APPEAL NO. 061132
FILED JULY 14, 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 April 26, 2006. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second, third, and fourth quarters. The appellant (carrier) appealed, disputing the hearing officer's finding of direct result as well as the determination of SIBs entitlement for the second, third, and fourth quarters. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; had at least a 15% impairment rating; and did not elect to commute any part of her impairment income benefits. At issues was entitlement to SIBs for the second, third, and fourth quarters. The evidence reflected that the claimant worked as a corrections officer and injured her shoulders and back when the elevator she was in free fell three floors.

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Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.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.

DIRECT RESULT

Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's average weekly wage 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. We have long stated that a direct result determination is sufficiently supported by the evidence if the injured employee sustained a serious injury with lasting effects and can no longer reasonably perform the type of work being done at the time of the injury. Appeals Panel Decision (APD) 960028, decided February 15, 1996. The carrier notes in its appeal that the claimant's treating doctor released her to return to

work without restrictions on February 9, 2004, and argues that in the CCH regarding SIBs entitlement for the first quarter, the claimant testified she could perform her previous work. The carrier additionally argued that the claimant testified in the instant CCH that she could perform her previous work. However, a review of the record indicates the claimant testified that the designated doctor gave her work restrictions and that she could perform her preinjury job with the restrictions, which included not standing longer than eight hours and no lifting more than 20 pounds. Conflicting evidence was presented at the CCH regarding direct result. Determination of "direct result" is normally a question of fact for the hearing officer to decide. APD 94150, decided March 22, 1994. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Although another fact finder could have drawn different inferences from the evidence, which would have supported a different result, that does not provide a basis for reversing the hearing officer's direct result determination in this instance. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

SECOND QUARTER

The claimant testified that during the qualifying period for the second quarter she attended a career institute, studying to become a paralegal. The claimant acknowledged that she attended this course with assistance from the Texas Workforce Commission (TWC) and not the Department of Assistive and Rehabilitative Services (DARS). The claimant testified that she also performed job searches during the qualifying period for the second quarter.

Rule 130.102(e) provides that except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, 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. Although the claimant made several job contacts during the qualifying period for the second quarter, there were three weeks in which no job search effort was documented.

Rules 130.102(d)(2) and (3) provide that an injured employee has made a good faith effort to obtain employment commensurate with his ability to work, if the employee, during the qualifying period, enrolled in and satisfactorily participated in a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC) (now part of DARS) or provided by a private provider that is included in the

Registry of Private Providers of Vocational Rehabilitation Services. Correspondence from DARS dated June 6, 2005, (a date within the qualifying period for the second quarter) was in evidence, which stated the claimant applied for services on December 30, 2003, but was determined ineligible. The evidence additionally included further correspondence from DARS dated October 5, 2005, which indicated the claimant applied for services on August 15, 2005 (a date outside the qualifying period for the second quarter) and based on information from the claimant's previous application in March of 2004, she is eligible for DARS services and upon completion of a comprehensive assessment of skills, abilities, and disabilities, DARS would begin writing an Individual Plan for Employment (IPE). Rule 130.101(4) provides that the qualifying period is the period of time for which the employee's activities and wages are reviewed to determine eligibility for SIBs. There is no evidence that the course attended by the claimant during the qualifying period for the second quarter was sponsored by DARS. The hearing officer's finding that the claimant was successfully engaged in an IPE as part of a vocational rehabilitation plan sponsored by DARS which plan was approved by DARS subsequent to the qualifying period for the second quarter of SIBs is against the great weight and preponderance of the evidence.

In APD 011068-s, decided June 25, 2001, the claimant testified he attended a truck driving course sponsored by TWC and his application for SIBs reflected he documented an employment search covering the four weeks of attendance at such course by showing he contacted a person and applied for "class truck driver WIA." Additionally, the claimant in that case provided exhibits which confirmed his attendance and successful completion of the class. The Appeals Panel in that case determined that the claimant met the requirements to document a job search in every week of the qualifying period and remanded the case back to the hearing officer to make a determination of whether there was a good faith effort by the claimant to obtain employment during the qualifying period. A concurring opinion noted in APD 011068-s, *supra*, that attendance at any non TRC or non-private provider program course which might at some future time lead to employment is not necessarily considered a documented job search within the meaning of Rule 130.102(e). In the instant case, the claimant did not document her attendance at the course in her second quarter SIBs application, nor did she provide any documentation of her attendance at the course. Because the claimant did not document a job search in each week of the qualifying period for the second quarter and did not provide evidence that she was enrolled in and satisfactorily participating in a full-time vocational rehabilitation program sponsored by DARS during the qualifying period for the second quarter, the hearing officer's determination that the claimant is entitled to SIBs for the second quarter is reversed and a new decision rendered that the claimant is not entitled to SIBs for the second quarter.

THIRD QUARTER

The carrier does not dispute in its appeal that the claimant documented a job search in each week of the qualifying period for the third quarter but rather argues that almost all of the contacts were made by mail or fax requiring very little time. Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3), and (4) of

Rule 130.102, 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, and that in determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(5), the reviewing authority shall consider the information provided from the injured employee, which may include, but is not limited to information listed in subsection (e)(1)-(11). The hearing officer's determination that during the qualifying period for the third quarter the claimant made a good faith effort to find employment commensurate with his ability to work is supported by sufficient evidence.

FOURTH QUARTER

The evidence reflected that the claimant also conducted a job search during the qualifying period for the fourth quarter. However, the claimant did not document a job search in each week of the qualifying period. The claimant testified that during a portion of the qualifying period for the fourth quarter, she worked part time at a retail establishment. With regard to the return to work in a position relatively equal to the ability to work, Rule 130.102(d)(1) 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 returned to work in a position which is relatively equal to the injured employee's ability to work. The preamble to Rule 130.102(d)(1) states, "This standard eliminates arguments regarding the rate of pay for the job because it ties the finding to whether or not the employment is appropriate considering the injured employee's ability to work. A person who has actually been successful in returning to work within his or her ability will not be required to continue additional job search efforts." The Appeals Panel has previously noted that the focus of the "relatively equal" inquiry in Rule 130.102(d)(1) is not on whether the wages are the same, but rather on whether the employment was relatively equal in terms of hours worked and whether the job is within the claimant's restrictions. APD 000702, decided May 22, 2000; APD 050667, decided May 6, 2005. As noted above, the claimant testified that the designated doctor gave her restrictions of not standing more than eight hours or lifting more than 20 pounds. Even accepting the claimant's testimony regarding her work restrictions, the evidence reflected that the claimant had returned to only part-time work and therefore, had not returned to work in a position relatively equal to her ability to work. The claimant therefore did not meet the requirements of Rule 130.102(d)(1). *See* APD 022432, decided October 31, 2002. The hearing officer's determination that the claimant is entitled to SIBs for the fourth quarter is reversed and a new decision rendered that the claimant is not entitled to SIBs for the fourth quarter.

We affirm the hearing officer's determination that the claimant is entitled to SIBs for the third quarter. We reverse the hearing officer's determinations that the claimant is entitled to SIBs for the second and fourth quarters and render a new determination that the claimant is not entitled to SIBs for the second and fourth quarters.

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

CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge