APPEAL NO. 93531

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On May 24, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The record was closed on June 2, 1993. The issues announced and agreed upon were: a) should there be a reduction in the amount of the impairment income benefits and supplemental benefits paid to the Claimant to reflect the continuing effects of a prior compensable injury; b) is the Claimant entitled to receive supplemental income benefits; and, c) must the Carrier pay supplemental income benefits upon receipt of the Commission's Form TWCC-52, Statement of Employment Status, with a finding of entitlement, or does the Carrier's obligation to pay supplemental income benefits cease upon the submission of a Notice of Dispute to the entitlement of supplemental income benefits within 10 days after the receipt of the Form TWCC-52.

The hearing officer determined that claimant was entitled to receive impairment income benefits (IIBS) for 75 weeks, that the carrier was entitled to receive credit for IIBS previously paid, that claimant is not qualified for supplemental income benefits (SIBS) when he applied for them and that carrier is not required to issue payment for SIBS if dispute is filed with the Texas Workers' Compensation Commission (Commission) within 10 days after receipt of the approved TWCC-52, or the expiration of the IIBS period.

Appellant, claimant herein, appealed taking exception to six of the hearing officer's 32 Findings of Fact and three of the six Conclusions of Law. Respondent, carrier herein, filed a response and requests that the hearing officer's decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The basic facts are not in dispute. Claimant was employed as a flight attendant with CA, employer herein. Claimant sustained a compensable back injury in 1990, which was treated and settled as an "old law" injury. On (date of injury), during a flight, while working on the "bar cart," claimant again injured his back. After medical treatment and surgery, the treating doctor, (Dr. B) certified maximum medical improvement (MMI) on March 30, 1992 with a 35% whole body impairment rating. Apparently as a result of a dispute over this rating a designated doctor, (Dr. S) was selected by the Commission. Dr. S determined that claimant reached MMI on March 30, 1992 with a 25% impairment rating. The parties have agreed that MMI was reached on March 30, 1992, with a 25% whole body impairment and that one-third of the impairment was due to the prior 1990 compensable injury. The parties have also agreed that the principle of contribution, as a result of the previous injury, would apply to reduce the benefits claimant would receive. There is also no dispute between the parties that the correct weekly impairment rating payment, before applying the principle of contribution, is $300.00 a week. Carrier began paying claimant IIBS on March 30, 1992 (the date of the agreed upon MMI). Carrier did not receive the determination of impairment

rating from the designated doctor until January 8, 1993, at which time carrier had already paid approximately 40 weeks of IIBS (from March 30, 1992 to January 8, 1993). The carrier apparently continued payment of IIBS at the $300.00 per week rate until 50 weeks were paid on March 16, 1993. Claimant believing that his IIBS had been paid out, on March 23, 1993, applied for SIBS by filing an Employee's Initial Request for Supplemental Income Benefits (TWCC-48). Payment of SIBS was approved on March 24, 1993, as noted on the TWCC-48. Carrier disputed the approval of the SIBS payment by filing a request for a Benefit Review Conference (BRC) (TWCC-45) on April 1, 1993 (within 10 days of March 24, 1993), and did not begin payment of SIBS, on the basis that claimant was not entitled to SIBS because he had not made a good faith attempt to obtain employment commensurate with his ability to work.

Carrier presented evidence that claimant had been released for light duty on January 8, 1992, and subsequent medical records indicate claimant was available for light duty on March 3, 1992. On March 9, 1992, claimant interviewed for a light duty job with the employer as a "video assistant" at substantially the same rate of pay as his pre-injury wage. At some time in March 1992, claimant was offered this position, but he refused the position because of his pain and because, as claimant testified, he did not believe he was physically capable of setting up the video equipment. Claimant testified he moved to Austin in March 1992 in order to go to school full time. Claimant testified he has been going to school full time since the summer of 1992 and has not been available for full time work. Carrier presented evidence by way of testimony and documentary evidence that the position of video assistant was within the work restrictions indicated by the treating doctor. Claimant stated he has not sought full time employment but will, in the upcoming semester, be employed in the school work-study program 15 hours a week at the federal minimum wage.

CONTRIBUTION

Article 8308-4.30 provides that at the request of a carrier ". . .the commission may order that impairment income benefits (IIBS) and supplemental income benefits (SIBS) be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries." *See also* Carey v. American General Fire and Casualty Company, 827 S.W.2d 631 (Tex. App.-Beaumont 1992, writ denied). As recited previously, the designated doctor rendered an impairment rating of 25% with one-third of the impairment due to a prior compensable back injury. Claimant did not dispute this finding and the hearing officer in the statement of evidence states:

> The parties did not dispute the finding that one-third of the impairment was due to the former injury. Neither did the parties disagree that the principle of contribution would apply to reduce the benefits the Claimant would receive. The parties did disagree about the procedures to apply the principle of contribution to the Claimant's impairment income benefits.

Accepting one-third of the impairment was due to a pre-existing compensable injury, claimant would be entitled to 75 weeks (25% impairment at three weeks per one percent) reduced by one-third. Carrier had begun paying IIBS on March 30, 1992, and the issue of contribution was not addressed and resolved until January 1992 after 40 weeks of IIBS at $300.00 a week had already been paid. The carrier proposed continuing paying IIBS at $300.00 a week for 50 weeks giving claimant the $15,000 to which he was entitled. The BRC report indicates that claimant ". . .was in agreement with the method and approach the carrier implemented in determining the amount of contribution per the reports from the various doctors." Carrier at the BRC proposed reducing the 75 weeks of impairment by one-third equalling a total payment of 50 weeks IIBS at the $300 a week rate. In Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992, we opined on the matter of contribution that it is the "benefit," not the rating, that is so reduced. However, at issue in that case was whether a doctor at the front end could reduce the percentage rating. This case involves completely different facts. As carrier has noted, one of the authors of the Texas Workers' Compensation Act, acknowledges that "Section 4.30 does not specify whether the impairment rating is reduced (thereby shortening the duration of IIBS) or if the amount of the weekly income benefit is reduced." Montford, A Guide to Texas Workers' Comp Reform, Volume 1, Section 4.30(a), pg 4-133. Montford does, however, go on to state "[t]o avoid a `gap' that may otherwise occur . . .the authors suggest that contribution under Section 4.30(a) should reduce the amount of the weekly impairment benefit rather than the impairment period." However, at the time the contribution issue was resolved in January of 1993, carrier had already paid 40 weeks at $300.00 a week. The carrier paid claimant 50 weeks of IIBS through March 16, 1993, and the hearing officer notes ". . .claimant did not dispute the procedure or disagree with it." On appeal claimant states he ". . .was not informed of the possibility of the reduced rate" and that "claimant had no idea that he would be due 75 weeks of benefits." Claimant is apparently claiming payment of an additional 25 weeks of IIBS at a reduced $200.00 a week. Carrier argues that this would allow a windfall to accrue to the claimant and ". . .would violate these well established (principles) under the case law and which is also contrary to the intent of the current legislation." We find that statement overly broad but agree that the operation of the law sets claimant's entitlement at a total of $15,000.00 for his impairment. As stated in Montford in order to avoid a gap between IIBS and SIBS, the contribution should be reduced in the amount of the weekly benefit rather than the impairment period. However, in the absence of rules or statutory direction on exactly how a benefit is to be reduced, we do not disagree with the approach taken by the hearing officer in this case. The hearing officer, after thoroughly evaluating and detailing the evidence and quite clearly researching the available law, concluded that "[t]he carrier is entitled to receive credit for impairment income benefits previously paid." The hearing officer in seeking justification for this conclusion cites Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992, for the "general principle" that "a claimant should receive the benefits he or she is entitled to under the law--no more or no less."

The hearing officer points out that "technically this was a commutation of the impairment income benefits, as contemplated by Article 8308-4.27. . . ." Having raised this possibility, the hearing officer rejects this theory by saying "the claimant did not make any election to receive commuted benefits, and the premature payout of impairment income benefits was due to a reasonable misunderstanding of the procedures involved." Without taking a position whether there was a misunderstanding, however, we note that a firmer ground for rejecting that this situation constituted a commutation of IIBS by operation of law, is that claimant has not returned to work for at least three months, earning at least 80% of his preinjury wage. Further if we held this action as being a commutation by operation of law, claimant would not be entitled to any additional income benefits such as SIBS.

Claimant cites Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, for the proposition that an ". . .insurance carrier cannot recover past over payments and that they are not released of their liability to continue benifits (sic) at this time." In Appeal No. 92291, *supra*, the carrier miscalculated temporary income benefits (TIBS) by improperly combining wages of two employers to obtain the average weekly wage (AWW). The carrier then sought to recoup the overpayment from future income benefits. In the instant case, there has been no overpayment and the carrier is not seeking recoupment. The carrier owed, and claimant was entitled to $15,000.00, which should have been paid over 75 weeks at $200.00 a week. Claimant actually received $15,000.00 paid over 50 weeks at $300.00 a week. Carrier is not seeking to obtain any payments back; but is only seeking to avoid payment of an additional sum to which claimant is not under any theory entitled to receive.

The hearing officer's determinations on this point are affirmed on the basis that, although the method of payment is discouraged in Montford, it is not precluded by statute. The potential "gap" between the expiration of IIBS and the beginning of SIBS is not an issue in this case and to allow additional IIBS to which claimant is clearly not entitled would create an unjust and inequitable windfall for the claimant in this particular situation. This decision does not proscribe that it is solely within the discretion of the hearing officer to determine whether to accept a reduction in the number of weeks IIBS is payable as opposed to a reduction in rate, as suggested by the carrier. Arguably the preferred method is to appropriately reduce the weekly rate. In this case however, where all the IIBS have been paid, where the claimant interposed no objection to the method of payment and where payment of additional IIBS is not due by law and would result in a clearly wrong or unjust result, we affirm the hearing officer's decision on this point.

ENTITLEMENT TO SUPPLEMENTAL INCOME BENEFITS

Supplemental Income Benefits (SIBS) are authorized in some circumstances under provisions of Article 8308-4.28 and Texas W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.101 through 130.110 (Rules 130.101 through 130.110). An employee is entitled to

SIBS if as of the expiration of the impairment period computed under Section 4.26(c)(1) of the 1989 Act:

(1)the employee has an impairment rating from the compensable injury of 15 percent or more as determined pursuant to this Act;

(2)the employee has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;

(3)the employee has not elected to commute any portion of the impairment income benefits pursuant to Section 4.27 of this Act, and

(4)the employee has in good faith attempted to obtain employment commensurate with the employee's ability to work.

A substantial amount of the testimony and evidence at the CCH dealt with the circumstances of claimant's interview for a position as a video assistant in March of 1992 and claimant's subsequent refusal of that job offer. We note that the interview and job offer apparently were made before IIBS even started on March 30, 1992. We also note the requirement that an employee's entitlement to SIBS begins "as of the expiration of the impairment period. . . ." Consequently what the employee was offered in the way of light duty in March of 1992 may affect the payment of TIBS as a bona fide offer of employment (Rule 129.5), but does not impact on SIBS where claimant's status at the expiration of IIBS is the determining factor. We agree with the hearing officer's comment that "The claimant must qualify for (SIBS) based on his work status and good faith efforts at the time he would become eligible for (SIBS), not his status a year or more before he became eligible."

Claimant, believing IIBS had expired on March 16, 1993, applied for SIBS on March 23, 1993. In applying for SIBS, claimant completed the TWCC-48 (Employee's Initial Request for SIBS). On this form claimant showed "Ø" wages received for the 13 week period prior to the date of the request and in response to the question "If you have applied for employment during the last 13 weeks, please list the employers contacted," claimant listed as the person contacted "Park Mesa"; for description of position, claimant listed "Sales Agent" and for weekly wage listed "$5.00 PER HOUR." Claimant indicated "I have not returned to work." Testimony at the CCH clearly developed that claimant moved to Austin in March 1992 (apparently after refusing the employer's offer of light employment) and has been a full time student since the summer term of 1992, usually carrying 15, or on one occasion 12, credit hours a semester with a goal to becoming an electrical engineer. Claimant testified he had not sought full time employment and the PM job was a part time, 15 hours a week position in the school work-study program. At the bottom of the TWCC-48 form under Commission Approval "Supplemental Income Benefits Approved" is checked

and the form is signed (presumably by a Disability Determination Officer (DDO)) on "3-24-93" with income benefits of $1302.72 to be paid the first quarter. Carrier contested claimant's entitlement to SIBS on June 1, 1993, being within 10 days of the date SIBS were approved.

Although claimant believed his expiration of the impairment period to have occurred on March 16, 1993, if the 75 week figure is used, the expiration of the impairment period would not occur until September 3, 1993. The hearing officer notes that "Claimant would not have qualified for (SIBS) when he applied for them because of an absence of good faith efforts to find suitable employment." The hearing officer characterized the employment application with PM as "Such feeble efforts do not constitute good faith efforts to find suitable employment." By claimant's own admission, he was not seeking employment. We therefore affirm the hearing officer's decision that the claimant was not entitled to SIBS when he applied for them because of an absence of good faith efforts to find suitable employment.

INITIATION OF SUPPLEMENTAL INCOME BENEFITS

Having agreed with the previous point that claimant at this time is not entitled to SIBS, we find this point to be moot. We might note that the Commission Rules, Rule 130.108, indicate that SIBS may be suspended when timely disputed. If the carrier does not prevail, the carrier is liable for attorney's fees and interest. As interest would only be due for unpaid SIBS, this indicates that suspension of SIBS during a dispute was contemplated by the legislature which then enacted a remedy for loss of use of the benefit.

Having reviewed the record, evidence and argument presented, we find that the hearing officer did not err and we affirm the Decision and Order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge