in a TRC sponsored program will be made by the finder of fact during the dispute resolution process.

Based upon this language, it appears that the Commissioners envisioned that the evidence of satisfactory participation presented by the claimant would come from the TRC. In this case, the September 3, 2003, letter is such evidence. Although the response quoted above states that the hearing officer, the fact finder, is to resolve the issue of satisfactory participation, the response also appears to envision that where there is evidence from the TRC of satisfactory participation, the carrier has the responsibility to come forward with evidence demonstrating that the claimant is not satisfactorily participating in the program. That is, there should be some affirmative showing that the claimant is not meeting the requirements of the vocational rehabilitation program established for him by the TRC, where, as here, the evidence from the TRC indicates satisfactory participation. *See* Texas Workers' Compensation Commission Appeal No. 010483-s decided April 20, 2001.

There is no evidence that shows that the TRC was unaware of the fact that the claimant was not attending AA, nor that that requirement was, or still is, an integral part of the claimant's IPE. In fact, the AA requirement was placed in the initial 2001 IPE, which indicated that the claimant would be reviewed at least annually on his progress in this regard. As over two years have elapsed since the claimant signed the initial IPE, it must be assumed that the TRC is aware that the claimant is not attending AA, or at a minimum does not believe such attendance is important enough to follow-up on. In the absence of such evidence, the hearing officer's determination that the claimant did not satisfactorily participate in a vocational rehabilitation program during the qualifying period for the fifth quarter is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse the hearing officer's determination that the claimant did not satisfy the good faith requirement under Rule 130.102(d)(2) and render a new decision that the claimant did prove that he had made the required good faith effort in the qualifying period for the fifth quarter by satisfactorily participating in a full-time vocational rehabilitation program sponsored by the TRC and that the claimant is entitled to SIBs for the fifth quarter.

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Edward Vilano
Appeals Judge