APPEAL NO. 120528
FILED MAY 29, 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 February 15, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second quarter. The appellant (carrier) appeals the hearing officer's determination of the claimant's entitlement to SIBs. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on August 5, 2006, which resulted in an impairment rating of 15% or greater; (2) the claimant has not commuted any portion of the impairment income benefits; (3) the qualifying period for the second quarter of SIBs was from June 2 through August 31, 2011; and (4) during the qualifying period for the second quarter of SIBs, the claimant was unemployed.

The claimant's theory of entitlement to SIBs for the second quarter is active participation in a vocational rehabilitation program (VRP). Section 408.1415(a)(1) provides that to be eligible to receive SIBs, a recipient must provide evidence satisfactory to the Texas Department of Insurance, Division of Workers' Compensation of active participation in a VRP conducted by the Department of Assistive and Rehabilitative Services (DARS) or a private vocational rehabilitation provider. 28 TEX. ADMIN. CODE § 130.101(8) (Rule 130.101(8)) defines VRP as any program, provided by DARS, a comparable federally-funded rehabilitation program in another state under the Rehabilitation Act of 1973, as amended, or a private provider of vocational rehabilitation services that is included in the Registry of Private Providers of Vocational Rehabilitation Services, for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a VRP. A VRP, also known as an Individualized Plan for Employment (IPE) at DARS, includes, at a minimum, an employment goal, any intermediate goals, a description of the 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.

Rule 130.102(d)(1) provides in 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:

(B) has actively participated in a [VRP] as defined in [Rule] 130.101 of this title (relating to [d]efinitions).

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).

In evidence was an IPE dated June 6, 2011, which the claimant had entered into with DARS. The employment goal was listed as production/laborer and services were to be provided from a specified consulting company as well as on the job training up to 4 months if deemed necessary (service provider listed as undecided) and counseling and guidance to assist the claimant in meeting her comprehensive needs. The claimant testified that she met with an individual from the consulting company one time only because the consultant told her that she should not list her restrictions on her resume. The claimant testified that she only applied for one job during the qualifying period and that the potential employer turned her down saying she had too many restrictions. Additionally, the claimant testified that she did not have any other job searches during the qualifying period. As previously noted, the qualifying period for the second quarter of SIBs was from June 2 through August 31, 2011.

The claimant testified that she went back to DARS and it was decided that her IPE be changed so she could attend school. A second IPE is in evidence dated August 11, 2011, and there are transcripts in evidence which reflect that the claimant attended a community college for the fall semester of 2011, in accordance with the terms of the second IPE (classes began on August 21, 2011, and ended on December 10, 2011). Although the claimant did not begin classes until August 21, 2011, she testified that she had to attend orientation and undergo testing prior to beginning classes. In evidence is correspondence from the claimant's counselor with DARS dated October 11, 2011. The counselor states the claimant became eligible for DARS services on June 3, 2011, and "has always maintained compliance with her services so far."

The hearing officer found that the claimant did demonstrate an active effort to obtain employment each week during the entire qualifying period by actively participating in a VRP as defined by Rule 130.101 and concluded that the claimant is entitled to SIBs for the second quarter. We note that the hearing officer's decision as listed in the decision and order is that the claimant is not entitled to SIBs for the second quarter. However, it is clear from the hearing officer's discussion, findings of fact and conclusions of law that she intended to decide the claimant is entitled to SIBs for the second quarter, making a typographical error.

The carrier contends in its appeal that there was no evidence at the CCH that the claimant was performing activities in compliance with the first IPE during weeks 2 through 10 of the qualifying period. We agree. There is evidence that the claimant secured funding as required by the terms of her second IPE in week 10 of the qualifying period. The claimant did not begin to attend classes under the terms of her second IPE until week 12 of the qualifying period. However, the claimant did not provide evidence at the CCH that she conducted an activity as required by her IPEs in each week of the qualifying period.

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 hearing officer's finding that during the qualifying period for the second quarter the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period by actively participating in a VRP as defined by Rule 130.101 is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's decision that the claimant is entitled to SIBs for the second quarter and render a new decision that the claimant is not entitled to SIBs for the second quarter.

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge