APPEAL NO. 94063

This appeal arises under the Texas Workers' Compensation Act of 1989. On December 8, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She prepared two decisions with the docket numbers listed above: the first dealt with whether an injury on the job to respondent's (claimant) right hand caused a compensable injury to the left hand; the second dealt with whether claimant is entitled to supplemental income benefits (SIBS) for the period beginning August 16, 1993. The hearing officer determined that the injury to the left hand was not compensable and that SIBS for the period in question are due. Claimant appealed from the compensability ruling and the self-insured appealed from the ruling as to SIBS, stating that it had disputed such payment and that claimant had refused services of the Texas Rehabilitation Commission (TRC).

DECISION

We affirm the decision in (Docket No.) and observe that the decision in (Docket No.) became final by operation of law since the appeal was not timely made. *See* Section 410.169.

I

The decisions in this case were distributed on December 23, 1993. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h) provides:

> For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed.

With a distribution date of December 23, 1993, the deemed date of receipt was five days later on December 28, 1993. Since Section 410.202 requires a party to file a written request for review "not later than the 15th day after the date on which the decision of the hearing officer is received . . .", the last day on which an appeal could be filed was January 12, 1994. Claimant's appeal regarding compensability of an injury to her left hand was received on January 18, 1994. Rule 143.3(c) also provides that if the appeal is mailed on or before the 15th day after receipt and is received not later than the 20th day after receipt, it will be presumed to be timely. In this instance, claimant's envelope is postmarked January 13, 1994, so it was not mailed on or before the 15th day. In addition, if it had been mailed on January 12th (on or before the 15th day), it was not received by the 20th day (January 17th), so it still did not meet the extra time period allowed for mailing. The decision of the hearing officer is therefore final in regard to whether there was a compensable injury to the left hand, (Docket No.)

While the decision of the hearing officer is final in regard to whether the injury to claimant's left hand was compensable, a review of the record and decision indicates that had the appeal been timely, the decision would have been affirmed. Claimant injured her right hand on (date of injury), when a needle in trash she was emptying entered her right

hand. After several months she could no longer work and thereafter had surgery twice on the right hand. She asserted in her claim that the inability to use the right hand put excessive demands on the left hand causing her to develop carpal tunnel syndrome in it. (There was no allegation that infection from one hand spread through the body to the other hand.) A letter from Health Benefit Management to both parties in May 1993 indicated a diagnosis of "overuse of left hand." Claimant also provided in evidence as Claimant's Exhibit 1A, a letter from (Dr. B), dated December 7, 1993, which said "[i]t is possible that due to the overuse of her left hand she has now developed carpal tunnel syndrome in this hand also." The hearing officer, in her decision that claimant's left hand was not compensably injured, noted Texas Workers' Compensation Commission Appeal No. 93725, dated September 28, 1993, in which a claimant was bitten on the left hand; right hand injury was found from "overuse" of that hand. The Appeals Panel in Appeal No. 93725 found that the right hand was not part of the compensable injury. As stated, had there been a timely appeal, this decision would have been affirmed.

II

Claimant filed a Statement of Employment Status on August 31, 1993. The Texas Workers' Compensation Commission (Commission) prepared a Notice of Entitlement on the same day. Self-insured offered into evidence a TWCC-45 Request for Setting a Benefit Review Conference, dated August 12, 1993 (prior to the date claimant filed for SIBS), which stated the disputed issue was whether the injury to the left hand was compensable. Nothing was said in this TWCC-45 about disputing SIBS. There were two issues at the hearing in regard to SIBS. One was whether the self-insured had disputed payment of SIBS; the second was whether claimant is entitled to SIBS. The record contains only the one TWCC-45 referred to above.

Self-insured indicates in its appeal that a TWCC-45 addressing its dispute of SIBS was filed and attaches a copy to the appeal. (We note that self-insured's appeal is postmarked January 12th and was received January 14, 1994, so it is timely.) The attached document is dated September 16, 1993; it contains no indication of filing with the Commission. Texas Workers' Compensation Commission Appeal No. 93536, dated August 12, 1993, discussed evidence attached to an appeal. It cited Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ) and numerous Appeals Panel decisions in stating that only the record will be considered on appeal. Evidence offered for the first time on appeal will cause a remand when the evidence came to the proponent's knowledge after the hearing, when it is not cumulative, when the reason the evidence was not offered at the hearing was not because of lack of diligence, and when it would probably produce a different result. Appeal No. 93536 also dealt with evidence that was relied upon at the benefit review conference but which was not offered at the hearing. There was no remand in Appeal No. 93536 and the evidence attached to the appeal was not considered. Also attached to the self-insured's appeal is an affidavit in which counsel states that to the best of his knowledge the TWCC-45, attached to the appeal, was tendered into evidence without objection. As stated, the record contains only the TWCC-45 that disputed left hand compensability. In addition the record clearly indicates that self-insured offered 27 exhibits and then added

number 28. The hearing officer lists 28 exhibits; again no TWCC-45 dealing with SIBS appears. Neither the record nor the decision of the hearing officer indicates that the hearing officer took official notice of the TWCC-45 in question or of any part of the Commission's claims file.

The self-insured states that there was no issue as to the sufficiency of the TWCC- 45 it entered into evidence. There were no findings of fact in regard to insufficiency, but the hearing officer's "Discussion" did refer to Carrier's Exhibit No. 11 (TWCC-45 that disputed the left hand injury) as insufficient to dispute entitlement to SIBS. The hearing officer was merely observing that the one TWCC-45 before her did not address the question of SIBS (it also predated that question) so it could not be looked to as evidence that SIBS had been effectively disputed. As stated, there was an issue of whether SIBS had been disputed. Self-insured stresses this issue (whether SIBS had been disputed) was reported out of the benefit review conference and the benefit review conference report referred to a TWCC-45 other than the one offered into evidence as Carrier's Exhibit No. 11.

Rule 130.108(b) states:

> A carrier waives the right to contest the commission's initial determination of entitlement or amount for the first compensable quarter if the carrier fails to request a benefit review conference within 10 days after the expiration of the impairment income benefit period, or within 10 days after receipt of the commission's initial determination, whichever is later.

Referral to a piece of evidence in the benefit review conference report does not place that piece of evidence before the hearing officer. (It may indicate that a party had such evidence at a particular time to affect the question of when evidence had been exchanged.) *See* Texas Workers' Compensation Commission Appeal No. 92635, decided January 8, 1993, which pointed out that a benefit review officer "does not take testimony or make a formal record." That opinion also states that it is the duty of the hearing officer to make a written decision based on the testimony and evidence received. *Also see* Rule 142.2(8) which authorizes the hearing officer to rule on the admissibility of evidence. *See also* Appeal No. 93536, *supra*.

Without a copy of the TWCC-45 indicating that the self-insured disputed the payment of SIBS, the hearing officer was sufficiently supported in this instance in finding that self-insured failed to timely request a benefit review conference to dispute the payment of SIBS. This finding sufficiently supported the conclusion of law that the self-insured waived its right to contest SIBS for this period. This finding and conclusion sufficiently supported the decision and order that SIBS should be paid for the quarter beginning August 16, 1993. In reaching this conclusion, we also observe that the hearing officer has a duty to "ensure . . . full development of facts required . . ." (Section 410.163(b)). In Texas Workers' Compensation Commission Appeal No. 93604, dated September 2, 1993, a hearing officer's review of the claims file to determine when a claim had been filed with the Commission was considered favorably in affirming that decision. We observe that both Appeal No. 93604

and this case involved a question of whether a party complied with a duty to file a document with the Commission.

This decision may be affirmed because of the supportable finding that self-insured failed to dispute SIBS; although the finding of fact that claimant made good faith attempts to obtain employment is against the great weight and preponderance of the evidence. Our determination in regard to this finding does not require reversal because of the basis for payment set forth in prior paragraphs.

Claimant on the Statement of Employment she filled out checked that she had not returned to work and that she had not earned a particular portion of her pre-injury wages. She did not assert that she had made a good faith attempt to find work, noting "I am still under doctor's care." If such a statement sufficed to negate the statutory requirement to have "attempted in good faith to obtain employment commensurate with the employee's ability to work" (*see* Sections 408.142 and 408.143), a significant number of claimant's otherwise qualifying for SIBS would similarly need to make no attempt. *See* Texas Workers' Compensation Commission Appeal No. 93636, decided September 3, 1993, which involved a claimant who had also been told that he could do light duty work, by his doctor, but he chose not to look for work because someone at the Social Security Administration told him he was disabled. The Appeals Panel reversed the determination of the hearing officer that the claimant in that case had made a good faith attempt.

The self-insured finally states that the hearing officer erred in finding that claimant did not refuse the services of Texas Rehabilitation Commission (TRC). The hearing officer in her "Discussion" did address claimant's reaction to the notice regarding TRC as delayed, not as a refusal. No finding of fact was made as to this specific point. Without a finding of fact to consider and with no assertion that a finding on this point was necessary to the decision, we will only review a "Discussion" of the evidence in the decision to see if it reasonably reflects the record. *See* Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993. This "Discussion" reasonably reflects the record.

For the reasons set forth within this opinion, the decision and order of the hearing officer in (Docket No. redacted) are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge