

APPEAL NO. 101115
FILED OCTOBER 15, 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 July 7, 2010. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 14th and 15th quarters.

The appellant (carrier) appealed, contending that the claimant is not entitled to SIBs because she had refused "to participate in vocational rehabilitation services" contrary to 28 TEX. ADMIN. CODE § 130.106(c) (Rule 130.106(c)) and that the claimant did not make "a good faith effort to find work" The file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that: on _____, the claimant sustained a compensable injury, which resulted in a final impairment rating of 16%; the claimant had not commuted any portion of her impairment income benefits; and the qualifying period for the 14th quarter was from August 31 through November 29, 2009, and the qualifying period for the 15th quarter was from November 30, 2009, through February 28, 2010. The hearing officer made an unappealed finding of fact that the minimum number of weekly work search efforts for the claimant's county of residence is five.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Rule 130.101(4) provides in part, that a qualifying period that begins on or after July 1, 2009, is subject to Rules 130.100-130.109 effective July 1, 2009.

Rule 130.102(d)(1) provides that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

- (A) has returned to work in a position which is commensurate with the injured employee's ability to work;
- (B) has actively participated in a vocational rehabilitation program [VRP] as defined in [Rule] 130.101 of this title (relating to definitions);
- (C) has actively participated in work search efforts conducted through the Texas Workforce Commission;
- (D) has performed active work search efforts documented by job applications; or

(E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The claimant's theory of entitlement to SIBs for the 14th and 15th quarters was a combination of active work search efforts documented by job applications (Rule 130.102(d)(1)(D)) and active participation in a VRP conducted by the Department of Assistive and Rehabilitative Services (DARS) (Rule 130.102)(d)(1)(B)).

Regarding the active work efforts documented by job applications, the hearing officer, in the Background Information, writes:

The claimant testified that during the entire qualifying periods for the 14th and 15th [q]uarters she engaged in an active effort to obtain employment by performing weekly work search efforts. Her weekly work search efforts included applying for jobs online, e-mailing resumes to potential employers, and talking to potential employers in person. Her job search documentation indicates that she performed at least [five] work search efforts during each week of both qualifying periods.

A review of the Detailed Job Search/Employer Contact Log of the Application for [SIBs] (DWC-52) for the 14th quarter qualifying period lists 66 job contacts; however, week 1 (beginning on August 31, 2009); week 6 (beginning on October 5, 2009); and week 8 beginning on October 19, 2009) only documents three job searches during those weeks. We note, for example, in week 1 (beginning August 31 through September 6, 2009) the claimant lists two job searches performed on August 30, 2009, a day before the qualifying period began. Similarly, a review of the DWC-52 for the 15th quarter qualifying period lists 87 job contacts; however, week 4 (from December 21 through December 27, 2009) only documents three job searches; week 10 (from February 1 through February 7, 2010) only documents four job searches and week 12 (from February 15 through February 21, 2010) only documents four job searches. The hearing officer's comment that the claimant's job search documentation indicates that she performed at least five work search efforts during each week of both qualifying periods is not supported by the evidence.

The hearing officer also comments:

In addition, during both qualifying periods the claimant satisfactorily participated in an [Individualized Plan for Employment (IPE)] created by DARS. As proof, she presented letters from DARS to that effect. (C-3, p. 1; C-6, p. 2.)

First we note that the IPE in evidence is dated July 23, 2007, and covers services provided between that date and July 23, 2008. There is no evidence of an IPE being in place during the qualifying period for the 14th and 15th quarters. One of the DARS

letters referenced by the hearing officer is dated January 13, 2010 (during the 15th quarter qualifying period) and checks a box that the claimant “is satisfactorily participating in an IPE dated 08/16/2007.” The other DARS letter referenced by the hearing officer is dated April 12, 2010 (after the 15th quarter qualifying period) and checks the same box as the January 13, 2010, letter and again references an IPE dated August 16, 2007. No IPE dated August 16, 2007, is in evidence. The letters dated January 13 and April 12, 2010, do not include an employment goal, any intermediate goals, a description of 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, as required by Rule 130.101(8) for an IPE at DARS. See Appeals Panel Decision 100429, decided June 14, 2010. There is no other documentary evidence that the claimant was actively participating in a VRP during the qualifying periods in dispute.

A DARS office note dated February 10, 2010, suggests some employment leads to the claimant. Another DARS office note dated January 4, 2010, lists some of the claimant’s complaints and that she had not heard from a vendor that DARS had retained to assist the claimant in finding a job. A DARS office note dated August 27, 2009 (just prior to the 14th quarter qualifying period) notes that the claimant continues to look for work mainly on her own. These DARS office notes do not constitute an IPE.

As previously noted, Rule 130.102 provides that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the specified work search requirements each week during the entire qualifying period. The preamble to Rule 130.102 stated “[s]ubsection (d)(1) is also amended to add ‘each week’ before ‘during’ and ‘entire’ before ‘qualifying period’ to clarify that the injured employee’s work search efforts were to continue each week during the entire qualifying period.” (34 Tex. Reg. 2140, 2009). The claimant presented no evidence of any other active work search efforts or compliance with a DARS IPE specifically for weeks 1, 6 and 8 of the 14th quarter qualifying period and weeks 4, 10 and 12 of the 15th quarter qualifying period. The IPE dated July 23, 2007, does not reference the weeks at issue.

In reviewing a “great weight” challenge, we must examine the entire record to determine if: (1) there is only “slight” evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We reverse the hearing officer’s determination that the claimant is entitled to SIBs for the 14th and 15th quarters as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We render a new decision that the claimant is not entitled to SIBs for the 14th and 15th quarters.

In that we have reversed the hearing officer’s decision on other grounds we need not address the applicability of Rule 130.106(c).

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

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge