

APPEAL NO. 142336
DECEMBER 5, 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 (CCH) was held on September 29, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 7th quarter and continuing through the 19th quarter; and (2) because the claimant was not entitled to SIBs for 12 consecutive months, including the 1st, 2nd, 3rd, 4th, 5th, and 6th quarters, as a matter of law, the claimant has permanently lost entitlement to additional income benefits for the compensable injury.

The claimant appealed the hearing officer's determinations, contending that because a district court judge issued an order that granted his motion for summary judgment in a lawsuit concerning a previous Decision and Order that disposed of the claimant's date of maximum medical improvement (MMI), impairment rating (IR), and 1st through 6th quarter SIBs, the hearing officer did not have jurisdiction on the issue of 7th through 19th quarter SIBs and permanent loss of entitlement of SIBs. The respondent (self-insured) responded, urging affirmance of the hearing officer's determinations. The self-insured contended the hearing officer retained jurisdiction in this case because the order granting the claimant's motion for summary judgment has not become final and is still pending in district court. We note that the Decision and Order incorrectly identifies the name of the self-insured's registered agent for service of process.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated in part that: (1) the claimant sustained a compensable injury on [Date of Injury]; (2) the date of statutory MMI is September 3, 2008; (3) the claimant's IR is 19%; and (4) the dates for the 7th quarter qualifying period of SIBs are December 16, 2010, through March 16, 2011; (5) the dates for the 8th quarter qualifying period of SIBs are March 17 through June 15, 2011; (6) the dates for the 9th quarter qualifying period of SIBs are June 16 through September 14, 2011; (7) the dates for the 10th quarter qualifying period of SIBs are September 15 through December 14, 2011; (8) the dates for the 11th quarter qualifying period of SIBs are December 15, 2011, through March 14, 2012; (9) the dates for the 12th quarter qualifying period of SIBs are March 15 through June 13, 2012; (10) the dates for the 13th quarter qualifying period of

SIBs are June 14 through September 12, 2012; (11) the dates for the 14th quarter qualifying period of SIBs are September 13 through December 12, 2012; (12) the dates for the 15th quarter qualifying period of SIBs are December 13, 2012, through March 13, 2013; (13) the dates for the 16th quarter qualifying period of SIBs are March 14 through June 12, 2013; (14) the dates for the 17th quarter qualifying period of SIBs are June 13 through September 11, 2013; (15) the dates for the 18th quarter qualifying period of SIBs are September 12 through December 11, 2013; and (16) the dates for the 19th quarter qualifying period of SIBs are December 12, 2013, through March 12, 2014. It was undisputed that the claimant's county of residence, Liberty County, requires a minimum of three work searches each week of the qualifying period.

JURISDICTION

The issues of MMI, IR, and whether the claimant is entitled to 1st through 6th quarter SIBs were determined at a prior CCH. The hearing officer in the prior CCH determined that: (1) the claimant's date of MMI is September 3, 2008; (2) the claimant's IR is 19%; and (3) the claimant is not entitled to 1st through 6th quarter SIBs. The claimant appealed the hearing officer's determination to the Appeals Panel; however, a written decision by the Appeals Panel on the claimant's appeal was not issued by the 45th day after the self-insured's response to the claimant's appeal was received by the Texas Department of Insurance, Division of Workers' Compensation (Division). The hearing officer's decision therefore became final regarding the self-insured's timely appeal pursuant to Section 410.204(c) and 28 TEX. ADMIN. CODE § 143.5(b) (Rule 143.5(b)).

The claimant subsequently filed a lawsuit in district court. The parties represented that an order was issued on September 23, 2014, granting the claimant's motion for summary judgment. The self-insured represented, and the claimant concedes in his appeal, that the lawsuit is pending in district court.

Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal under Subchapter F or G (relating to Judicial Review). In *Lopez v. Texas Workers' Comp. Ins. Fund*, 11 S.W.3d 490 (Tex. App.—Austin 2000, pet. denied), the court held that Section 410.205(b) clearly provides that the ultimate administrative ruling—whether granting or denying benefits—remains in effect until overturned by a final and enforceable judicial decision. The hearing officer correctly noted in the Discussion portion of the decision that the Appeals Panel's prior decision is binding until there is a final, non-appealable judgment in this case.

Furthermore, it is undisputed that the issues before the hearing officer in the instant case, which are entitlement to SIBs for the 7th through 19th quarters, and whether the claimant has permanently lost entitlement to SIBs, have not been

previously litigated. The Division has jurisdiction on the issues of entitlement to SIBs for the 7th through 19th quarters of SIBs and permanent loss of entitlement of SIBs.

PERMANENT LOSS OF ENTITLEMENT OF SIBS

The hearing officer's determination that the claimant has permanently lost entitlement to SIBs pursuant to Section 408.146(c) because he was not entitled to SIBs for 12 consecutive months is supported by sufficient evidence and is affirmed.

7TH AND 10TH THROUGH 19TH QUARTER SIBS

That portion of the hearing officer's determination that the claimant is not entitled to SIBs for the 7th quarter and the 10th through 19th quarters is supported by sufficient evidence and is affirmed.

8TH AND 9TH QUARTER SIBS

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.

One of the claimant's theories of entitlement to SIBs for the 8th and 9th quarters is based on a total inability to work. The hearing officer noted in the Discussion portion of the decision that the claimant relied on medical reports from (Dr. E) and (Dr. M) to explain why he had a total inability to work; however, the hearing officer explained that those reports were insufficient evidence of a total inability to work. The hearing officer found that the claimant had some ability to work during the 8th and 9th quarter qualifying periods. The hearing officer's findings are supported by sufficient evidence.

The claimant's other theory of entitlement to SIBs for the 8th and 9th quarters is based on an active work search effort every week of the qualifying periods in dispute. The hearing officer noted in the Discussion portion of the decision that "[t]he evidence indicated [that the] [c]laimant's Application for [SIBs] [(DWC-52)] for the [8th] and the [9th] quarters documents at least three job search contacts during each week of the entire qualifying periods. . . ." The hearing officer found in Finding of Fact No. 4.a. that

during the 8th and 9th quarter qualifying periods the claimant demonstrated an active effort to obtain employment each week during the entire qualifying periods.

In evidence are the claimant's DWC-52s for the 8th and 9th quarters. Attached to the claimant's DWC-52s are Detailed Job Search/Employer Contact Log sheets documenting the claimant's job searches during the 8th and 9th quarter qualifying periods. As noted above, it was undisputed that the claimant's county of residence, Liberty County, requires a minimum of three work searches each week of the qualifying period. A review of the log sheets for the 8th quarter qualifying period shows that, although the claimant listed a minimum of three job searches for weeks 1 through 9 and 11 through 12, the claimant did not list any job searches during the 10th and 13th weeks. That portion of Finding of Fact No. 4.a. that during the 8th quarter qualifying period the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period is not supported by the evidence. We therefore reverse Finding of Fact No. 4.a. with respect to the 8th quarter. Because the evidence established that during the 8th quarter qualifying period of SIBs the claimant had an ability to work and the claimant did not make a minimum of three job searches each week of the 8th quarter qualifying period, we affirm that portion of the hearing officer's determination that the claimant is not entitled to SIBs for the 8th quarter.

A review of the log sheets for the 9th quarter qualifying period shows that the claimant made a minimum of three job searches each week of the entire qualifying period. The hearing officer's finding that during the 9th quarter qualifying period the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period is supported by the evidence.

However, the hearing officer also found that the claimant did not actively participate in job search efforts conducted through the Texas Workforce Commission (TWC), and that the claimant did not demonstrate that he had reasonable grounds for failure to comply with the work search requirements of Rule 130.102(d).

Rule 130.102(d)(1) provides, in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least the following work search requirement each week during the entire qualifying period: (D) has performed 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 TWC

which are required for unemployment compensation in the injured employee's county of residence pursuant to the TWC Local Workforce Development Board requirements.

The preamble to Rule 130.102 discusses Rule 130.102(f), Work Search Efforts, and states that "[t]he new subsection (f) includes language regarding the required documentation an injured employee must provide to sufficiently establish active participation in work search efforts and active work search efforts" and that "[a]s a result of multiple comments received seeking clarification, language was added to subsection (f) to clarify that work search efforts would be consistent with job applications or the work search contacts established by TWC." (34 Tex. Reg. 2139, 2009).

The preamble to Rule 130.102(d)(1)(D) clarifies that "work search efforts" encompass both job applications and work search contacts as described by TWC rules. (34 Tex. Reg. 2145, 2009). Further, the following public comment and Division response to Rule 130.102(d)(1)(D), states:

Comment: Commenter requests clarification of the phrase "has performed active work search efforts documented by job applications" that requires an injured employee, who engages in a job search outside of TWC in an effort to establish SIBs entitlement, to document those work search efforts by submitting completed job applications and that other job search activities will not be sufficient to establish SIBs entitlement.

Agency Response: This Division clarifies that, as set forth in adopted § 130.102(f), "work search efforts" encompasses both job applications and work search contacts as described by the TWC rules.

In the instant case, it is clear from the hearing officer's decision that she believed the claimant made at least three job search contacts during each week of the entire qualifying period for the 9th quarter. However, the hearing officer indicates in her findings of fact that the claimant did not comply with the work search requirements of Rule 130.102(d) because he did not actively participate in job search efforts conducted through the TWC. The preamble to Rule 130.102(d)(1)(D) clarifies that "work search efforts" encompass both job applications and work search contacts as described by TWC rules. The DWC-52 for the 9th quarter of SIBs in evidence reflects that the claimant met the work search efforts requirement by making at least three work search contacts for each week during the entire qualifying period in dispute. See Appeals Panel Decision (APD) 100229-s, decided April 30, 2010, and APD 101430, decided November 15, 2010. Although the claimant met the criteria for entitlement to SIBs for the 9th quarter, the claimant is no longer entitled to income benefits under Section 408.146(c) because he was not entitled to SIBs for 12 consecutive months (nonentitlement to SIBs for the 1st through 6th quarters, and nonentitlement to 10th through 19th quarters). Accordingly, we affirm the hearing officer's determination that

the claimant is not entitled to SIBs for the 9th quarter because the claimant has permanent loss of SIBs entitlement under Section 408.146(c).

SUMMARY

We affirm the hearing officer's determination that the claimant has permanently lost entitlement to SIBs pursuant to Section 408.146(c) because he was not entitled to SIBs for 12 consecutive months.

We affirm the hearing officer's determination that the claimant is not entitled to SIBs for the 7th through 19th quarters.

We reverse that portion of Finding of Fact No. 4.a. that during the qualifying period for the 8th quarter, the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period, and we render a new decision by striking that portion of Finding of Fact No. 4.a.

The true corporate name of the insurance carrier is **TEXAS ALLIANCE OF ENERGY PRODUCERS WORKERS' COMPENSATION SELF-INSURED GROUP TRUST** and the name and address of its registered agent for service of process is

**TEXAS DEPARTMENT OF INSURANCE, COMMISSIONER
333 GUADALUPE
AUSTIN, TEXAS 78701.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge