

APPEAL NO. 100229-s
FILED APRIL 30, 2010

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 February 8, 2010. The disputed issue before the hearing officer was:

- (1) Is the appellant (claimant) entitled to supplemental income benefits (SIBs) for the 10th quarter, November 3, 2009, through February 1, 2010?

The hearing officer determined that the claimant is not entitled to SIBs for the 10th quarter, from November 3, 2009, through February 1, 2010. The claimant appealed, contending that based on documentary evidence he demonstrated an active work effort to obtain employment within his ability to work by making the minimum work effort searches each week of the qualifying period in dispute. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

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 [Texas Department of Insurance, Division of Workers' Compensation (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 parties stipulated that: (1) on _____, the claimant sustained a compensable injury that resulted in a 20% impairment rating; (2) the claimant did not commute any portion of his impairment income benefits; (3) the qualifying period for the 10th quarter of SIBs began on July 22, 2009, and continued through October 20, 2009; (4) the 10th quarter of SIBs began on November 3, 2009, and continued through February 1, 2010; and (5) the minimum number of weekly work search efforts for (County) is 5.

The claimant's theory of entitlement to SIBs for the 10th quarter is based on an active work search effort every week of the qualifying period in dispute. Section 408.1415(a)(3) provides in part that to be eligible to receive SIBs, a recipient must provide evidence satisfactory to the Division of active work search efforts documented

by job applications submitted by the recipient. Section 408.1415(b)(2) provides that in adopting rules under this section, the commissioner shall define the number of job applications required to be submitted by a recipient to satisfy the work search requirements. 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 Texas Workforce Commission (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). Further, the preamble states that “[a]mendments also add language to subsection (f) to clarify that work search efforts are consistent with job applications or the work search contacts established by TWC and that if the work search requirements changed during a qualifying period, the injured employee would be responsible for the lesser of the two requirements.” (34 Tex. Reg. 2140, 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.¹ (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.

¹ The preamble states that TWC has implemented rules and provides guidelines that describe the types of activities that may constitute a work search contact. See 40 Texas Administrative Code (TAC) § 815.28. (34 Tex. Reg. 2139, 2009). 40 TAC § 815.28(b)(4) provides examples of the types of activities that may constitute a work search contact for purposes of a productive search for suitable work.

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 evidence is an Application for [SIBs] (DWC-52) for the 10th quarter of SIBs, which lists that the claimant made 5 work searches for each week, totaling 65 work searches, for the qualifying period in dispute, and attached a detailed job search listing that shows the employer’s name and telephone number for each of the 65 work searches for the qualifying period in dispute. The claimant testified that out of the 65 work searches with potential employers he listed on his DWC-52, he made about 4 to 5 job applications with potential employers. The claimant testified that he conducted his search for employment through newspaper and in-store employment listings. In the Background Information section of the decision, the hearing officer states that the “[c]laimant, who has an ability to work, did not return to work, did not actively participate in a vocational rehabilitation program, did not actively participate in work search efforts conducted through the [TWC], and did not document his active work search efforts by job applications. Claimant’s search for work was limited to talking with 65 potential employers (5 each week) and leaving an application for work with only 5 employers.” The hearing officer found that the claimant failed to demonstrate an active effort to obtain employment during the qualifying period for the 10th quarter of SIBs.

In the instant case, based on the hearing officer’s statements in the Background Information section, she believed the claimant made 65 work search efforts, however since the claimant only made 5 job applications, she found that the claimant did not meet the requirements of Rule 130.102(d)(1)(D). Although Rule 130.102(d)(1)(D) requires that the injured employee for each week during the entire qualifying period “performed active work search efforts documented by job applications,” 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 10th quarter of SIBs in evidence, along with the claimant’s testimony, reflects that the claimant met the work search efforts requirement by making job applications and work search contacts for each week during the entire qualifying period in dispute. Accordingly, we reverse the hearing officer’s decision that the claimant is not entitled to SIBs for the 10th quarter and we render a new decision that the claimant is entitled to SIBs for the 10th quarter.

The true corporate name of the insurance carrier is **FIDELITY & GUARANTY 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