APPEAL NO. 130032
FILED FEBRUARY 28, 2013

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 8, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole issue before him by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 12th quarter, August 14 through November 12, 2012.

The appellant (carrier) appealed the hearing officer's determination, arguing that the claimant did not meet the requirements of an active effort to obtain employment as set forth in 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), and that the claimant did not return to work commensurate with his ability to work. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury], which resulted in an impairment rating of 15% or greater; (2) the claimant has not commuted any portion of the impairment income benefits; (3) the qualifying period for the 12th quarter of SIBs was from May 2 through July 31, 2012; (4) during the 12th quarter qualifying period the claimant was employed and earned less than 80% of his preinjury wage; (5) for the 12th quarter qualifying period, the claimant is required to conduct five job searches per week with the first week of the 12th quarter qualifying period beginning on May 2, 2012, and ending on May 8, 2012 (we note the stipulation as written on the decision incorrectly states the first week ended on May 6, 2012); and (6) the claimant worked for [NPI] during the 12th quarter qualifying period.

The claimant's theory of entitlement is that he has returned to work in a position which is commensurate with his ability to work.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 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 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 130.102(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.

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 claimant testified that he worked as a media consultant for the employer. The claimant sustained a compensable injury that resulted in the amputation of his left big and little toes due to a compensable blister. The claimant also testified that he had sustained a heart attack in February or March of 2012. It was undisputed that the heart attack was not a part of the compensable injury.

The claimant testified that he received a letter offering him work at NPI. In evidence is a letter dated May 7, 2012, regarding an offer for work at NPI signed by the claimant on May 11, 2012. The claimant testified that NPI attempted on numerous occasions to contact [Dr. Z], the treating doctor, regarding the claimant's restrictions, and that Dr. Z finally responded to NPI after the claimant discussed the matter with Dr. Z. The claimant also testified that Dr. Z told the claimant that he should not return to work, but upon the claimant's insistence released the claimant to work initially for six hours per day, and then ultimately for four hours per day due to the claimant's heart attack.

The claimant could not recall when he began working for NPI. In evidence is a document dated September 17, 2012, noting the claimant's wage information from NPI. This document shows the claimant's earned wages for two-week increments, from June 21 through August 30, 2012. Two weeks prior to June 21, 2012, is June 7, 2012. There is nothing in evidence establishing that the claimant worked for NPI, or any other employer, for the period May 2 through June 6, 2012. The claimant testified that he did not conduct any job searches from May 2 through July 31, 2012, because he had received an offer from NPI. The claimant also testified that he did not participate in any vocational rehabilitation training during the 12th quarter qualifying period.

The hearing officer found in appealed findings of fact that the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period by returning to work in a position commensurate with his ability to work, and that the claimant's underemployment was a direct result of his impairment from the compensable injury. We note it was undisputed that the claimant was limited to working four hours per day due to his noncompensable heart attack.

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).

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 following 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 evidence established that the claimant received an offer for work in the first week of the 12th quarter qualifying period but did not accept that offer until the second week of the 12th quarter qualifying period. The evidence also established that the claimant did not begin working for NPI until the sixth week of the 12th quarter qualifying period. Further, the claimant specifically testified that during the 12th quarter qualifying period he did not search for work or comply with a Department of Assistive and Rehabilitative Services Individualized Plan for Employment prior to working for NPI. The claimant did not meet the requirements of an active effort to obtain employment as set forth in Rule 130.102(d). Accordingly, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the 12th quarter, and render a new decision that the claimant is not entitled to SIBs for the 12th quarter.

The true corporate name of the insurance carrier is **XL SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

KIRK HOOD1
1021 MAIN STREET, SUITE 1150
HOUSTON, TEXAS 77003-6508.

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge

[1] We note that the carrier information form, Hearing Officer's Exhibit No. 2, identifies the carrier's registered agent for service of process as Kirk Hood. The decision and order incorrectly lists the registered agent's name as Dirk Hood.