APPEAL NO. 040954
FILED JUNE 14, 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 April 1, 2004. The hearing officer resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first, second, third, or fourth quarters. The claimant appeals these determinations. The respondent (carrier) urges affirmance of the hearing officer's decision.

DECISION

Affirmed in part, reversed and remanded in part.

Section 408.142(a) outlines the requirements for SIBs eligibility as follows:

> An employee is entitled to [SIBs] if on the expiration of the impairment income benefit [IIBs] period computed under Section 408.121(a)(1) the employee:
>
> (1) has an impairment rating [IR] of 15 percent or more as determined by this subtitle from the compensable injury;
>
> (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
>
> (3) has not elected to commute a portion of the [IIBs] under Section 408.128; and
>
> (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

The claimant appeals the hearing officer's direct result and good faith findings. However, as the hearing officer's direct result finding is favorable to the claimant, we will not address the claimant's appeal of Finding of Fact No. 4B. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) (Rule 130.102(d)(5)) provides that the good faith requirement may be satisfied if the claimant "has provided sufficient documentation as described in subsection (e)." Rule 130.102(e) states that "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." The rule then lists information to be considered in determining whether the injured employee has made a good faith effort, including, among other things, the number of jobs applied for, applications which document the job search, the amount of time spent in attempting to find employment,

and any job search plan. The hearing officer noted that the claimant made no job searches during the first quarter qualifying period; that she failed to document a job search during each week of the second quarter qualifying period; and that although she documented searches each week during the third and fourth quarter qualifying periods, those searches, as well as the searches made during the second quarter qualifying period, were not reasonably calculated to result in success. The hearing officer concluded that the claimant was not entitled to SIBs for the first through fourth quarters. Whether the claimant satisfied the good faith requirement of Rule 130.102(d)(5) was a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Nothing in our review of the record indicates that hearing officer's good faith determination, as it specifically relates to Rule 130.102(d)(5), 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 (Tex. 1986).

The claimant also asserted that during the fourth quarter qualifying period, she was enrolled in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC). The hearing officer did not address this theory of recovery in any way in the decision and order. 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 TRC during the qualifying period. Rule 130.101(8) defines the phrase "full time vocational rehabilitation program" as follows:

> 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. 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.

To determine which programs are to be considered full-time vocational rehabilitation programs, we have previously turned to the preamble and comments to Rule 130.102(d)(2). As we noted in Texas Workers' Compensation Commission Appeal No. 000001, decided February 16, 2000, the preamble to Rule 130.102(d)(2) states that any program provided by the TRC should be considered a full-time program. In the present case, the Individualized Plan for Employment (IPE) in evidence clearly establishes that the claimant was enrolled in a vocational rehabilitation program sponsored by the TRC during the fourth quarter qualifying period and, based upon the

unambiguous language in the preamble, that program was to be considered a full-time program.

The remaining question, which requires resolution by the hearing officer, is whether the claimant satisfactorily participated in the full-time program sponsored by the TRC. The carrier argued at the hearing and on appeal that the claimant was not enrolled in any training programs during the qualifying period. However, in order to have satisfactorily participated in the TRC program, the claimant need only to have complied with the IPE, which provides that during the period from November 6, 2003, through March 1, 2005, the claimant will receive "Counseling and Guidance, Job Placement Assistance." On remand, the hearing officer should determine whether the claimant satisfactorily participated in the full-time TRC program, as detailed in the IPE.

The hearing officer's decision that the claimant is not entitled to first, second, or third quarter SIBs is affirmed. The determination that the claimant is not entitled to fourth quarter SIBs is reversed and remanded for the hearing officer to determine whether the claimant satisfactorily participated in a full-time vocational rehabilitation program sponsored by the TRC and whether the claimant is entitled to fourth quarter SIBs.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

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

JEFF W. AUTREY
400 WEST 15TH STREET, SUITE 710
FIRST STATE BANK TOWER
AUSTIN, TEXAS 78701.

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Chris Cowan
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Veronica L. Ruberto
Appeals Judge