

APPEAL NO. 111136
FILED OCTOBER 6, 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 was held on July 6, 2011. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter; (2) the claimant is not entitled to SIBs for the second quarter; (3) the claimant is entitled to SIBs for the third quarter; and (4) since the Texas Department of Insurance, Division of Workers' Compensation (Division) failed to issue a determination of non-entitlement to SIBs for the first quarter until January 27, 2011, 28 TEX. ADMIN. CODE §130.105(a)(2) (Rule 130.105(a)(2)) applies, and since the claimant filed his second and third Application for [SIBs] (DWC-52) simultaneously on January 25, 2011, the appellant (carrier) is not relieved of liability.

The carrier appealed, contending that the claimant it is not entitled to SIBs for the third quarter. Additionally, the carrier appeals the hearing officer's determination that it is not relieved from liability due to the claimant's late filing of the second and third quarter DWC-52s. The claimant responded, urging affirmance. The hearing officer's determinations that the claimant is not entitled to SIBs for the first quarter and is not entitled to SIBs for the second quarter were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The hearing officer's determination that since the Division failed to issue a determination of non-entitlement to SIBs for the first quarter until January 27, 2011, Rule 130.105(a)(2) applies, and since the claimant filed his second and third quarter DWC-52s simultaneously on January 25, 2011, carrier is not relieved of liability is supported by sufficient evidence and is affirmed.

The parties stipulated in part that: on (date of injury), the claimant sustained a compensable injury; the qualifying period for the third quarter of SIBs was from September 13, 2010, through December 12, 2010; (Dr. V) was selected by the Division to serve as the designated doctor to determine the claimant's return to work status; and that during the first, second, and third quarter qualifying periods the claimant did not work nor earn any wages. The claimant testified that his right foot was injured when a metal beam fell on his right foot and has undergone five surgeries.

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 as defined in [Rule] 130.101 of this title (relating to [d]efinitions);
- (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 third quarter was a total inability to work (Rule 130.102(d)(1)(E)). The hearing officer stated she found that (Dr. K)'s narrative sufficiently details the nature of the complications that resulted from the claimant's compensable injury and how it resulted in the claimant's total inability to work during the third quarter qualifying period.

The evidence reflects that Dr. K performed surgery on the claimant's right foot on November 3, 2010, during the qualifying period for the third quarter. Dr. K discussed in correspondence some of the claimant's medical history since the injury and his continuing problems with his right foot and the pain he has when walking. However, Dr. K did not give an opinion about the claimant's ability to work in any capacity. Dr. K's report does not constitute a narrative which specifically explains how the compensable injury causes a total inability to work pursuant to Rule 130.102(d)(1)(E). Additionally, there is no other narrative in evidence that specifically explains how the compensable injury causes a total inability to work pursuant to Rule 130.102(d)(1)(E).

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 third quarter 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 third quarter.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE 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 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas L. Knapp
Appeals Judge