

APPEAL NO. 043447
FILED FEBRUARY 15, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 21, 2004. The hearing officer determined that the appellant/cross-respondent (claimant) was not entitled to supplemental income benefits (SIBs) for the seventh quarter, but was entitled to SIBs for the eighth quarter.

The claimant appealed, contending that he was entitled to the seventh quarter SIBs because he was satisfactorily participating in a Texas Rehabilitation Commission (TRC) sponsored program during the qualifying period. The respondent/cross-appellant (self-insured) in a request for review (timely as an appeal) and response to the claimant's appeal contends that the claimant's "inability to earn 80% of the preinjury wage was [not] a direct result of the employee's impairment from the compensable injury" and that the claimant was not entitled to SIBs for the eighth quarter. Otherwise, the self-insured urges affirmance of the hearing officer's decision on the seventh quarter SIBs. The file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

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 claimant contends that he met the requirement of Section 408.142(a)(4) and Rule 130.102(b)(2) requirement of a good faith effort to obtain employment commensurate with his ability to work by complying with Rule 130.102(d)(2). 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 (VRP) sponsored by the TRC¹ during the qualifying period. Rule 130.101(8) provides the following definition:

Full time vocational rehabilitation program - - Any program, provided by the [TRC] or a private provider of vocational rehabilitation services that is included in the Registry of Private Providers of Vocational Rehabilitation Services, 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.

¹ TRC is now part of the Department of Assistance and Rehabilitation Services.

The parties stipulated that the claimant sustained a compensable (low back lifting) injury on _____; that the claimant had a 16% impairment rating (IR); that impairment income benefits (IIBs) had not been commuted; and that the qualifying period for the seventh quarter began on May 26 through August 24, 2004. An Individualized Plan for Employment (IPE) required the claimant to “complete Pell Grant application,” maintain at least 2.0 GPA (grade point average) and 12 credit hours each semester. The claimant acknowledged that he did not attend the 2004 summer school session and did not look for work in the summer of 2004. Testimony was that the fall semester began on August 24, 2004, and that the claimant enrolled and met the fall semester IPE requirements. The hearing officer commented in the Background Information section that the claimant had enrolled in the summer session for 2003. We note that the evidence indicates that the claimant may have enrolled for 6 credit hours in the summer session of 2003, but apparently only completed three hours.

One of the claimant’s Vocational Rehabilitation Counselors (VRC) testified that the claimant was satisfactorily participating in the TRC program and that summer sessions were not addressed in the IPE. A letter, dated October 15, 2004, from a TRC VRC states:

[F]ull time programs means that during regular sessions the consumer will need to enroll in and pass no less than 12 credit hours in order to receive continued assistance from this agency. Previous VRC . . . did not designate the necessity for consumer to attend summer sessions therefore he is not obligated to do so. Per policy funding up to \$380.00 is available per summer session after the utilization of the PELL grant, but since it was not mandated for consumer to attend summer sessions funding was not discussed.

Another letter dated September 21, 2004, from the claimant’s VRC states that the claimant continues to participate in the VRP, and continues to make excellent progress in his IPE benchmarks and IPE goal. The hearing officer commented in the Background Information that the claimant failed to establish that he was enrolled in a full-time program during the seventh quarter qualifying period and found that the claimant “did not attend the summer 2004 session and did not look for work during every week of the qualifying period” and therefore “was not satisfactorily participating in a TRC sponsored program and did not make a good faith effort to seek employment commensurate with his ability to work.” The Appeals Panel has held that the best evidence of satisfactorily participation in a full-time VRP sponsored by the TRC will be that coming directly from the TRC. Texas Workers’ Compensation Commission Appeal No. 010483-s, decided April 20, 2001. We have also stated that we will not second-guess the TRC on what they consider satisfactory participation. Texas Workers’ Compensation Commission Appeal No. 040985, decided June 18, 2004. In this case the VRC testified at the CCH and letters/forms in evidence indicate that the TRC believed that the claimant was in compliance with his IPE, was satisfactorily participating in the program and that attendance in the summer session 2004 was not required by the IPE or the TRC program. The claimant’s vocational rehabilitation plan

did not require attendance at the summer session and the hearing officer's determination that the claimant was not satisfactorily participating in a TRC sponsored program runs counter to what the TRC is saying. We hold that the hearing officer's determination that the claimant was not satisfactorily participating in a TRC sponsored program and did not make a good faith effort to seek employment commensurate with his ability to work to be against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's determination that the claimant is not entitled to SIBs for the seventh quarter and render a new decision that the claimant is entitled to SIBs for the seventh quarter.

CARRIER'S APPEAL

The self-insured, in a timely appeal, contends that the claimant's unemployment was not a direct result of the compensable 1999 injury because the claimant was involved in a subsequent motor vehicle accident (MVA) on (2nd date of injury) (the 2000 injury) which generally injured the same body parts as the 1999 injury. Medical records and Work Status Report (TWCC-73) in evidence distinguish between the compensable 1999 "lifting" injury and the compensable 2000 "MVA" injury. The parties stipulated that the claimant had a 16% impairment rating (IR) due to the compensable 1999 injury. Rule 130.102(c) provides that an injured employee has earned less than 80% of the average weekly wage (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," (emphasis added). This is consistent with our prior decisions that the claimant need prove the impairment is only a cause of the underemployment or unemployment, not that it is the sole cause. Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996. To the extent that the self-insured is making the argument that the 2000 MVA was the sole cause of the claimant's unemployment (inability to earn 80% of the AWW) the self-insured had the burden of proving that contention and failed to do so in this case.

Regarding the eighth quarter of SIBs, the self-insured contends that the claimant failed to prove that he was in compliance with his IPE (i.e. that he had a 2.0 GPA for the fall semester). The self-insured contends that the VRC was unaware of the claimant's grades for the fall semester (the eighth quarter qualifying period) "even though the grades were available at the time of the hearing." The claimant testified that he had a 2.25 GPA for the semester. The hearing officer is the sole judge of the credibility to be given to the evidence and she could believe all, part, or none of the testimony of any witness, including the claimant. (Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ)). The hearing officer could, and apparently did, believe the claimant's testimony and the failure to provide documentary evidence was a matter for the hearing officer to consider. The hearing officer's determinations on the direct result criteria for both quarters and that the claimant was entitled to SIBs for the eighth quarter is supported by the evidence, and are affirmed.

Although some of the medical reports reference a total inability to work the claimant was clearly not pursuing that theory and the hearing officer correctly did not premise her decision on that theory.

The hearing officer's decision and order are affirmed with regard to entitlement to SIBs for the eighth quarter and we reverse the hearing officer's decision that the claimant is not entitled to SIBs for the seventh quarter and render a new decision that the claimant is entitled to SIBs for the seventh quarter.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

**JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.**

For service by mail the address is:

**JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge