

APPEAL NO. 140039
FILED MARCH 3, 2014

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 December 3, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter, March 12 through June 10, 2013, and the fifth quarter, June 11 through September 9, 2013. The claimant appealed, disputing the hearing officer's determination of non-entitlement for the fourth and fifth quarters. The claimant argues the (respondent) carrier failed to offer any proof that it complied with the requirements of 28 TEX. ADMIN. CODE § 130.104(b)(5) (Rule 130.104(b)(5)). The claimant contends she was told by the adjuster for the carrier and her ombudsman that she was correctly completing her job search requirements. The carrier responded, urging affirmance of the disputed determinations of non-entitlement to fourth and fifth quarter SIBs.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury], 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 fourth quarter of SIBs was from November 28, 2012, through February 26, 2013; (4) during the qualifying period for the fourth quarter of SIBs, the claimant was unemployed; (5) the qualifying period for the fifth quarter of SIBs was from February 27 through May 28, 2013; (6) during the qualifying period for the fifth quarter of SIBs, the claimant was unemployed; and (7) the Texas Workforce Commission Local Workforce Development Board has determined five weekly job searches for the county the claimant lives in, [W] county, are required for unemployment compensation for the qualifying periods.

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.

Rule 130.102(d)(2) provides that:

- (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 claimant's theory of entitlement for SIBs for the fourth and fifth quarters, was based on an active work search effort documented by job applications each week during the qualifying period. It was undisputed that the claimant had applied for SIBs for the second and third quarters and that the carrier paid the claimant for the second and third quarters. The claimant's theory of entitlement for the second and third quarters was also based on an active work search effort documented by job applications. However, the evidence reflects that for the second and third quarter qualifying periods, the claimant performed three job searches per week rather than the five job searches required for [W] County as stipulated by the parties. As previously noted, it was undisputed that the carrier paid the claimant for the second and third quarters of SIBs.

The Applications for [SIBs] (DWC-52) for both the second and third quarter were in evidence. The DWC-52 for the second quarter does not provide the number of minimum weekly work search efforts for the claimant's county of residence. However,

the DWC-52 for the third quarter lists the claimant's county of residence as [W] and lists the number of minimum weekly work searches as three.

It is undisputed that the claimant continued to perform three job searches per week during the qualifying periods for the subsequent fourth and fifth quarters of SIBs currently in dispute. The claimant argued that she was unaware that five job searches were required for her county of residence. The claimant further argued that the carrier failed to offer any proof that it complied with the requirements of Rule 130.104(b)(5). Rule 130.104(b)(5) provides in part that:

With the first monthly payment of [SIBs] for any eligible quarter and with any insurance carrier determination of non-entitlement, the insurance carrier shall send the injured employee a copy of the [DWC-52] and the proper address to file the subsequent application. On the DWC-52 sent by the insurance carrier, the insurance carrier shall include: (5) the minimum number of work search efforts required by Rule 130.102(d)(1) and (f) of this title (relating to Eligibility for [SIBs]; Amount) during the next qualifying period.

The preamble to Rule 130.104 states adopted Rule 130.104(b) "requires the insurance carrier to advise the injured employee of the number of work search contacts required when it sends out the [DWC-52] prior to the beginning of a qualifying period." (34 Tex.Reg. 2145, 2009). Under Rule 130.104(b), the carrier is required to send a DWC-52 for a subsequent quarter with either the first payment for a quarter of SIBs to which the claimant is determined to be entitled or with the carrier's determination of non-entitlement for that quarter. See Appeals Panel Decision (APD) 050280, decided April 6, 2005, and APD 021776, decided August 28, 2002.

The applications for the fourth and fifth quarter were in evidence. Additionally, in evidence was correspondence from the carrier which denied claimant's entitlement to SIBs for the fourth and fifth quarters. Neither the fourth or fifth quarter DWC-52s provide the minimum number of work search efforts required by Rule 130.102(d)(1) and (f). The claimant testified that the insurance company never told her that she needed to apply for five jobs in each week of the qualifying period rather than three. The claimant was paid SIBs for the second and third quarter even though she only conducted three job searches per week rather than the five required for her county of residence. There was no evidence that the number of job searches required for [W] County had changed during any of the SIBs quarters for the claimant. The claimant testified that she was led to believe she was doing "the correct thing" because the carrier had paid her for the other two quarters and her husband had spoken with the carrier's adjuster, who told him

the claimant was doing everything correctly. The claimant testified that this conversation with the adjuster occurred after the second quarter of SIBs.

In its response the carrier contends that the claimant had the responsibility to know how many job searches she had to do during each week of the qualifying period and that “ignorance of the law is no excuse.” The carrier does not concede that it failed to provide the required number of job searches but states that if it did, such a failure is simply a compliance issue.

In APD 010617-s, decided May 15, 2001, the majority opinion stated that Rule 130.104(b) requires that the carrier complete the blanks on the DWC-52 provided the number of the applicable quarter, the dates of the qualifying period, the dates of the quarter, and the deadline for filing the application with the carrier before providing that form to the claimant. The majority opinion in APD 010617-s further stated it is axiomatic that accuracy on the part of the carrier in providing that information is required. In that case the carrier provided inaccurate dates for the qualifying periods in issue and the majority held that the carrier is precluded from benefitting from having done so. APD 010617-s went on to hold that as a prerequisite for advancing the argument that the claimant failed to document a weekly job search in accordance with Rule 130.102(e), the carrier is first required to comply with its obligation to accurately provide the information required in Rule 130.104(b) on the DWC-52.

Although APD 010617-s, *supra*, was decided prior to the current SIBs rules, we find the holding in that case remains applicable in the case on appeal. Neither the fourth or fifth quarter SIBs applications reflect that the number of job searches required for [W] County was provided by the carrier as required by Rule 130.104(b). Accordingly, we reverse the hearing officer’s determination that the claimant is not entitled to fourth and fifth quarter SIBs and render a new decision that the claimant is entitled to fourth and fifth quarter SIBs.

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

**CT CORPORATION SYSTEM
350 NORTH SAINT PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Carisa Space-Beam
Appeals Judge