

APPEAL NO. 150797
FILED JUNE 1, 2015

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 March 23, 2015, in San Antonio, 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 sixth quarter, January 16 through April 16, 2015. The appellant (carrier) appealed the hearing officer's determination of the sixth quarter of SIBs entitlement based on sufficiency of the evidence. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

SIXTH QUARTER SIBS

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 his impairment income benefits; (3) the qualifying period for the sixth quarter of SIBs was from October 4, 2014, through January 2, 2015; (4) during the qualifying period for the sixth quarter of SIBs, the claimant was unemployed; (5) during the qualifying period for the sixth quarter of SIBs, the minimum number of job applications or work search contacts for Kendall County was five contacts per week; (6) the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor to determine the claimant's ability to return to work for the purposes of SIBs was (Dr. A); and (7) on November 6, 2014, Dr. A, designated doctor, determined that the claimant was able to return to work in a sedentary capacity for the period of September 16, 2013, through the present.

The claimant testified that he injured his left knee in the course and scope of his employment on [date of injury]. The claimant had a left knee surgery on May 14, 2010. The claimant testified that he was in compliance with his Individualized Plan for Employment (IPE) by attending school full-time, and that his IPE did not require him to look for work. The claimant testified that at the end of the fall semester, he studied math and registered for the spring semester. Furthermore, the claimant testified that due to scar tissue he is unable to sit in one position or walk for a long time, and has to keep his knee propped up during the day.

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. 28 TEX. ADMIN. CODE §§ 130.100-130.109 (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.

The claimant's theory of entitlement to SIBs for the sixth 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 Division of active participation in a VRP conducted by the Department of Assistive and Rehabilitative Services (DARS) or a private vocational rehabilitation provider. 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 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 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 [VRP] 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 (TWC);

(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.

In evidence are three IPEs dated September 6, 2013, December 3, 2014, and January 14, 2015, which the claimant entered into with DARs. The employment goal in each of the IPEs is to earn a degree. The IPEs dated December 3, 2014, and January 14, 2015, encompass the qualifying period in dispute. The claimant's responsibilities were to maintain and complete a full-time course load, and obtain and maintain employment after earning a bachelor's degree.

As previously noted, the qualifying period for the sixth quarter began from October 4, 2014, through January 2, 2015, and the parties stipulated that during the qualifying period for the sixth quarter of SIBs, the claimant was unemployed. The record reflects that the claimant did not attend school during the winter break from December 22, 2014, through January 2, 2015, which encompasses weeks 12 and 13 of the qualifying period for the sixth quarter. The claimant testified that during weeks 12 and 13, he used that time to study and register for the next semester.

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).

Rule 130.102(d)(2) provides that 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 made a specific written finding regarding whether the claimant had reasonable grounds for failing to make five or more job contacts during each week of the qualifying period for the sixth quarter of SIBs. In the Discussion section of her decision and order, the hearing officer stated:

While it is apparent that the [c]laimant did not document any work search efforts for weeks 12 and 13, December 20, 2014, through January 2, 2015, he was still actively involved in the IPE, and he demonstrated that he had reasonable grounds for failing to comply with the work search requirements. . . . Based on [the] [c]laimant's limited abilities and the short period of time between semesters, the evidence is sufficient to prove that [the] [c]laimant had reasonable grounds for failing to comply with the work search requirements for weeks 12 and 13. Although [the] [c]laimant did not successfully complete all his classes for the fall semester, he was actively enrolled and participating in 12 hours of credit and maintained a GPA over 2.0, in compliance with his IPE requirements.

The preamble to Rule 130.102 states that Rule 130.102(d)(2) was added to confirm that hearing officers would continue to retain discretion in determining if an injured employee had demonstrated reasonable grounds for failure to meet at least one of the work search requirements in this section during any week during the qualifying period. (34 Tex. Reg. 2140, 2009).

In Appeals Panel Decision (APD) 100615-s, decided July 23, 2010, the hearing officer determined the claimant made a reasonable effort to fulfill her obligations in accordance with the terms of her IPE for the SIBs quarter in dispute, however the claimant did not look for work in week 12 of the qualifying period for the SIBs quarter in dispute. In that case, the claimant presented no evidence of any other active efforts during week 12 to meet the work search requirements of Rule 130.102(d)(1). The Appeals Panel reversed the hearing officer's determination and rendered a new decision that the claimant was not entitled to SIBs for the quarter in dispute. Similarly, in APD 101913, decided February 18, 2011, the claimant contended that she did not have to perform the required work search requirements of Rule 130.102 because she was satisfactorily participating in her IPE during the qualifying period and was not required nor expected to attend class or look for work during the summer months of the qualifying period for the sixth quarter of SIBs. The only activity the claimant performed each week of the qualifying period was self-study of a math workbook which was not part of her IPE. In that case, the Appeals Panel stated that the claimant did not have reasonable grounds for failing to comply with the work search requirements of Rule 130.102, because DARS did not require the claimant to attend summer school or look for employment during the summer. The Appeals Panel reversed the hearing officer's determination and rendered a new decision that the claimant is not entitled to SIBs for the quarter in dispute.

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 the instant case, the hearing officer determined the claimant demonstrated reasonable grounds for failing to document five job contacts per week for weeks 12 and 13, beginning December 20, 2014, through January 2, 2015, although it is undisputed that the claimant did not look for work during weeks 12 and 13 and no evidence was offered that the claimant performed any other activity in connection with his IPE for weeks 12 and 13 of the qualifying period in dispute. Furthermore, the claimant presented no evidence of any other active efforts during weeks 12 and 13 to meet the work search requirements of Rule 130.102(d)(1). Under the facts of this case, we do not agree with the hearing officer that because the claimant had limited abilities and the short period of time between semesters, the evidence is sufficient to prove that the claimant had reasonable grounds for failing to comply with the work search requirements for weeks 12 and 13.

Accordingly, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the sixth quarter and render a new decision that the claimant is not entitled to SIBs for the sixth quarter.

SUMMARY

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

The true corporate name of the insurance carrier is **ILLINOIS NATIONAL 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge