APPEAL NO. 101913
FILED FEBRUARY 18, 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 November 18, 2010. The hearing officer resolved the sole disputed issue before her by determining that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the sixth quarter. The appellant (self-insured) appealed the hearing officer's determination of the sixth quarter entitlement for SIBs. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

In unappealed findings of fact, the hearing officer determined that: (1) on _____, the claimant sustained damage or harm to the physical structure of her body while she was within the course and scope of her employment; (2) as a result of her compensable injury of _____, the claimant has an impairment rating equal to or greater than 15%; (3) the claimant did not elect to commute any portion of the impairment income benefits payable to her on account of her compensable injury of _____; (4) during the qualifying period preceding the sixth SIBs quarter, the claimant did not return to work earning at least 80% of her pre-injury average weekly wage; (5) that the claimant's unemployment during the qualifying period preceding the sixth SIBs quarter was a direct result of the impairment attributable to the claimant's compensable injury of _____; and (6) the claimant did not make five or more job contacts during each week of the qualifying period preceding the sixth SIBs quarter. A review of the Texas Department of Insurance, Division of Workers' Compensation (Division) records indicate that the qualifying period for the sixth quarter of SIBs is from May 28 through August 26, 2010.

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. 28 TEX. ADMIN. CODE § 130.101(8) (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;

(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 April 21, 2009, which the claimant had entered into with DARS. The employment goal in the IPE was identified as social work and the services to be provided by DARS included "[counseling & guidance] services leading to employment," counseling, tuition, assistance with the purchase of books not to exceed $400.00 per semester, and services leading to employment arranged with Workforce Solutions. The start dates of the services to be provided began April 21, 2009, and are anticipated to end on December 31, 2014. The IPE encompasses the entire qualifying period of the sixth 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 application, submit grades to her counselor, obtain and maintain employment, and participate in "JQT" (i.e. job seeking skills, interview skills, etc.) and job placement activities.

In evidence is correspondence from a DARS representative dated August 31, 2010, which notes that an IPE was developed for the claimant, and that the claimant was actively participating with DARS from May 28 through August 27, 2010, and DARS does not require its consumers to attend summer school. It further stated that the claimant reported to her counselor that she spent her summer sharpening her math skills in preparation for the fall 2010 school semester. Further, in evidence is correspondence from a DARS representative dated October 7, 2010, which notes that an IPE was developed for the claimant, and that the claimant was actively participating with DARS from May 25 through August 27, 2010, and that the claimant was not

required to attend summer school or to seek employment during the summer when she is not in school. DARS also stated that job placement services will be provided once the claimant completes her training and at this time, the claimant needs retraining to rejoin the workforce.

As previously noted, the qualifying period for the sixth quarter began on May 28, 2010, and ended on August 26, 2010. The evidence reflects that the claimant completed 12 credit hours in the spring school semester, which began on January 11, 2010, and continued to May 12, 2010, and that on July 21, 2010, the claimant registered online for 12 credit hours in the 2010 fall semester, which began on August 23, 2010, and continued to December 15, 2010. The claimant testified that she did not attend school during the sixth quarter qualifying period.

The claimant testified that she did not look for work or attend summer school during the qualifying period for the sixth quarter of SIBs because her DARS counselor did not require it. Rather, the claimant testified that her DARS counselor wanted her to study and review the math she had learned in the spring semester in order to prepare for her upcoming math course in the 2010 fall semester. In evidence is a typed-written log prepared by the claimant and dated May 25 through August 27, 2010, in which the claimant noted her near daily activities, including self-study of a math workbook; symptoms of pain; or laying on the couch.

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).

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:

> Specifically, [the] [c]laimant herein has presented evidence that her DARS counselor did not expect her to make job contacts during the summer, and also has presented a description of her daily activities during the applicable qualifying period, evidence that apparently was lacking in the case authority [Appeals Panel Decision 100615-s, decided July 23, 2010] that [the] [s]elf-insured has cited. [The] [c]laimant therefore has shown that during each week of the qualifying period, she had reasonable

> grounds for failing to make any required job contacts, in that she was complying with the directive of her DARS counselor by studying independently when she was physically able to do so.

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 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 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 claimant's IPE covered the entire qualifying period. The only activity the claimant performed each week of the qualifying period was self-study of a math workbook. The self-study was not part of her IPE. We cannot agree under the facts of this case that because DARS did not require the claimant to attend summer school or look for employment during the summer that the claimant has reasonable grounds for failing to comply with the work search requirements of Rule 130.102. Therefore, the hearing officer's determinations that during the qualifying period preceding the sixth SIBs quarter, the claimant was enrolled in and satisfactorily participating in a full-time VRP sponsored by DARS[1] and that the claimant had reasonable grounds for failing to make five or more job contacts during each week of the qualifying period preceding the sixth SIBs quarter, are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's decision 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.

[1] We note that the hearing officer used language of "satisfactorily participating" in a VRP, which was a criteria for entitlement under the old SIBs rules. However, the Discussion indicates that the hearing officer was applying the criteria of active participation in a VRP for entitlement required under the new SIBs rules.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Carisa Space-Beam
Appeals Judge