APPEAL NO. 100429-s
FILED JUNE 14, 2010

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 March 8, 2010. The disputed issue before the hearing officer was:

> Is the respondent (claimant) entitled to supplemental income benefits (SIBs) for the 23rd quarter, January 27 through April 27, 2010?

The hearing officer determined that the claimant is entitled to SIBs for the 23rd quarter, from January 27 through April 27, 2010. The appellant (carrier) appealed, arguing that the claimant did not meet her burden of proof in demonstrating an active effort to obtain employment each week during the qualifying period in dispute. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, 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 (Division)] 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 130.101(4) provides in part that a qualifying period that begins on or after July 1, 2009, is subject to the provisions of this subchapter, and a qualifying period that begins prior to July 1, 2009, remains subject to the rules in effect on the date the qualifying period begins.

The parties stipulated that: (1) on _____, the claimant sustained a compensable injury; (2) the claimant reached maximum medical improvement on September 23, 2003, with a 15% impairment rating; (3) the claimant did not commute any portion of his impairment income benefits; (4) the qualifying period for the 23rd quarter of SIBs began on October 15, 2009, and continued through January 13, 2010. It is undisputed that the minimum number of weekly work search efforts for (County Name) County, claimant's county of residence, is three.

The claimant's theory of entitlement to SIBs for the 23rd quarter is based on: she returned to work in a position which is commensurate with the injured employee's ability to work; she actively participated in a vocational rehabilitation program (VRP) as defined in Rule 130.101; and she performed active work search efforts documented by job applications every week of the qualifying period in dispute. The hearing officer found that:

Finding of Fact No. 3(C)

> [c]laimant demonstrated an active effort to obtain employment each week during the entire qualifying period by: returning to work in a position commensurate with her ability to work; by performing active work search efforts documented by job applications; and by actively participating in a [VRP] as defined by Rule 130.101.

Rule 130.102(d)(1) provides, in pertinent part, 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 (in Rule 130.102(d)(1)(A)-(E)) each week during the entire qualifying period. The preamble to Rule 130.102(d)(1) clarifies that "the injured employee is required [to] make an active effort to meet the work search requirements each week during the entire qualifying period by making use of any one or more of the criteria in [Rule]130.102(d)(1)(A)-(E) rather than being restricted to only one of the criteria during a qualifying period." (34 Tex. Reg. 2139, 2009).

RETURNED TO WORK

Rule 130.102(d)(1)(A) - Returned to Work in a Position which is Commensurate with the Injured Employee's Ability to Work

The carrier argues that the claimant is not entitled to SIBs pursuant to Rule 130.102(d)(1)(A) because the claimant was not employed each week of the qualifying period. In evidence is an Application for [SIBs] (DWC-52) for the 23rd quarter of SIBs that shows that the claimant was employed during the 3rd, 7th and 10th weeks of the qualifying period. 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. In the instant case, the claimant need not be employed every week of the qualifying period, because she may combine any one or more of the criteria in Rule 130.102(d)(1)(A)-(E) during the qualifying period to establish entitlement to SIBs. As previously mentioned, the preamble to Rule 130.102(d)(1) states that the injured employee is not restricted to only one of the criteria during a qualifying period.

Under the old SIBs rules, if the injured employee returned to work in a position which was relatively equal to the injured employee's ability to work *during any portion of the qualifying period*, that would satisfy the good faith requirement for SIBs entitlement. *See* Appeals Panel Decision 030298, decided March 10, 2003. Under the new SIBs rules, Rule 130.102(d)(1) was amended to clarify that an injured employee is required to make an active effort to meet the work search requirements each week during the entire qualifying period by making use of any one or more of the criteria in Rule 130.102(d)(1)(A)-(E). The preamble to Rule 130.102(d)(1) states that subsection (d)(1) was 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. (*See* 34 Tex. Reg. 2140, 2009). In the instant case, the claimant showed that she complied with Rule 130.102(d)(1)(A), for the 3rd, 7th and 10th weeks of the qualifying period, however the claimant must also show that she complied with Rule 130.102(d)(1)(A)-(E) for the remaining weeks in the qualifying period. That portion of the hearing officer's finding that the claimant demonstrated an active effort to obtain employment by "returning to work in a position commensurate with her ability to work" during the 3rd, 7th and 10th weeks of the qualifying period, is supported by sufficient evidence.

PARTICIPATION IN THE DEPARTMENT OF ASSISTIVE AND REHABILITIVE SERVICES (DARS)

Rule 130.102(d)(1)(B) - Actively Participated in a VRP

The carrier argues that the claimant is not entitled to SIBs pursuant to Rule 130.102(d)(1)(B) because the claimant only provided a letter from DARS dated November 5, 2009, which does not state the dates in which the claimant participated in the program during the qualifying period, and it does not include a VRP or Individual Plan for Employment (IPE). Further, the carrier argues that the claimant did not provide an IPE with her application for SIBs. In evidence is a letter from DARS dated November 5, 2009, which states that the claimant "has been actively involved with vocational rehabilitation service from Division [f]or Rehabilitation Services. She is currently in plan and seeking [f]ull time employment."

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: (B) has actively participated in a VRP as defined in Rule 130.101. 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 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. In the preamble the following public comments and Division responses to Rule 130.102(d)(1)(B) state:

> Comment: Commenter requests that at an [IPE] be required by the injured employee in order to receive SIBs.
>
> Agency Response: The Division agrees that an IPE should be required for injured employees enrolled in a [VRP] and the rule has been revised to reflect that requirement.

> Comment: Commenter expresses concern that active participation in a [VRP] fails to establish a level of activity with DARS and that the rule limits the authority of a hearing officer to review factual issues.
>
> Agency Response: The Division disagrees. The Commissioner is charged with establishing the level of activity that is required of an injured employee with DARS. As stated previously, active participation means the injured employee is making a reasonable effort to fulfill his or her obligations in accordance with the terms of his or her vocational rehabilitation plan or [IPE]. The adopted rule is not intended to limit a hearing officer's role in reviewing the facts of a case. Evidence from DARS regarding the injured employee's participation level will be considered equally along with all other evidence. (34 Tex. Reg. 2144, 2009).

In the instant case, the letter from DARS dated November 5, 2009, does not include 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, as required by Rule 130.101(8) for an IPE at DARS. The DARS letter dated November 5, 2009, does not indicate that the claimant was making a reasonable effort to fulfill her obligations in accordance with the terms of a vocational rehabilitation plan or IPE. There is no IPE in evidence. There is no other evidence that the claimant was actively participating in a VRP during the qualifying period in dispute. The DARS letter dated November 5, 2009, does not constitute an IPE. That portion of the hearing officer's finding that the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period by actively participating in a VRP as defined by Rule 130.101 is against the great weight and preponderance of the evidence.

ACTIVE WORK SEARCH EFFORTS

Rule 130.102(d)(1)(D) - Performed Active Work Search Efforts Documented by Job Applications

The carrier argues that the claimant failed to make a minimum of three work searches for the 12th week of the qualifying period (December 31, 2009, through January 6, 2010).[1] In evidence is a DWC-52 for the 23rd quarter of SIBs, which lists under "Section 4: Work Search Activities for the Qualifying Period" and subsection entitled "Notes and Type of Documentation Attached" that the claimant made the following work search contacts for the 12th week:

> 3 job contacts made. 1 job posting from 2010 Job Census. 1 job posting and thank you letters for position Administrative Support through US Army

[1] We note that the qualifying period begins on Thursday, October 15, 2009, and ends on Wednesday, January 13, 2010. The 12th week of the qualifying period begins on Thursday, December 31, 2009, and ends on Wednesday January 6, 2010.

and letter from Goodwill in regards to a position that they submitted my resume.

Section 4 of the DWC-52 instructs the injured work: *"[t]o further document work searches use the 'Detailed Job Search/Employer Contact Log' on page 5 of this form*." The claimant attached to her DWC-52 a Detailed Job Search/Employer Contact Log for each week of the qualifying period documenting her work searches. For the 1st through 11th and 13th weeks of the qualifying period she documented a minimum number of 3 work searches. However, for the 12th week of the qualifying period (December 31, 2009, through January 6, 2010) she documented only 2 work searches (January 4 and January 5, 2010). There was no documentation for the third work search contact for the 12th week of the qualifying period. As previously mentioned, the minimum number of work searches in (County Name) County is three.

Section 408.1415(b)(2) provides that in adopting rules under this section, the commissioner shall define the number of job applications required to be submitted by a recipient to satisfy the work search requirements. 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: (D) has performed active work search efforts documented by job applications. Rule 130.102(f) provides in part, that as provided in subsection 130.102(d)(1)(C) and (D), regarding active participation in work search efforts and active work search efforts, an injured employee shall provide documentation sufficient to establish that he or she has, each week during the qualifying period, made the minimum number of job applications and or work search contacts consistent with the work search contacts established by the Texas Workforce Commission (TWC) which are required for unemployment compensation in the injured employee's county of residence pursuant to the TWC Local Workforce Development Board requirements.

The preamble to Rule 130.102 discusses Rule 130.102(f), Work Search Efforts, and states that "[t]he new subsection (f) includes language regarding the required documentation an injured employee must provide to sufficiently establish active participation in work search efforts and active work search efforts" and that "[a]s a result of multiple comments received seeking clarification, language was added to subsection (f) to clarify that work search efforts would be consistent with job applications or the work search contacts established by TWC." (34 Tex. Reg. 2139, 2009). Further, the preamble states that "[a]mendments also add language to subsection (f) to clarify that work search efforts are consistent with job applications or the work search contacts established by TWC and that if the work search requirements changed during a qualifying period, the injured employee would be responsible for the lesser of the two requirements." (34 Tex. Reg. 2140, 2009).

In the instant case, the claimant did not provide documentation sufficient to establish that she has, each week during the qualifying period, made the minimum number of job applications and or work search contacts consistent with the work search contacts established by TWC which are required for unemployment compensation in the

injured employee's county of residence pursuant to the TWC Local Workforce Development Board requirements. The evidence shows that the claimant did not provide documentation to establish that she has made a minimum number of three job applications or work search contacts for the 12th week of the qualifying period. There is no evidence that the minimum number of work searches during the qualifying period in dispute changed from the required minimum number of three. That portion of the hearing officer's finding that the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period by performing active work search efforts documented by job applications is against the great weight and preponderance of the evidence.

Although the evidence reflects that the claimant combined work search requirements for the 1st through 11th and 13th weeks of the qualifying period, she did not meet the work search requirement for the 12th week of the qualifying period pursuant to Rule 130.102. The evidence reflects that the claimant demonstrated an active effort to obtain employment by returning to work in a position commensurate with her ability to work for the 3rd, 7th and 10th weeks of the qualifying period, and by performing active work search efforts documented by job applications for the 1st through 11th and 13th weeks of the qualifying period. However, the evidence does not establish that the claimant meets any of the requirements for active work search efforts for the 12th week of the qualifying period by meeting at least one or any combination of the work search requirements pursuant to Rule 130.102(d)(1)(A)-(E). Given that the claimant did not demonstrate 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* pursuant to Rule 130.102, the hearing officer's determination that the claimant is entitled to SIBs for the 23rd quarter of SIBs 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 23rd quarter and we render a new decision that the claimant is not entitled to SIBs for the 23rd quarter.

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

JAMES H. MOODY III
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DALLAS, TEXAS 75201.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge