ADVISORY NO. 267

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TOPIC: Carrier Provided Vocational Rehabilitation Under the New SIBs Rules

In its 1999 session, the Legislature enacted H.B. 2513, which amended Sections 408.150, 409.012, and 413.018 of the Texas Labor Code, regarding vocational rehabilitation. The stated purpose of this legislation was to rectify situations where claimants had been recommended vocational assistance through the Texas Rehabilitation Commission, yet because of its limited resources, was unable to assist them. The effective date of this legislation was September 1, 1999.

In particular, Section 408.150 was amended to provide that a claimant that refuses services or refuses to cooperate with services provided by a private vocational rehabilitation provider loses entitlement to SIBS.

The Commission has recently adopted rules implementing these statutory changes. The effective date of these new rules is November 28, 1999.

Rule 130.102(h) allows a carrier to provide vocational rehabilitation services through a private provider registered in accordance with Rule 136.2. However, the carrier will be responsible for reasonable travel expenses incurred by the claimant if he is required to travel in excess of 20 miles one way from the his residence to obtain vocational rehabilitation services.

Of specific concern is that Rule 130.102(d)(3) provides that the claimant satisfies the "good faith effort" requirement if he has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider. Although this ignores the fact that the Legislature made cooperation with a carrier provided vocational program a *separate* requirement from the "good faith effort" requirement, unless there is a rule change, this is the law.

A "full time vocational rehabilitation program" is defined in Rule 130.101(8) as vocational rehabilitation services "designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. A vocational rehabilitation plan 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." Vocational rehabilitation services are separately defined in Rule 130.101(7) as "services which can reasonably be expected to benefit the employee in terms of employability including, but not limited to, identification of the employee's physical and vocational abilities, training, physical or mental restoration, vocational assessment, transferable skills assessment, development of and modifications to an individualized vocational rehabilitation plan, or other services necessary to enable an injured employee to become employed in an occupation that is reasonably consistent with his or her strengths, physical abilities including ability to travel, educational abilities, interest, and pre-injury income level"

The comments to the amendments indicate that although "[t]he employee has the burden of proof to prove participation in a full time vocational rehabilitation program and should provide evidence of such as required to remain entitled to SIBs," "it is virtually impossible to develop an all encompassing definition [of full time vocational program] since every vocational rehabilitation program must be tailored to the specific individual." Therefore, the comments indicate that "*any* vocational rehabilitation program provided by TRC or arranged for by an insurance carrier should be considered a full time program. This concept precludes an insurance carrier from requiring an injured employee to continue to seek employment commensurate with the injured employee's ability over and above the rehabilitation plan requirements.

The practical effect of these new rules is that a carrier will be bound by the vocational services that it provides. Therefore, the carrier that wishes to utilize this provision would be well served by ensuring that the services provided are, in fact, a *full time* vocational rehabilitation program. If the only rehab program provided by the carrier consists, for example, of merely sending a few unverified job contacts each quarter, and the claimant spends a few minutes contacting the listed employers by telephone to determine that they are no longer hiring, or that the job has been filled, then he will *arguably have fulfilled his requirements*. If the claimant reasonably cooperates with the provided plan, he or she will essentially be automatically entitled to SIBS for that quarter, with nothing else required. Therefore, any vocational consultant provided by the carrier should formulate a *full time* plan consistent with the provisions of Rule 130.101(8), and provide a copy of that plan (in English and Spanish if needed) to the claimant. If the claimant fails to cooperate with a more extensive plan, then the claimant will automatically *not* be entitled to SIBS. If he fully cooperates, then the hope is that he will actually find employment.

Nothing in these rules preclude, however, a carrier from utilizing a vocational expert to rebut a claimant's assertion that he or she is entitled to SIBS. The services provided by this expert may include job search verification, a labor market survey, or a job skills transfer analysis. As long as these are not provided to the claimant as part of a vocational rehabilitation

program, they will not bind the carrier in any way. However, where the expert purports to be providing rehabilitation or vocational services to the claimant, it will be bound.