

APPEAL NO. 090237
FILED APRIL 29, 2009

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 November 6, 2008, with the record closing on January 16, 2009. The hearing officer determined that the respondent/cross-appellant (claimant) was entitled to supplemental income benefits (SIBs) for the 11th, 13th, and 16th quarters and that the claimant was not entitled to SIBs for the 12th, 14th, and 15th quarters.

The appellant/cross-respondent (carrier) appealed the hearing officer's determinations for the 11th, 13th, and 16th quarters. The claimant appealed the hearing officer's determinations for the 12th, 14th, and 15th quarters. The carrier responded to the claimant's appeal, urging affirmance for the quarters for which it prevailed. The appeal file does not contain a response by the claimant to the carrier's appeal.

The carrier also filed a Motion to Correct Clerical Error pointing out that Issue No. 6 on page 1 and Conclusion of Law No. 8 on page 7 of the hearing officer's decision and order lists a March 27, 2007, date as the beginning date of the 16th quarter of SIBs, when the true date should be March 27, 2008.

DECISION

Affirmed in part, and reversed and rendered in part as reformed.

CORRECTION OF TYPOGRAPHICAL ERROR

Issue No. 6 on page 1 of the hearing officer's decision and order and the corresponding Conclusion of Law No. 8 on page 7 of the decision and order lists the 16th quarter as being March 27, 2007, through June 25, 2008. The evidence establishes this as being an obvious typographical error and we reform Conclusion of Law No. 8 to read that the 16th quarter was from March 27, 2008, through June 25, 2008.

SIBS FOR THE 11TH, 12TH, 13TH, 14TH, AND 15TH QUARTERS

The hearing officer's determinations that the claimant is entitled to SIBs for the 11th and 13th quarters are supported by sufficient evidence and are affirmed. The hearing officer's determinations that the claimant is not entitled to SIBs for the 12th, 14th, and 15th quarters are also supported by sufficient evidence and are affirmed.

SIBS FOR THE 16TH QUARTER

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 part of his impairment income benefits; (4) the 16th quarter of SIBs was from March 27, 2008, through June 25, 2008; and (5) the qualifying period for the 16th quarter was from December 14, 2007, and ended March 13, 2008.

The claimant's Application for [SIBs] (DWC-52) for the 16th quarter indicates that the claimant is not able to work in any type of job in any capacity and that he is not enrolled in and satisfactorily participating in, a full-time vocational rehabilitation program (VRP) sponsored by the Department of Assistive and Rehabilitative Services (DARS).

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. We note that the Division has adopted new 28 TEX. ADMIN. CODE §§ 130.101-130.109 (Rules 130.101-130.109); however, these rules are effective for claims in which the qualifying period begins on or after July 1, 2009. Therefore, we will refer to the eligibility criteria in the current Rule 130.102 in this case. The hearing officer found that during the 16th quarter qualifying period the claimant had some work ability; the claimant did not seek employment commensurate with his ability to work each week of the qualifying period; the claimant did not return to work and that the claimant's unemployment during the 16th quarter qualifying period was a direct result of the impairment resulting from the compensable injury. Those findings are supported by sufficient evidence.

Although the claimant, on his DWC-52 indicated he was not enrolled in and satisfactorily participating in a full-time VRP sponsored by DARS, the hearing officer in her Background Information commented that during the 16th quarter qualifying period the claimant "enrolled in [a] [VRP] with DARS." The hearing officer found that during the 16th quarter qualifying period the claimant enrolled in and satisfactorily participated in a VRP sponsored by DARS.

Rule 130.102(d)(2) 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. In evidence is a Individualized Plan for Employment (IPE) dated January 7, 2008, which lists services provided from January 7, 2008, to December 31, 2010, which includes "[c]ounseling and guidance throughout the VR process to address [the claimant's] disability" and "tuition assistance for 3 courses: CAD; Basic Drafting and Piping." The IPE specified the claimant was to maintain a 2.0 grade point average

(GPA) and take 12 credit hours each semester. There is no evidence that the claimant was enrolled in any classes during the 16th quarter qualifying period and there is no evidence from DARS regarding the claimant's participation.

The evidence established that the claimant had previously completed a security guard training program but had abandoned that potential line of employment based on his doctor's recommendation that it was too dangerous. The claimant had then applied for a draftsman program with DARS. At the CCH the claimant, in response to a question whether he was still attending drafting school, replied that he was unable to continue the course and the instructor had recommended that he drop the course. There was no other evidence regarding the claimant's enrollment in the drafting program or any other DARS program during the 16th quarter qualifying period of SIBs.

In Appeals Panel Decision 010483-s, decided April 20, 2001, the Appeals Panel held that the best evidence of satisfactory participation in a full-time VRP will be that coming directly from DARS. There is no documentary or testimonial evidence from DARS that during the 16th quarter qualifying period the claimant was enrolled in and satisfactorily participated in a full-time VRP sponsored by DARS. The IPE contained specific requirements as to the number of hours the claimant was required to take as well as a minimum GPA he was required to maintain. There is no evidence that the claimant met the basic minimum requirements contained in the IPE. In fact, according to the claimant's own testimony, he did not meet the requirements of the IPE. Under these circumstances, the hearing officer's determination that the claimant did satisfactorily participate in a full-time VRP sponsored by DARS during the qualifying period at issue is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Accordingly, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the 16th quarter, March 27, 2008, through June 25, 2008, and render a new decision that the claimant is not entitled to SIBs for the 16th quarter, March 27, 2008, through June 25, 2008.

SUMMARY

We reform a typographical error in Conclusion of Law No. 8 that the 16th quarter is from March 27, 2008, through June 25, 2008.

We affirm the hearing officer's determinations that the claimant is entitled to SIBs for the 11th and 13th quarters and that the claimant is not entitled to SIBs for the 12th, 14th, and 15th quarters.

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the 16th quarter, March 27, 2008, through June 25, 2008, and render a new decision that the claimant is not entitled to SIBs for the 16th quarter, March 27, 2008, through June 25, 2008.

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

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge