

APPEAL NO. 120154
FILED APRIL 30, 2012

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 January 10, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the two disputed issues, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the fourth quarter but was not entitled to SIBs for the fifth quarter.

The appellant (carrier) appealed, contending that the hearing officer erred in finding that the claimant had reasonable grounds for failing to comply with the work search requirements of 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) and that the claimant's "unemployment was a [direct] result of his impairment from the compensable injury." The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part.

FIFTH QUARTER OF SIBS

The carrier appealed the hearing officer's finding that the claimant's unemployment "was a [direct] result of his impairment from the compensable injury." The evidence reflects that the claimant had permanent lifting restrictions from the compensable injury. The hearing officer's finding that for the qualifying period for the fifth quarter of SIBs, the claimant's unemployment was a direct result of his impairment from the compensable injury is supported by sufficient evidence.

However, the hearing officer also found that during the qualifying period for the fifth quarter, the claimant did not demonstrate an active effort to obtain employment each week of the qualifying period. This finding is supported by sufficient evidence. Accordingly, the hearing officer's determination that the claimant is not entitled to SIBs for the fifth quarter is supported by sufficient evidence and is affirmed.

FOURTH QUARTER OF SIBS

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury], with a 15% impairment rating (IR) or greater; (2) the claimant had not commuted any portion of the impairment income benefits; (3) the qualifying period for the fourth quarter of SIBs was May 15 through August 13, 2011; (4) for the qualifying period of the fourth quarter of SIBs, the claimant is required to conduct five active job searches a week; and (5) during the qualifying periods for the fourth and fifth quarters

the claimant was unemployed. In evidence are two prior CCH decision and orders which document that the claimant's abdominal hernias required multiple surgeries. The claimant testified that he had been an air conditioning (A/C) technician and that he continued to have permanent lifting restrictions due to his compensable injury.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 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 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 130.102(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.
- (2) An injured employee who has not met at least one of the work search requirements in any week during the qualifying period is not entitled to SIBs unless the injured employee can demonstrate that he or she had reasonable grounds for failing to comply with the work search requirements under this section.

The hearing officer's determination, and the claimant's theory of entitlement for SIBs for the fourth quarter, were based on an active work search effort documented by job applications (Rule 130.102(d)(1)(D)) each week during the qualifying period.

A review of the “Detailed Job Search/Employer Contact Log of the Application for [SIBs]” (DWC-52) for the fourth quarter qualifying period (May 15 through August 13, 2011) lists 68 job contacts; however, the claimant only documents 4 job contacts in the second week (May 22 through May 28, 2011), the fifth week (June 12 through June 18, 2011), and the eighth week (July 3 through July 9, 2011). Clearly the claimant did not meet the requirement of making 5 job searches during each week of the qualifying period.

The hearing officer, in his Background Information, comments:

During the qualifying period for the fourth quarter, [the] [c]laimant was the victim of a violent robbery. He was hit in the head with a baseball bat and received a metal plate in his head. [The] [c]laimant stated that he does not recall everything correctly but was hospitalized for a three week period during the qualifying period for the fourth quarter of [SIBs]. His girlfriend documented job searches that she made on his behalf during this period. He has reasonable grounds for not searching for work during that three week period.

The hearing officer then made a finding of fact:

[The] [c]laimant demonstrated that he had reasonable grounds for failing to comply with the work search requirements of Rule 130.102(d) for the qualifying period for the fourth quarter of [SIBs].

A police report reflects that the claimant was struck on the left side of his forehead with a baseball bat on August 7, 2011. A hospital medical note dated August 12, 2011, indicates that the claimant had fractures of his frontal sinus and orbital roof fracture which required oral and maxillofacial surgery on August 7, 2011. The note recommends that the claimant stay home over the next two weeks.

We note that the assault occurred on August 7, 2011, at the start of week 13 of the fourth quarter qualifying period which was several weeks after the claimant had failed to document the required 5 job search efforts in weeks two, five and eight of the fourth quarter qualifying period. The claimant had already failed to comply with the 5 job searches in weeks two, five, and eight before the assault occurred.

As previously noted, 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.” 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 Department of Assistive and Rehabilitative Services Individualized Plan for Employment specifically for weeks two, five, and eight of the fourth quarter qualifying period.

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 fourth 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 fourth quarter.

SUMMARY

We affirm the hearing officer's decision that the claimant is not entitled to SIBs for the fifth quarter.

We reverse the hearing officer's decision that the claimant is entitled to SIBs for the fourth quarter and render a new decision that the claimant is not entitled to SIBs for the fourth quarter

The true corporate name of the insurance carrier is **EMPLOYERS ASSURANCE COMPANY** and the name and address of its registered agent for service of process is¹

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals

¹ In his decision, the hearing officer erroneously noted the address of its registered agent for service of process as 701 Brazos Street, Suite 1050, Austin, Texas 78701-3232.