

APPEAL NO. 080818  
FILED JULY 25, 2008

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 January 3, 2008. In Appeals Panel Decision (APD) 080143, decided April 9, 2008, we remanded the case to the hearing officer to reconstruct the record. A CCH on remand was held on April 28, 2008. The hearing officer decided that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter, from July 19 through October 17, 2007. The appellant (carrier) appealed, disputing the hearing officer's determination of entitlement to SIBs for the first quarter. The carrier contends that the hearing officer's findings that the claimant's unemployment was a direct result of his impairment, and that the claimant made a good faith effort to obtain employment commensurate with his ability to work during the first quarter qualifying period by virtue of his satisfactory participation in a full-time vocational rehabilitation program (VRP) sponsored by the Department of Assistive and Rehabilitative Services (DARS) was error. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant reached maximum medical improvement on September 6, 2006; (2) the claimant's impairment rating is 15%; (3) the claimant did not elect to commute any portion of his impairment income benefits; and (4) the qualifying period for the first quarter of SIBs was from April 6 through July 5, 2007.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. 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 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Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.

The hearing officer found that on \_\_\_\_\_, the claimant had "sustained a serious work injury with lasting effects that has prevented him from being able to return to and perform his pre-injury job duties;" and that finding is supported by sufficient evidence. It is undisputed that during the qualifying period for the first quarter the claimant had some ability to work and did not document any job search efforts.

Rule 130.102(d) provides in part that an injured worker 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 (now DARS) during the qualifying period.

Proceeding on a theory of entitlement to SIBs based on enrollment and satisfactory participation in a full-time VRP sponsored by DARS during the qualifying period for the first quarter of SIBs, April 6 through July 5, 2007, the claimant testified that he contacted DARS on March 19, 2007. The claimant testified that beginning in March of 2007 he met with his vocational rehabilitation counselor, Mr. T at least once a month (sometimes as much as four times a month) in order to get enrolled in a June 2007 summer school session. After weeks of vocational exploration, Mr. T then scheduled the claimant for a psychological exam in August of 2007 (which is after the expiration of the qualifying period for the first quarter). The claimant testified that he learned in August of 2007 that Mr. T was no longer a counselor for DARS, and that he needed to talk to Mr. S about DARS services and an Individual Plan for Employment (IPE).

In evidence is a letter from DARS dated July 6, 2007 (which is after the expiration of the qualifying period for the first quarter), and signed by Mr. T, in which DARS states that the claimant has requested or completed an application with DARS and "an eligibility determination has not yet been made." Also in evidence is the claimant's Application for Services with DARS, dated July 6, 2007, and the initial IPE developed for the claimant and approved by the DARS counselor, Mr. T, dated July 20, 2007. The provisions and requirements under the IPE are dated from July 20, 2007, to July 20, 2008 (a period after the expiration of the qualifying period for first quarter of SIBs). Mr. S testified that he was a supervising counselor at DARS and was aware of the claimant coming to the DARS office and working with Mr. T since March of 2007. Mr. S testified that in August of 2007 he reviewed the claimant's file and found that the July 2007 IPE was not specific enough and needed to be amended. Mr. S acknowledged that the claimant was not enrolled in and satisfactorily participating in a full-time VRP during the qualifying period for the first quarter of SIBs. Mr. S testified that the delay in enrollment in a VRP was Mr. T's fault and not the claimant's. In evidence is a letter dated September 12, 2007, written by Mr. S, stating that the claimant had complied with everything that Mr. T had instructed him to do. "Due to our oversight [DARS] [the claimant] was not able to comply with the SIB's requirements [for the qualifying period for the first quarter of SIBs]."

The hearing officer found that the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the first quarter and concluded that the claimant is entitled to SIBs for the first quarter. It is clear from his discussion in the Background Information section of his decision that the hearing officer based his determination of entitlement to the first quarter of SIBs on his belief that the delay in executing the IPE was solely due to Mr. T, the previous DARS counselor. However, the testimony of Mr. S and the DARS documentation in evidence

clearly establish that there is no evidence that the claimant was determined to be eligible for DARS services or was enrolled in a full-time VRP sponsored by DARS during the qualifying period for the first quarter of SIBs. As stated in APD 061027, decided July 20, 2006, simply making an inquiry of DARS and cooperating with them does not meet the requirements of Rule 130.102(d)(2) that the claimant be “enrolled in” and “satisfactorily participated in,” a full-time VRP.

Accordingly, we hold that the hearing officer’s determination that the claimant is entitled to SIBs for the first quarter is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We reverse the hearing officer’s determination that the claimant is entitled to SIBs for the first quarter, from July 19 through October 17, 2007, and render a new decision that the claimant is not entitled to SIBs for the first quarter, from July 19 through October 17, 2007.

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

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

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Cynthia A. Brown  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge