

APPEAL NO. 172459
FILED NOVEMBER 28, 2017

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 September 13, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the sixth quarter, July 12 through October 10, 2017. The claimant appealed, disputing the ALJ's determination that he is not entitled to SIBs for the sixth quarter. The claimant contends that the respondent (carrier) did not inform him of the change of the number of job searches required prior to the beginning of the qualifying period and that the carrier should not benefit from providing inaccurate information. The carrier responded, urging affirmance of the disputed sixth quarter SIBs determination.

DECISION

Reversed and rendered.

The parties stipulated, in part, that: (1) on (date of injury), the claimant sustained a compensable injury which resulted in an impairment rating of 15% or greater; (2) the qualifying period for the sixth quarter is from March 30 through June 28, 2017; (3) the Texas Workforce Commission Local Workforce Development Board has determined that in January of 2017, the required number of weekly work search efforts for the county claimant lives in, Lubbock County, changed from five to seven weekly searches as a requirement for unemployment compensation; and (4) the claimant received notice of the changed number of weekly work search efforts from five to seven weekly searches on April 17, 2017.

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, in part, that the Texas Department of Insurance, Division of Workers' Compensation commissioner by rule shall adopt compliance standards for SIBs recipients. 28 TEX. ADMIN. CODE §§ 130.100-130.109 (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's theory of entitlement for SIBs for the sixth quarter was based on an active work search effort documented by job applications each week during the qualifying period. In evidence is a Benefit Dispute Agreement (DWC-24) in which the parties agreed that the claimant was entitled to SIBs for the fifth quarter. The evidence reflects that the claimant performed six job searches per week during the qualifying period for the sixth quarter of SIBs currently in dispute.

The ALJ stated that the claimant received an initial Application for [SIBs] (DWC-52) from the carrier for the sixth quarter that noted the required number of weekly work search efforts was five. As previously mentioned, the parties stipulated that the required number of weekly work search efforts changed from five to seven in January of 2017; that the qualifying period for the sixth quarter began on March 30, 2017; and that the claimant received notice of the changed number of weekly work search efforts from five to seven weekly searches on April 17, 2017.

In its response the carrier contends that once the claimant became aware that the correct number of job searches was seven instead of five, the claimant then had a duty to make seven job contacts for the remainder of the qualifying period. The carrier concedes that the DWC-52 sent to the claimant initially for the sixth quarter contained the incorrect number of job searches required.

Rule 130.104(b)(5) provides, in part, that:

With the first monthly payment of [SIBs] for any eligible quarter and with any insurance carrier determination of non-entitlement, the insurance carrier shall send the injured employee a copy of the [DWC-52] and the proper address to file the subsequent application. On the DWC-52 sent by the insurance carrier, the insurance carrier shall include: (5) the minimum number of work search efforts required by Rule 130.102(d)(1) and (f) of this title (relating to Eligibility for [SIBs]; Amount) during the next qualifying period.

The preamble to Rule 130.104 states adopted Rule 130.104(b) “requires the insurance carrier to advise the injured employee of the number of work search contacts required when it sends out the [DWC-52] prior to the beginning of a qualifying period.” (34 Tex. Reg. 2145, 2009). Under Rule 130.104(b), the carrier is required to send a DWC-52 for a subsequent quarter with either the first payment for a quarter of SIBs to which the claimant is determined to be entitled or with the carrier’s determination of non-entitlement for that quarter. See Appeals Panel Decision (APD) 050280, decided April 6, 2005, and APD 021776, decided August 28, 2002.

Rule 130.102(f) provides, in part, that if the required minimum number of work search contacts changes during a qualifying period, the lesser number of work search contacts shall be the required minimum number of contacts for that period. In the instant case the parties agreed that the change in work search contacts occurred prior to the beginning of the qualifying period at issue but that the carrier provided the wrong number of work search contacts to the claimant prior to the beginning of the qualifying period. The rules do not contemplate having two different numbers of minimum weekly work search contacts during the same qualifying period.

In APD 010617-s, decided May 15, 2001, the majority opinion stated that Rule 130.104(b) requires that the carrier complete the blanks on the DWC-52 providing the number of the applicable quarter, the dates of the qualifying period, the dates of the quarter, and the deadline for filing the application with the carrier before providing that form to the claimant. The majority opinion in APD 010617-s further stated it is axiomatic that accuracy on the part of the carrier in providing that information is required. In that case the carrier provided inaccurate dates for the qualifying periods in issue and the majority held that the carrier is precluded from benefitting from having done so. APD 010617-s went on to hold that as a prerequisite for advancing the argument that the claimant failed to document a weekly job search in accordance with Rule 130.102(e), the carrier is first required to comply with its obligation to accurately provide the information required in Rule 130.104(b) on the DWC-52.

Although APD 010617-s, *supra*, was decided prior to the current SIBs rules, we find the holding in that case remains applicable in the case on appeal. See *a/so* APD 140039, decided March 3, 2014. Accordingly, we reverse the ALJ's determination that the claimant is not entitled to sixth quarter SIBs and render a new decision that the claimant is entitled to sixth quarter SIBs.

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

**MR. RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge