

APPEAL NO. 110547
FILED JUNE 15, 2011

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 March 29, 2011. The hearing officer determined that: (1) the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the sixth quarter beginning on January 9, 2010, and ending on April 9, 2010; (2) the claimant is entitled to SIBs for the eighth quarter beginning on July 10, 2010, and ending on October 8, 2010; (3) the claimant is entitled to SIBs for the ninth quarter beginning on October 9, 2010, and ending on January 7, 2011; and (4) (Dr. P) was properly appointed as the designated doctor in accordance with Section 408.0041 and 28 TEX. ADMIN. CODE § 126.7 (Rule 126.7).¹

The appellant (carrier) appeals the hearing officer's determinations. The claimant responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

PROPERLY APPOINTED DESIGNATED DOCTOR AND EIGHTH QUARTER SIBS

The hearing officer's determinations that Dr. P was properly appointed as the designated doctor in accordance with Section 408.0041 and Rule 126.7 and that the claimant is entitled to SIBs for the eighth quarter beginning on July 10, 2010, and ending on October 8, 2010, are supported by sufficient evidence and are affirmed.

SIXTH AND NINTH QUARTER SIBS

The parties stipulated the following: the claimant was injured in the course and scope of employment on _____;² the claimant reached maximum medical improvement on May 12, 2006, with a 42% impairment rating; the claimant did not elect to commute any portion of his IIBs; the qualifying period for the disputed sixth quarter began on September 27, 2009, and ended on December 26, 2009; and the qualifying period for the disputed ninth quarter began on June 27, 2010, and ended on September 25, 2010.

¹ We note that the Texas Department of Insurance, Division of Workers' Compensation (Division) has adopted new rules concerning designated doctor scheduling and examinations effective February 1, 2011; however, the rule in effect at the time of the CCH was Rule 126.7.

² We note the hearing officer states in his decision that the parties stipulated that the claimant sustained a compensable injury on _____; however, the parties stipulated on the record as reflected above. We further note that the parties also stipulated, among other things, that the Division's initial determination of SIBs was made on October 6, 2008; and that the claimant's impairment income benefits (IIBs) period ended on October 10, 2008.

The claimant sustained a serious traumatic injury on _____, when he was hit in the head by a crane and knocked off the rig on which he was working and fell 8-10 feet to the ground. The claimant has sustained severe traumatic head injuries and also injuries to other parts of his body, and has undergone multiple surgeries. The claimant testified he has not worked since the date of the injury.

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 Division commissioner by rule shall adopt compliance standards for SIBs recipients. Rules 130.100-130.109, effective July 1, 2009, govern the eligibility of SIBs. 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 the qualifying period begins.

Sixth Quarter SIBs

The claimant argues entitlement for the sixth quarter based on a total inability to work. The sixth quarter qualifying period began on September 27, 2009, and ended on December 26, 2009.

Rule 130.102(d)(1) provides in pertinent part 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: (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 hearing officer found the claimant was unable to perform any type of work in any capacity during the sixth quarter qualifying period, and noted in the Background Information section of his decision that the claimant's inability to work is reflected in the medical records of (Dr. H), and Dr. P, as well as testimony from (Dr. A). The hearing officer did not identify which medical record is a narrative report from a doctor which specifically explains how the work injury causes a total inability to work.

A review of the record reflects that Dr. H issued a letter dated September 23, 2009, and (Dr. T), the claimant's treating doctor, issued a letter dated December 18, 2009. In these letters Dr. H and Dr. T each state the following:

[The claimant] continues to have worsening cognitive function. He is noted to have repetition of the same questions without being able to retain the information. He also continues to have balance and vestibular problems and continues to intermittently use a single-point cane. We

await approval from Workers' Compensation for neuropsychological testing. This will provide objective data for complaints of cognitive decline.

It is my opinion that [the claimant] is not able to return to competitive employment now or in the future.

Neither of these letters from Dr. H and Dr. T specifically explain how the compensable injury caused a total inability to work; therefore, neither letter is sufficient to constitute a narrative as required by Rule 130.102(d)(4). There are no other records in or near the sixth quarter qualifying period that would constitute a narrative as required by Rule 130.102(d)(4). Therefore, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the sixth quarter beginning on January 9, 2010, and ending on April 9, 2010, and render a new decision that the claimant is not entitled to SIBs for the sixth quarter beginning on January 9, 2010, and ending on April 9, 2010.

Ninth Quarter SIBs

The claimant argues entitlement for the ninth quarter based on a total inability to work, and in the alternative argues he made job searches in compliance with Rule 130.102.

Total Inability to Work During the Ninth Quarter Qualifying Period

The ninth quarter qualifying period began June 27, 2010, and ended on September 25, 2010. The hearing officer found that the claimant was unable to perform any type of work in any capacity during the ninth quarter qualifying period. The hearing officer did not identify which medical record is a narrative report from a doctor which specifically explains how the work injury causes a total inability to work.

In evidence is a letter dated September 20, 2010, from Dr. T in which he discusses the claimant's inability to work as follows:

I had previously recommended return to work with restrictions, as [the claimant] had been doing better clinically. At the time of his most recent visit with me on 9/20/10, it appears that [the claimant] has worsened clinically to the point where I do not believe he should attempt work re-entry. Given his head injury, [the claimant] is more sensitive to other medical issues that may arise, for which the net effect has been a decrease in functional status. For this reason, I have placed him on a 'no-work restriction' and will plan on re-evaluating this status at the time of our next appointment in 3 months.

However, also in evidence is a letter dated June 18, 2010, from Dr. T, stating the claimant can return to work with the following restrictions:

1. Work in a non-stress single-minded focused task work setting as opposed to a multitask environment.
2. No driving or operating heavy machinery due to seizure precautions.
3. No climbing heights.
4. No activity that would put the [claimant] or others at risk should the [claimant] have a seizure.

Although Dr. T's September 20, 2010, letter is sufficient to constitute a narrative as required by Rule 130.102(d)(4), Dr. T's June 18, 2010, letter, issued just nine days prior to the start of the ninth quarter qualifying period, is an other record, as discussed in Rule 130.102(d)(1), that shows the claimant had an ability to work for at least part of the ninth quarter qualifying period. Dr. T does not explain in his September 20, 2010, letter how the claimant's compensable injury caused a total inability to work from June 18 through September 20, 2010, the date he opined the claimant could no longer work.

Job Search During the Ninth Quarter Qualifying Period

Section 408.1415(a)(3) provides in part that to be eligible to receive SIBs, a recipient must provide evidence satisfactory to the Division of active work search efforts documented by job applications submitted by the recipient. Section 408.1415(b)(2) provides that in adopting rules under this section, the commissioner shall define the number of job applications required to be submitted by a recipient to satisfy the work search requirements. Rule 130.102(d)(1)(D) provides, in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least the following work search efforts each week during the entire qualifying period by performing active work search efforts documented by job applications. Rule 130.102(f) provides in part, that as provided in subsection 130.102(d)(1)(C) and (D), regarding active participation in work search efforts and active work search efforts, an injured employee shall provide documentation sufficient to establish that he or she has, each week during the qualifying period, made the minimum number of job applications and/or work search contacts consistent with the work search contacts established by the Texas Workforce Commission (TWC) which are required for unemployment compensation in the injured employee's county of residence pursuant to the TWC Local Workforce Development Board requirements.

It was undisputed the claimant was required to make a minimum of 3 job searches each week of the ninth quarter qualifying period. A review of the Detailed Job Search/Employer Contact Log of the Application for [SIBs] (DWC-52) for the ninth quarter qualifying period lists 36 job contacts; however, the claimant failed to make the required number of job searches for the first, seventh, and eighth weeks of the ninth quarter qualifying period.

As previously discussed, to meet the eligibility requirements for the ninth quarter of SIBs, the claimant had to meet at least one of the work search requirements listed in Rule 130.102(d)(1) for every week of the ninth quarter qualifying period. Because the evidence contained a record showing the claimant had some ability to work during the ninth quarter qualifying period and because the claimant failed to make the required number of job searches for the ninth quarter qualifying period, the claimant has not met the eligibility requirements for the ninth quarter SIBs. We therefore reverse the hearing officer's determination that the claimant is entitled to SIBs for the ninth quarter beginning on October 9, 2010, and ending on January 7, 2011, and render a new decision that the claimant is not entitled to SIBs for the ninth quarter beginning on October 9, 2010, and ending on January 7, 2011.

SUMMARY

We affirm the hearing officer's determination that Dr. P was properly appointed as the designated doctor in accordance with Section 408.0041 and Rule 126.7.

We affirm the hearing officer's determination that the claimant is entitled to SIBs for the eighth quarter beginning on July 10, 2010, and ending on October 8, 2010.

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the sixth quarter beginning on January 9, 2010, and ending on April 9, 2010, and render a new decision that the claimant is not entitled to SIBs for the sixth quarter beginning on January 9, 2010, and ending on April 9, 2010.

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the ninth quarter beginning on October 9, 2010, and ending on January 7, 2011, and render a new decision that the claimant is not entitled to SIBs for the ninth quarter beginning on October 9, 2010, and ending on January 7, 2011.

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

**JAMES H. MOODY III
2001 BRYAN STREET, SUITE 1800
DALLAS, TEXAS 75201-3070.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge