

APPEAL NO. 060802
FILED JUNE 20, 2006

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 March 6, 2006. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter (September 9 through December 8, 2005); that the claimant is entitled to SIBs for the second quarter (December 9, 2005, through March 9, 2006); and that the appellant (self-insured) is relieved from liability for SIBs for the second quarter because of claimant's failure to timely file (without good cause) his application for SIBs, for the period from December 9, 2005 (the beginning date of the second quarter) through December 13, 2005 (the date the self-insured received the application). The self-insured appealed, disputing the determination that the claimant is entitled to SIBs for the second quarter. The appeal file does not contain a response from the claimant. The determinations that the claimant is not entitled to SIBs for the first quarter and that the self-insured is relieved from liability for SIBs for the second quarter from December 9 through December 13, 2005, have not been appealed, and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated in part that the claimant sustained a compensable injury on _____, that resulted in an impairment rating of 15% or greater; that the claimant did not commute any portion of the impairment income benefits; that the second quarter dates are December 9, 2005, through March 9, 2006; and that the second quarter qualifying period dates are August 27 through November 25, 2005. What we address here is the self-insured's appeal of the hearing officer's findings that the claimant met the good faith criteria for SIBs entitlement for the second quarter.

Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) states that the (Texas Department of Insurance, Division of Workers' Compensation (Division)) commissioner by rule shall adopt compliance standards for SIBs recipients. In that no such rules have been implemented as of this date, we refer to the eligibility criteria for SIBs entitlement in 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Commissioner's Bulletin No. B-0058-05 dated September 23, 2005, provides that until new SIBs rules are adopted, the Division's Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation. Also, Rule 130.100(a) provides that entitlement or nonentitlement to SIBs shall be determined in accordance with the rules in effect on the date a qualifying period begins.

Although there was some evidence that the claimant worked during a portion of the second quarter qualifying period, the hearing officer was not persuaded that the evidence presented was persuasive to show that the claimant “had returned to a relative position commensurate with his ability to work during the qualifying period [for the second quarter].” It is undisputed that the claimant did not perform a job search in every week of the qualifying period. The claimant did not contend that for the second quarter qualifying period that he had a total inability to work. The hearing officer based her determination of entitlement to good faith on her finding that during the qualifying period for the second quarter, “claimant was involved in a full time vocational rehabilitation program sponsored by the Department of Assistive and Rehabilitative Services [DARS].” 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) (now part of DARS) during the qualifying period.

The self-insured argues that the hearing officer did not apply the correct legal standard set forth in the rules for evaluation when cooperation with DARS rises to the level of a good faith search for employment. The hearing officer specifically found that the claimant was “involved” in a full-time vocational rehabilitation program sponsored by DARS. However, as stated above, Rule 130.102(d)(2) provides that to meet the good faith requirement, an employee must be found to have been enrolled in and satisfactorily participated in a full-time vocational rehabilitation program sponsored by DARS 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.

The self-insured additionally argues that there is no evidence in the record that during the qualifying period, the claimant was enrolled in and satisfactorily participated in a full-time program of vocational rehabilitation. The evidence reflected that the claimant applied for services from DARS on September 21, 2005, and that on November 10, 2005, an Individualized Plan for Employment (IPE) for Extended Evaluation was formulated for the claimant specifying the steps he needed to take to determine his eligibility for DARS services. There were two letters from DARS dated January 9, 2006, which stated that extended evaluation is needed and that “[the

claimant] is satisfactorily participating in services to assist in determining eligibility” and that “[the claimant] is cooperating with services to assist in determining eligibility.” The claimant testified that he was found to be eligible for DARS services in late January or early February 2006. The evidence reflected that after the claimant was determined to be eligible to receive services, an IPE dated February 6, 2006, was formulated which listed an employment goal for the claimant and specified the services that DARS would provide, purchase, and/or arrange to help the claimant achieve his goal as well as specifying claimant’s responsibilities.

In Appeals Panel Decision (APD) 010483-s, decided April 20, 2001, the hearing officer’s decision that the claimant did not satisfy the good faith requirement under Rule 130.102(d)(2) was reversed and a new decision rendered that the claimant did prove that she made the required good faith effort in the qualifying periods for the second, third, and fourth quarters by satisfactorily participating in a full-time vocational rehabilitation program sponsored by TRC, entitling the claimant to SIBs for the second, third, and fourth quarters. In APD 010483-s, *supra*, the IPE in evidence was dated March 23, 2000, and the claimant had undertaken several evaluations and examinations prior to the IPE including an eye examination, a psychological evaluation and a two-day vocational evaluation. However, in APD 010483-s, *supra*, there was a letter in evidence dated November 17, 2000, from a TRC rehabilitation counselor which stated that the claimant “has been in compliance with this TRC agency since November 12, 1999, and has made herself available to this TRC agency for examinations and evaluations upon request to the present day.” The letter from TRC specifically related the claimant’s compliance to the qualifying periods at issue. The case went on to note that based on the preamble to Rule 130.102, the “Commissioners envisioned that the evidence of satisfactory participation presented by the claimant would come from the TRC.” In the instant case although there is evidence from DARS that the claimant was satisfactorily participating in services to determine eligibility and was cooperating with services to determine eligibility, the correspondence was dated outside the qualifying period for the second quarter and did not reference that such cooperation and satisfactory participation was within the dates of the qualifying period. It is clear that the claimant was not found to be eligible to receive services from DARS within the qualifying period. Accordingly, we reverse the hearing officer’s determination that the claimant is entitled to SIBs for the second quarter and render a new determination that the claimant is not entitled to SIBs for the second quarter.

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

**MR. GH
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge