

APPEAL NO. 101722
FILED JANUARY 12, 2011

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 October 13, 2010. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 15th quarter and that the appellant (carrier) did not waive its right to contest the claimant's entitlement to SIBs for the 15th quarter by failing to timely request a benefit review conference (BRC).

The carrier appealed, contending that the claimant is not entitled to SIBs for the 15th quarter. The claimant responded, urging affirmance. The hearing officer's determination that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the 15th quarter by failing to timely request a BRC was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that: on _____, the claimant sustained a compensable injury, which resulted in a final impairment rating of 15% or greater; the claimant had not commuted any portion of his impairment income benefits; and the qualifying period for the 15th quarter was from April 9 through July 8, 2010. It was undisputed that the minimum number of weekly work search efforts for the claimant's county of residence is five.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. 28 TEX. ADMIN. CODE § 130.101(4) (Rule 130.101(4)) provides in part, that a qualifying period that begins on or after July 1, 2009, is subject to Rules 130.100-130.109 effective July 1, 2009.

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 vocational rehabilitation program 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;

- (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.

The claimant's theory of entitlement to SIBs for the 15th quarter was an active work search effort documented by job applications (Rule 130.102(d)(1)(D)). The hearing officer noted in the Background Information portion of the decision that "the [c]laimant's testimony with the evidence of record is persuasive that the [c]laimant met the requirements of Rule 130.102(d)(1)(D)." The hearing officer further noted in the Background Information portion of the decision that the claimant made at least five job searches for each week of the qualifying period.

A review of the Detailed Job Search/Employer Contact Log of the Application for [SIBs] (DWC-52) for the 15th quarter qualifying period lists 84 job contacts. The claimant alleges in his response that he made 89 job contacts, however, the DWC-52 in evidence lists 94 job contacts but 10 job contacts are outside the qualifying period. Week one of the qualifying period began on April 9 and ended on April 15, 2010. Week three of the qualifying period (April 23 through April 29, 2010) lists only 4 job contacts. The hearing officer's comment that the claimant's job search documentation indicates that he performed at least five work search efforts during each week of both qualifying periods is not supported by the evidence.

As previously noted, 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 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). The claimant presented no evidence of any other active work search efforts or compliance with a Department of Assistive and Rehabilitative Services Individualized Plan for Employment specifically for week three of the 15th quarter qualifying period.

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).

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the 15th quarter as being so against the great weight and preponderance of the

evidence as to be clearly wrong and manifestly unjust. We render a new decision that the claimant is not entitled to SIBs for the 15th quarter.

The true corporate name of the insurance carrier is **OLD REPUBLIC 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge