

APPEAL NO. 170747  
FILED JUNE 14, 2017

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 March 6, 2017, 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, September 13 through December 12, 2016.

The appellant (carrier) appeals the hearing officer's determination as being legally in error and contrary to the evidence. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The parties stipulated in part that: (1) on (date of injury), the claimant sustained a compensable injury which resulted in an impairment rating (IR) of 15% or higher; (2) the claimant has not commuted any portion of the impairment income benefits; and (3) the minimum number of job applications or work search contacts required pursuant to 28 TEX. ADMIN. CODE § 130.102(f) (Rule 130.102(f)) is three per week. Although no stipulation was obtained from the parties regarding the qualifying period for the second quarter of SIBs, the hearing officer's finding of fact that the qualifying period for such quarter was from June 1 through August 30, 2016, is undisputed. Additionally, we note that in her Decision and Order, the hearing officer indicates that Claimant's Exhibits C-1 through C-11 were admitted into evidence when, in fact, Claimant's Exhibit C-1 lists Exhibit C-6 as "omitted" and, in fact, no Exhibit C-6 is in the record.

No testimony was offered during the CCH. Although it is undisputed that the claimant failed to demonstrate an active effort to obtain employment by meeting at least one or any combination of the work search requirements contained in Rule 130.102(d)(1) each week during the entire qualifying period, the claimant argued his entitlement to SIBs for the second quarter based upon his meeting work search requirements under Rule 130.102(f) during each week of the qualifying period following his receipt from the carrier of a blank Application for [SIBs] (DWC-52) listing the correct dates of the second quarter and the second quarter qualifying period.

On February 12, 2016, the carrier initially mailed to the claimant a blank DWC-52 for the second quarter based upon the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor certification of

maximum medical improvement (MMI) on October 31, 2014, and assignment of an IR of 22%. This initial second quarter DWC-52 listed the dates of the quarter as beginning on May 7, 2016, and ending on August 5, 2016, and the dates of the qualifying period as beginning on January 24, 2016, and ending on April 23, 2016.

Thereafter, on April 20, 2016, a Division hearing officer entered a Decision and Order determining that the correct MMI date was August 3, 2015, and the correct IR was 15% as certified by the carrier's choice of physician. The carrier, on June 20, 2016, mailed a second DWC-52 to the claimant which listed the correct dates of the second quarter and second quarter qualifying period based upon the hearing officer's decision dated April 20, 2016. The subsequent DWC-52 for the second quarter was received by the claimant on June 27, 2016, more than three weeks after the beginning of the qualifying period. On September 22, 2016, the claimant filed a copy of the initial DWC-52 with the carrier which reflected that the claimant had performed one work search contact during the initial week of the correct qualifying period (June 1, 2016, through June 7, 2016) and the fourth week of the qualifying period (June 22, 2016, through June 28, 2016) but had performed at least the required number of work search contacts for the remaining weeks of the qualifying period.

Rule 130.104(b) provides, in part, that a 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 nonentitlement for that quarter. See Appeals Panel Decision (APD) 021776, decided August 28, 2002. The duty of a carrier to send the application arises only with either the first payment of SIBs or a determination of nonentitlement for any quarter. See APD 020047, decided February 21, 2002. It is undisputed that the Division determined the claimant was not entitled to SIBs for the first quarter. Nevertheless, the hearing officer clearly based her determination that the claimant was entitled to SIBs for the second quarter upon her finding that the carrier failed to comply with its obligation under Rule 130.104(b) to provide the claimant with a DWC-52 containing accurate information regarding the dates of the qualifying period and her further finding that the claimant performed the required number of work search contacts after he received the second DWC-52 on June 27, 2016, containing the correct dates of the qualifying period at issue. We disagree and hold that the hearing officer erred, as a matter of law, in basing her decision on the carrier's failure to send a DWC-52 form for the second quarter as required by Rule 130.104(b), because no such obligation was triggered under Rule 130.104(b), since the carrier never sent a monthly payment for a SIBs quarter nor did it make a determination of nonentitlement after the Division's initial nonentitlement determination for the first quarter.

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. As mentioned earlier, it is undisputed that the claimant failed to demonstrate an active effort to obtain employment by meeting at least one or any combination of the work search requirements contained in Rule 130.102(d)(1) each week during the entire qualifying period; however, the hearing officer made no finding in her Decision and Order regarding whether the claimant had reasonable grounds under the evidence presented for failing to comply with work search requirements in weeks one and four of the qualifying period for the second quarter.

Accordingly, we reverse the hearing officer's decision that the claimant is entitled to SIBs for the second quarter, September 13 through December 12, 2016, and we remand the issue of entitlement to SIBs for the second quarter to the hearing officer to consider the evidence, make findings of fact concerning whether the claimant had reasonable grounds for failing to comply with the work search requirements under Rule 130.102 during each week of the qualifying period for the second quarter of SIBs and make a determination concerning whether the claimant is entitled to SIBs for the second quarter.

### **REMAND INSTRUCTIONS**

On remand the hearing officer is to consider all of the evidence, make findings of fact regarding whether the claimant has demonstrated reasonable grounds for failing to comply with the work search requirements during each week of the qualifying period for the second quarter of SIBs under Rule 130.102, and render conclusions of law and a decision regarding whether the claimant is entitled to SIBs for the second quarter consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT  
6210 EAST HIGHWAY 290  
AUSTIN, TEXAS 78723.**

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K. Eugene Kraft  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge