

APPEAL NO. 092043
FILED FEBRUARY 10, 2010

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 18, 2009. The disputed issues before the hearing officer were:

- (1) Is the respondent (claimant) entitled to receive supplemental income benefits (SIBs) for the second quarter, from June 4 through September 2, 2009?
- (2) Is the claimant entitled to receive SIBs for the third quarter, from September 3 through December 2, 2009?

The hearing officer determined that the claimant was entitled to SIBs for the second and third quarters.

The appellant (carrier) appealed the hearing officer's determination that the claimant was entitled to SIBs for the second and third quarters. The carrier contends that the hearing officer misapplied the new SIBs rules because those rules are not applicable to the qualifying periods of SIBs in dispute. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

It is undisputed that: (1) the claimant sustained a compensable injury on _____; (2) the claimant had at least a 15% impairment rating; (3) the claimant did not elect to commute any part of his impairment income benefits; (4) the second quarter of SIBs was from June 4 through September 2, 2009; (5) the qualifying period for the second quarter of SIBs was from February 20 through May 21, 2009; (6) the third quarter of SIBs was from September 3 through December 2, 2009; and (7) the qualifying period for the third quarter of SIBs was from May 22 through August 20, 2009.

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. 28 TEX. ADMIN. CODE §§ 130.100-130.109 (Rules 130.100-130.109), effective July 1, 2009, govern the eligibility of SIBs. Rule 130.101(1)(4) provides in part that a qualifying period that begins on or after July 1, 2009, is subject to the provisions of this subchapter, and a qualifying period that begins prior to July 1, 2009, remains subject to the rules in effect on the date the qualifying period begins. The hearing officer correctly states in her decision that "since both

qualifying periods at issue in this decision began prior to July 1, 2009, application of the Division's new [SIBs] [r]ules is inappropriate."

The hearing officer's finding that during the qualifying period for the second and third quarters of SIBs, the claimant was unemployed as a direct result of the impairment from the compensable injury is supported by sufficient evidence. In unappealed findings, the hearing officer determined that for the second and third quarters of SIBs the claimant: (1) "did not make an active work search effort documented by job applications"; and (2) "was not enrolled in and satisfactorily participating in a vocational rehabilitation program sponsored by the Texas Department of Assistive and Rehabilitative Services." However, the hearing officer found that the claimant was entitled to SIBs for the second and third quarters of SIBs because the claimant "actively participated in work search efforts conducted through the [Texas Workforce Commission (TWC)]."

In evidence is an Application for [SIBs] (DWC-52) for each SIBs quarter in dispute. Although both DWC-52s do not show documentation of job searches on the applications, both DWC-52s have attached sheets showing job contacts for the qualifying periods in dispute. In Appeals Panel Decision (APD) 030850, decided May 29, 2003, the hearing officer determined that the claimant satisfied the job search requirement and the documentation requirement in those weeks by going to TWC, searching the employment opportunities on their database, and introducing summary sheets showing the dates the claimant went to TWC. In that case, the Appeals Panel held that "job search activities are not necessarily limited to completion of applications but can encompass other activities such as looking in the newspaper or computer employment databases, meeting with an employment counselor, or assessing postinjury employment skills." Further, the Appeals Panel held that "the hearing officer did not err in considering the records summary showing the dates the claimant went to the TWC in determining that the claimant satisfied the requirement to document his weekly job search efforts or in determining that the claimant's efforts of searching for employment opportunities on the TWC databases constituted a job search activity." In APD 030850, the claimant met the good faith requirements of Rules 130.102(d) and (e) because he looked for work during each week of the qualifying period and he documented a job search each week during the qualifying period.

In the instant case, the claimant testified that he began his job search with TWC on June 17, 2009, which is during the qualifying period for the third quarter. However, the hearing officer determined that the claimant made a good faith job search based on the testimony of the claimant and his TWC counselor that the claimant made an active work search through the resources of TWC, therefore the claimant was entitled to SIBs for the second and third quarters. This finding is in conflict with her unappealed finding that the claimant "did not make an active work search effort documented by job applications" for the second and third quarters of SIBs and the claimant's testimony that he began his job search with TWC during the qualifying period for the third quarter. In the instant case, there is no evidence showing job searches through TWC during the

qualifying periods in dispute, which is in contrast with APD 030850, *supra*, in which there was evidence of summary sheets showing the dates the claimant went to TWC.

Rule 130.102(d)(5) provides that an injured employee has made a good faith effort to obtain employment commensurate with his ability to work, if the employee has provided sufficient documentation as described in subsection (e) of the rule to show that he has made a good faith effort to obtain employment. 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 by the injured employee, which may include, but is not limited to information listed in subsection (e)(1)-(11).¹ We have held that the documentation requirement of Rule 130.102(e) is mandatory and undocumented employment contacts may not be considered in arriving at the good faith determination. APD 000505, decided April 20, 2000.

The hearing officer's finding that the claimant was entitled to SIBs for the second and third quarters of SIBs because the claimant "actively participated in work search efforts conducted through the [TWC]" is in conflict with the hearing officer's unappealed findings that for the second and third quarters of SIBs the claimant "did not make an active work search effort documented by job applications" and the claimant's testimony that he began his job search with TWC during the qualifying period for the third quarter. Because the hearing officer determined that the claimant did not document his job search efforts as required by Rule 130.102(d)(5), actively participating in work search efforts through TWC, does not satisfy the eligibility requirements for SIBs entitlement for the second and third quarters of SIBs, without documentation of his job search efforts.

Additionally, the hearing officer states that the claimant "qualifies to receive [SIBs] pursuant to Section [408.1415(a)(2)]"² and that "[a]s satisfaction of any one of the work search compliance standards set forth in Section 408.1415 is adequate to show an acceptable search for employment." As previously mentioned, Section 408.1415 provides that the Division Commissioner by rule shall adopt compliance standards for SIBs recipients. Rule 130.101(4) provides in part that "a qualifying period that begins on or after July 1, 2009, is subject to the provisions of this subchapter, and a qualifying period that begins prior to July 1, 2009, remains subject to the rules in effect on the date of the qualifying period begins."

¹ Rule 130.102(e)(10) provides in part that in determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(5) of this section, the reviewing authority shall consider the information from the injured employee, which may include, but is not limited to information regarding registration with TWC.

² Section 408.1415(a)(2) provides in part that to be eligible to receive SIBs under this chapter, a recipient must provide evidence satisfactory to the Division of active participation in work search efforts conducted through the TWC.

Accordingly, we reverse the hearing officer's decision that the claimant is entitled to the second and third quarters of SIBs as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and render a new decision that the claimant is not entitled to the second and third quarters of SIBs.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge