

APPEAL NO. 070702
FILED JUNE 12, 2007

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, 2007. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 15th, 16th, or 17th quarters. The claimant appealed, arguing that the hearing officer's decision is against the great weight and preponderance of the evidence. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on _____; (2) the claimant reached maximum medical improvement with an impairment rating of 15% or greater; (3) the claimant did not elect to commute any portion of impairment income benefits; (4) the 15th quarter qualifying period began October 13, 2005, and ended January 11, 2006; (5) the 16th quarter qualifying period began January 12 and ended April 12, 2006; (6) the 17th quarter qualifying period began April 13 and ended July 12, 2006; (7) the 15th quarter began January 25 and ended April 25, 2006; (8) the 16th quarter began April 26 and ended July 25, 2006; and (9) the 17th quarter began July 26 and ended October 24, 2006. The hearing officer's findings that the claimant's unemployment during the quarters in dispute was a direct result of the impairment resulting from the compensable injury was not appealed.

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Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation. At the CCH, the claimant contended that she met the requirement to make a good faith effort to obtain employment commensurate with her ability to work based on 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 sponsored by the Texas Rehabilitation Commission (TRC) (now

part of the Department of Assistive and Rehabilitative Services (DARS)) during the qualifying period. Two amended Individualized Plans for Employment (IPE) were in evidence, dated December 9, 2004, and February 13, 2006. The 2004 amended IPE listed the amended employment goal as court reporter and the amended services provided from December 9, 2004, to December 9, 2005, as counseling and guidance provided by DARS and tuition, books, and supplies for training in the court reporter certification program at a specific community college. The 2006 amended IPE listed the services provided from February 13 to December 31, 2006, as guidance and counseling and tuitions/fees, books, and supplies at a specified community college for required courses leading to certification and degree. The 2006 amended IPE employment goal stated that it is expected the claimant will become employed after completing the last service on this IPE. The claimant acknowledged that she was having trouble with some of the required courses and had to retake some of the courses several times and that she had missed some time from school due to muscle spasms and blood clots related to the prolonged sitting and other physical requirements of the court reporting program. In evidence was correspondence from DARS dated October 13, 2006, which stated that the claimant is satisfactorily participating in an IPE dated February 13, 2006. Additional correspondence dated January 12, 2006, and April 13, 2006, from DARS identifies the claimant as an active consumer of DARS services. The transcript from the community college where DARS was providing fees/tuition and books for the claimant to attend was also in evidence and reflected that the claimant had been attending courses during the qualifying periods at issue.

The hearing officer noted in her discussion of the evidence that both the claimant and her treating doctor testified that the claimant's vocational retraining is inconsistent with her physical limitations/restrictions. The hearing officer based her determination of nonentitlement to SIBs on her belief that the claimant's IPE was not appropriate for the claimant. As noted in Appeals Panel Decision (APD) 032949, decided December 15, 2003, it is the obligation of DARS to assess the injured worker and develop an appropriate IPE for each individual worker due to its expertise. There is no authority which supports the proposition that a hearing officer may substitute his or her own judgment for that of DARS in determining how to best retrain and return an injured worker to the workforce. Whether or not a vocational rehabilitation plan is reasonable and appropriate for a given injured worker is a matter which has been entrusted to DARS. It is for DARS, not the hearing officer, to decide whether or not a given plan is appropriate for an injured worker on a case-by-case basis.

It is the question of whether the claimant satisfactorily participated in the full-time DARS program that presents a question of fact for the hearing officer to resolve. APD 010483-s, decided April 20, 2001, held that the best evidence of satisfactory participation will be that coming directly from the TRC (now DARS). In the instant case, there was an IPE in evidence as well as the claimant's transcript from the college DARS was paying for her to attend, correspondence from DARS regarding satisfactory participation, and the claimant's testimony that she fulfilled the requirements of the IPE during the SIBs quarters at issue. Under the evidence presented, the hearing officer's determination that the claimant did not satisfactorily participate in a full-time vocational

rehabilitation program sponsored by DARS during the qualifying periods at issue is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse the hearing officer's determination that the claimant is not entitled to SIBs for the 15th, 16th, and 17th quarters and render a new determination that the claimant is entitled to SIBs for the 15th, 16th, and 17th quarters.

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

**PA
(ADDRESS)
(CITY), TEXAS (ADDRESS).**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge