

APPEAL NO. 033227  
FILED JANUARY 30, 2004

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 10, 2003. The hearing officer determined that: (1) the respondent (self-insured) did not waive its right to contest entitlement to 10th quarter supplemental income benefits (SIBs); (2) the appellant (claimant) is not entitled to SIBs for the 10th quarter; and (3) the claimant is not entitled to SIBs for the 11th quarter. The claimant appeals these determinations on sufficiency of the evidence grounds. The self-insured urges affirmance.

DECISION

Affirmed in part, and reversed and rendered in part.

**SIBs WAIVER ISSUE**

The hearing officer did not err in determining that the self-insured did not waive its right to contest entitlement to 10th quarter SIBs. Section 408.147(b) provides, in pertinent part, "if an insurance carrier fails to make a request for a benefit review conference...within 10 days after receipt of the employee's [Application for SIBs (TWCC-52)], the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period..." See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(d) (Rule 130.108(d)), regarding subsequent quarters with prior payment. The claimant concedes that the self-insured timely requested a benefit review conference in accordance with Section 408.147(b), but argues that the self-insured waived its right to contest entitlement to 10th quarter SIBs because it disputed "the amount of SIBs to be paid and not [c]laimant's entitlement thereto." We have previously held that there is no authority for the proposition that a carrier's failure to sufficiently notify the claimant of the basis for nonentitlement results in waiver. Texas Workers' Compensation Commission Appeal No. 991922, decided October 18, 1999. Additionally, we have said that a carrier is not limited to the issues raised in the Notice of Non-Entitlement contained in the Application for Supplemental Income Benefits (TWCC-52). Texas Workers' Compensation Commission Appeal No. 980106, decided March 3, 1998; Texas Workers' Compensation Commission Appeal No. 021996, decided September 16, 2002. Accordingly, the hearing officer properly concluded that the self-insured did not waive its right to contest the claimant's entitlement to 10th quarter SIBs.

**SIBs ENTITLEMENT ISSUES**

The parties stipulated that the claimant has a 23% impairment rating and did not commute impairment income benefits. The 10th quarter began on March 26, 2003, and continued through June 24, 2003, with a corresponding qualifying period from

December 12, 2002, through March 12, 2003. The 11th quarter began on June 25, 2003, and continued through September 23, 2003, with a corresponding qualifying period from March 13, 2003, through June 11, 2003. It is undisputed, on appeal, that the claimant's unemployment during the qualifying period for the 10th and 11th quarters is a direct result of the impairment from the compensable injury. At issue is whether the claimant satisfied the good faith criteria of Section 408.142(a)(4) and Rule 130.102(d)(2) by enrolling in, and satisfactorily participating in, a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC) during the qualifying periods.

The claimant testified that she contacted the TRC during the 10th quarter qualifying period and enrolled in a vocational rehabilitation program. The claimant's Individualized Plan for Employment (IPE) indicates that it was signed by the claimant and her TRC counselor on February 10, 2003. There was no dispute with regard to the authenticity of the IPE or that it was, in fact, signed on February 10, 2003. The IPE provides an employment goal of becoming a Pharmacy Technician and requires the claimant to complete a training program at Odessa College Continuing Education Department, obtain certifications/license, report progress to the TRC, and obtain and follow-up on job leads from the school, TRC, and the Texas Workforce Commission. The IPE further provides that the following services are to be furnished by the TRC from February 10, 2003, through February 9, 2004, in furtherance of the claimant's goal of becoming a pharmacy technician: Vocational counseling and Guidance; and Tuition, Fees and Books needed for Continuing Educational Training for Pharmacy Technician Certification at Odessa College Continuing Education Department. The documentary evidence shows that the claimant enrolled in a Pharmacy Technician Certification course at Odessa College, on February 10, 2003, the effective date of the IPE. The IPE shows that the claimant's tuition, fees, and books were "purchased" by the TRC and claimant corroborated this through her testimony. The claimant began classes for her pharmacy technician certification on March 27, 2003, and completed the course on May 15, 2003. Although a progress report from the TRC is not in evidence, the documentary evidence shows the claimant received a certificate of recognition from Odessa College, dated May 15, 2003, "for completing all the requirements for the following course: Pharmacy Tech Certification Review." Following completion of the course, the claimant testified that she presented her certificate to her TRC counselor and registered to take her license examination. The claimant took her license examination in July 2003.

The hearing officer considered the evidence and stated, in the "Statement of the Evidence" portion of the decision:

In support of her position, Claimant offers an unsigned [IPE] dated February 10, 2003. The IPE calls for the Claimant to receive vocational counseling and guidance from the TRC and for the TRC to purchase tuition, fees and books needed for continuing education training for Pharmacy Technician Certification at Odessa College Continuing Education Department. Claimant's responsibilities are listed in the IPE and they include requirements for Claimant to keep all appointments,

participate in training, submit grades to counselor and maintain regular contact with TRC counselor. Most of the requirements set out in the IPE are unique to the TRC and can only be verified by it.

\* \* \* \*

Claimant did not provide anything from the TRC indicating that her actions were sponsored by them much less that her one continuing education class met the TRC requirements for participating in a full-time vocational rehabilitation program. There is a complete void of information from the TRC concerning sponsorship of any program. There is [sic] no signed documents, statements or letters from the TRC. There is no showing that the TRC paid the tuition for the one course taken by Claimant.

The hearing officer determined that the claimant had not established that she was enrolled in, and satisfactorily participated in, a full-time TRC vocational rehabilitation program during the 10th and 11th quarter qualifying periods.

The hearing officer erred in determining that the claimant is not entitled to 10th and 11th quarter SIBs. Section 408.142(a)(4) and Rule 130.102(d)(2) provide that an injured employee has made a good faith effort to obtain employment commensurate with his 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. A full-time vocational rehabilitation program is defined, in pertinent part, as *any* program provided by the TRC for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. Rule 130.101(8); and see Texas Workers' Compensation Commission Appeal No. 000001, decided February 16, 2000. 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. Rule 130.101(8). Additionally, we have held that an injured worker may establish satisfactory participation in full-time vocational rehabilitation program through testimony and documentary evidence from the TRC was not absolutely required. Texas Workers' Compensation Commission Appeal No. 010952-s, decided June 20, 2001; Texas Workers' Compensation Commission Appeal No 032664 decided December 1, 2003. The evidence, in this case, shows that the claimant had an IPE, which was signed on February 10, 2003. There was no dispute with regard to the authenticity of the IPE or that it was, in fact, signed on February 10, 2003. The claimant enrolled in a pharmacy technician certification course at Odessa College consistent with the IPE. The IPE, which was signed on the date that the claimant enrolled in the required course, shows that the TRC "purchased" the claimant's tuition, fees, and books. The claimant testified and the documentary evidence shows that she successfully completed the course on May 15, 2003. The claimant further testified that she reported her progress and presented her certificate of completion to her TRC counselor. In view of the evidence, we conclude that the hearing officer's

determination 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). Accordingly, we reverse the hearing officer's determination and render a decision that the claimant is entitled to 10th and 11th quarter SIBs.

The hearing officer's decision and order is affirmed in part and reversed and rendered in part, consistent with our decision above.

The true corporate name of the insurance carrier is **(a certified self-insured)** 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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Edward Vilano  
Appeals Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge