APPEAL NO. 101929
FILED FEBRUARY 28, 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 29, 2010. Regarding the sole issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the seventh quarter. The appellant (carrier) appeals the hearing officer's determination, contending the claimant's inability to work during the disputed quarter is not as a direct result of his compensable injury, and that the claimant did not demonstrate an active effort to obtain employment each week during the entire qualifying period. The claimant responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: the claimant sustained a compensable injury on _____, that resulted in an impairment rating of 15% or greater; the claimant did not commute any portion of the impairment income benefits; and the qualifying period dates for the seventh quarter are from March 13 through June 11, 2010.

DIRECT RESULT

The hearing officer's finding that during the qualifying period for the seventh quarter the claimant was unemployed as a direct result of the impairment from the compensable injury is supported by sufficient evidence and is affirmed.

ACTIVE PARTICIPATION WITH THE DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES (DARS) AND JOB SEARCHES

The claimant's theory of entitlement to SIBs for the seventh quarter is active participation in a vocational rehabilitation program (VRP) sponsored by DARS. Section 408.1415(a)(1) provides that to be eligible to receive SIBs, a recipient must provide evidence satisfactory to the Texas Department of Insurance, Division of Workers' Compensation of active participation in a VRP conducted by 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 (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 1, 2009, which the claimant had entered into with DARS. The employment goal in the IPE was identified as dispatcher and the services to be provided by DARS included counseling and guidance and a $30.00 weekly maintenance for job search related expenses for six weeks. Also included were job placement and job development services provided by Texans for Work. The start dates of the services to be provided began May 1, 2009, and continued through May 1, 2010. The claimant's responsibilities in achieving the employment goal included following up on job leads; obtaining and maintaining employment; and following doctor recommendations.

As previously noted, the qualifying period for the seventh quarter began on March 13, 2010, and ended on June 11, 2010. It was undisputed by the parties that the number of weekly job searches required in [county name], the county in which the claimant resided during the qualifying period in dispute, is three per week. In evidence was a Detailed Job Search/Employer Contact Log of the Application for [SIBs] (DWC-52). In the log the claimant documented at least three job searches for each of the weeks during the qualifying period except for the first week, March 13 through March 19, 2010, and the final week, June 5 through June 11, 2010; both of those weeks listed no job searches.

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).

The hearing officer noted the following in the Background Information:

> However, although the IPE does indicate that the end date was May 1, 2010, the credible evidence incidates that the plan remained in effect through the entire qualifying period. Specifically, DARS provided a weekly stipend of $30 for job search expenses. Claimant also met with his counselor several times during this period and went to the [TWC] as required under the IPE. The claimant met his burden of proof to show that he is entitled to [SIBs] for the seventh quarter.

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).

Under the facts as presented in this case, the hearing officer's finding that during the qualifying period for the seventh quarter the claimant was enrolled in and satisfactorily participating in a full-time VRP sponsored by DARS is against the great weight and preponderance of the evidence. The only evidence presented by the claimant that his IPE was extended beyond May 1, 2010, was his testimony that he continued to receive the weekly $30.00 stipend through the end of June 2010; his testimony that he met with a DARS counselor during the qualifying period; and a letter from DARS dated June 28, 2010, stating that an IPE was developed and the claimant was actively participating from March 13 through June 30, 2010, which were dates provided by the claimant and correspond to the SIBs qualifying period. We cannot agree under the facts of this case that the claimant's IPE was extended beyond the end date of May 1, 2010, to cover the entire qualifying period. Because the IPE ended May 1, 2010, the claimant must show he met at least one of the other criteria listed in Rule 130.102(d)(1) during the weeks of the qualifying period after May 1, 2010.

The claimant documented job searches for all but the first and final week of the qualifying period. The first week of the qualifying period was during the claimant's IPE; however, the final week fell outside the claimant's IPE. As previously mentioned, there was no evidence that during the first or last week of the qualifying period the claimant returned to work in a position commensurate with his ability to work; actively participated in work search efforts conducted through TWC, performed an active work search documented by job applications during the entire qualifying period; or had a total

inability to work. We note that even if the claimant's IPE had been extended through the last week of the qualifying period, as a matter of law the claimant did not demonstrate an active effort to obtain employment under Rule 130.102(d)(1) because the claimant failed to document any job searches during the first and last weeks of the qualifying period. The claimant's IPE specifically required him to follow-up on job leads and obtain and maintain employment, and the claimant failed to document any such efforts during the first and last week of the qualifying period at issue. Therefore, the hearing officer's finding that during the qualifying period for the seventh quarter[1] the claimant made an active effort to find employment commensurate with his ability to work is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's decision that the claimant is entitled to SIBs for the seventh quarter and render a new decision that the claimant is not entitled to SIBs for the seventh quarter.

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

CORPORATION SERVICE COMPANY
D/B/A/ CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

_____
Carisa Space-Beam
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge

[1] We note the hearing officer made a clerical error in referencing the third quarter in Finding of Fact No. 6. The disputed quarter in this case was the seventh quarter.