

APPEAL NO. 070825  
FILED JUNE 25, 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 April 11, 2007. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the sixth quarter. The claimant appeals, asserting that she was satisfactorily participating in a full-time vocational rehabilitation program (VRP) sponsored by the Department of Assistive and Rehabilitative Services (DARS) during the qualifying period. The respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant had at least a 15% impairment rating and had not elected to commute any part of her impairment benefits. It is undisputed that the qualifying period for the sixth quarter ran from September 5 through December 4, 2006, and that the claimant's unemployment during the qualifying period for the sixth quarter was a direct result of the impairment from the compensable injury.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). 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 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Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.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 is entitled to SIBs based on enrollment and satisfactory participation in a full-time VRP sponsored by DARS pursuant to 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 VRP sponsored by the Texas Rehabilitation Commission (TRC, now DARS) during the qualifying period. In evidence was an Individualized Plan for Employment (IPE) for the claimant dated October 5, 2005, covering the period of October 5, 2005, through October 5, 2008. The IPE has an employment goal of office occupations and an expectation of employment after completing the services in the IPE. The claimant

agreed in the IPE to conduct job search activities and improve her mobility. She is required to maintain contact with her DARS counselor. DARS agreed to provide her with an eye examination and glasses if she needed them, job placement service, and counseling and guidance during the period of the IPE. In evidence is a letter from the claimant's DARS' counselor dated September 18, 2006, which not only stated that the claimant was in fact satisfactorily participating in the IPE but also states that the claimant "has been actively involved in activity from 6-8-2006 to 9-6-2006." The DARS' counselor testified telephonically at the CCH that the claimant was satisfactorily participating in a VRP during the sixth quarter qualifying period. The carrier argued that DARS was simply monitoring the claimant's efforts to get a job.

The Division has the authority to refer injured employees to DARS for retraining in an effort to expedite a return to the workforce. As noted in Appeals Panel Decision (APD) 032949, decided December 15, 2003, it is the obligation of DARS, due to its expertise, to assess the injured employee and develop an appropriate IPE. In the instant case, the hearing officer states the counselor's testimony was conclusory and without a credible factual basis. Rule 130.101(8) sets out the basic requirements for a full-time VRP. It includes any program provided by DARS for the provision of vocational rehabilitation services that includes a vocational rehabilitation plan, which 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. Whether or not a VRP is reasonable and appropriate for a given injured employee is a matter which has been entrusted to DARS. APD 032949 *supra*. If DARS discovers that a particular IPE is not appropriate for an injured employee, it is they, and not the hearing officer, who should amend it. See *also* APD 070702, decided June 12, 2007.

In the instant case, the September 18, 2006, letter and the counselor's testimony provides evidence of satisfactory participation in a full-time VRP sponsored by DARS. The Appeals Panel has held that the best evidence of satisfactory participation in a full-time VRP sponsored by DARS will be that coming directly from DARS. APD 010483-s, decided April 20, 2001. We have also stated that we will not second-guess DARS on what they consider satisfactory participation. APD 040985, decided June 18, 2004.

The carrier argues that DARS was simply monitoring the claimant's job search activities and that the Appeals Panel has previously held that monitoring and sponsorship are not synonymous. The carrier cites APD 010497-s, decided April 17, 2001, where the Appeals Panel reversed a hearing officer's decision, which found that the injured employee satisfied the good faith requirement of Rule 130.102(d)(2), where the injured employee participated in a full time job training program monitored by the TRC, but the program was not sponsored by the TRC because the injured employee had already exhausted available funds and the injured employee's progress in the job training program was only monitored by the TRC. Furthermore, in that case, there was no evidence of an IPE being in place during the qualifying period. We distinguish APD 010497-s from the instant case in that the claimant in this case had an IPE, was in a

full-time program sponsored by DARS and was satisfactorily participating in the full-time VRP during the qualifying period, according to the DARS' counselor.

Under the facts of this case, where there was evidence from DARS of the claimant's satisfactory participation in a VRP sponsored by DARS, the hearing officer's implied determination that the claimant did not satisfactorily participate in a full-time VRP sponsored by DARS during the qualifying period for the sixth quarter 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 did not satisfy the good faith requirement under Rule 130.102(d)(2) and render a new decision that the claimant had made the required good faith effort during the qualifying period for the sixth quarter by satisfactorily participating in a full-time VRP sponsored by DARS and that the claimant is entitled to SIBs for the sixth quarter.

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

**CORPORATION SERVICE COMPANY  
701 BRAZOS STREET, SUITE 1050  
DALLAS, TEXAS 78701.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge