

APPEAL NO. 100615-s
FILED JULY 23, 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 (CCH) was held on April 16, 2010. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the eighth quarter, January 24 through April 24, 2010, and that the claimant has not permanently lost entitlement to SIBs pursuant to Section 408.146(c). The appellant (carrier) appealed the hearing officer's determination of the eighth quarter of SIBs entitlement as well as the determination that the claimant has not permanently lost entitlement to SIBs pursuant to Section 408.146(c). The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

EIGHTH QUARTER SIBS

The parties stipulated that: (1) on _____, the claimant sustained a compensable injury with a 15% impairment rating; (2) the claimant has not commuted any portion of her impairment income benefits; (3) the qualifying period for the eighth quarter of SIBs began on October 12, 2009, and ended on January 10, 2010; and (4) the minimum number of job applications or work search contacts pursuant to 28 TEX. ADMIN. CODE § 130.102(f) (Rule 130.102(f)) required for the eighth quarter qualifying period is five per week. The claimant testified that she injured her neck, back, and left arm in a motor vehicle accident on _____, while in the course and scope of her employment. Additionally, she testified that she has had surgery on her left shoulder and her back.

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 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 eighth 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 Individual Plan for Employment (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 definitions);
- (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 was an IPE dated May 4, 2009, which the claimant had entered into with DARS. The employment goal in the IPE was identified as a social service worker and the services to be provided by DARS included counseling and guidance, aid with a monthly bus pass, and assistance with tuition, books and supplies for college courses. The start dates of the services to be provided began May 4, 2009, and are anticipated to end on May 4, 2014. The IPE encompasses the entire qualifying period of the eighth quarter. The claimant's responsibilities in achieving the employment goal included: maintain at least a 2.0 grade point average and 12 credit hours each semester, complete a Pell Grant, submit grades to her counselor, obtain and maintain employment once school is completed, follow doctor recommendations, apply for comparable services/benefits identified to assist the claimant in reaching her employment goal, and follow up on job leads once school is completed. In evidence is correspondence from a DARS representative dated December 22, 2009, which notes that an IPE was

developed for the claimant, and that the claimant was actively participating with DARS from December 23, 2008, through December 22, 2009.

As previously noted, the qualifying period for the eighth quarter began on October 12, 2009, and ended on January 10, 2010. The evidence reflects that the claimant was awarded a Pell Grant in December of 2009, and that she completed 12 credit hours in the fall semester beginning August 24, 2009. The record reflects that one of the classes ended on October 15, 2009, but that the other three classes did not end until December 10, 2009. The evidence further reflects that the claimant enrolled in 12 credit hours for the spring semester beginning January 19, 2010.

The claimant attended school the first 9 weeks of the qualifying period. The claimant documented 7 job searches in week 10 of the qualifying period, 8 job searches in week 11 of the qualifying period, and 14 job searches in week 13 of the qualifying period. However, the claimant did not document any job searches for week 12 of the qualifying period, December 28, 2009, to January 3, 2010.

The carrier contends in its appeal that Rule 130.102 requires active efforts in each week of the qualifying period and that because the claimant was neither attending school nor searching for work in week 12 of the qualifying period she did not establish that she was entitled to SIBs for the eighth quarter. The claimant did not present any evidence that she performed any other activity in connection with her IPE in week 12 of the qualifying period. The hearing officer determined that the claimant made a reasonable effort to fulfill her obligations in accordance with the terms of her IPE for the eighth quarter.

As previously noted 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). Although the hearing officer determined the claimant made a reasonable effort to fulfill her obligations in accordance with the terms of her IPE for the eighth quarter, it is undisputed that the claimant did not look for work in week 12 of the qualifying period for the eighth quarter and as previously noted no other evidence was offered that she performed any other activity in connection with her IPE in week 12 of the qualifying period for the eighth quarter. Further, 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). Accordingly, the hearing officer’s decision is reversed.

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. Although the hearing officer did not make a specific written finding regarding whether the claimant had reasonable grounds under the evidence presented for failing to comply with work search requirements in week 12 of the qualifying period for the eighth quarter in his decision and order, he discussed this issue on the record. The hearing officer stated on the record that in his opinion the claimant did not present evidence of reasonable grounds for failing to search for work in week 12 if it is determined that the claimant had to perform an activity in week 12 since she was not attending classes or performing any other activity under the provisions of the IPE. The preamble 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). There is sufficient evidence to support the hearing officer's stated finding on the record at the CCH that the claimant did not have reasonable grounds for failing to comply with work search requirements in week 12 of the qualifying period for the eighth quarter. We reverse the hearing officer's determination that the claimant is entitled to SIBs for the eighth quarter and render a new determination that the claimant is not entitled to SIBs for the eighth quarter.

PERMANENT LOSS OF SIBS ENTITLEMENT

The hearing officer's determination that the claimant has not permanently lost entitlement to SIBs pursuant to Section 408.161(c) is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's determination that the claimant has not permanently lost entitlement to SIBs pursuant to Section 408.161(c).

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

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge