APPEAL NO. 941544

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On September 2, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer A) presiding. Hearing officer A then left employment with the Texas Workers' Compensation Commission (Commission) and Hearing Officer B (herein referred to as the hearing officer) rendered a decision from the record.

The issues recited on the record were:

1. Is the Claimant entitled to supplemental income benefits [SIBS] for the first compensable quarter;

2. Is the Claimant entitled to [SIBS] for the second compensable quarter;

3. Is the Self Insured [sic] entitled to suspend the Claimant's income benefits to recoup the previous overpayment of $2,358.33.

The hearing officer determined that the claimant is not entitled to SIBS for the first compensable quarter, but is entitled to SIBS for the second compensable quarter and that "the [self-insured] in [sic] not entitled to suspend the claimant's income benefits to recoup its overpayment . . . because it made that payment in error."

Appellant, self-insured, contends that the hearing officer erred in not allowing the self-insured recoupment for the SIBS paid in good faith and in error during a period when claimant was not entitled to those benefits; that the hearing officer erred in finding that the self-insured did not rely on any Commission representation regarding claimant's entitlement to SIBS or the amount of the SIBS payment; and that the decision and order "is void and of no force or effect due to the failure to file the Decision and Order within the mandatory time established by the Commission." Respondent, claimant, did not file a response. The appeal contained no assertion of error based on a decision rendered by a hearing officer not in attendance at the hearing.

DECISION

The decision and order of the hearing officer are affirmed.

Most of the pertinent facts are contained in a series of stipulations agreed to by the parties. The self-insured stipulated on the record that the claimant was entitled to SIBS for the second compensable quarter; therefore, that issue has been resolved. The parties stipulated that the first compensable quarter for SIBS began April 23, 1994, and ended July 22, 1994. The claimant testified, and the hearing officer determined, that claimant went to the Commission's field office and applied for SIBS for the first compensable quarter on April 12, 1994. Apparently, claimant at that time was working and was making

at least 80% of his pre-injury wage. Claimant testified, and the parties stipulated, that at the time claimant was unaware that he was not eligible for SIBS but that he now understands that he was not eligible for SIBS in the first quarter. What happened to claimant's application is not clear. Testimony from one of the self-insured's adjustors would indicate there may have been some verbal contact between one of the self-insured's other adjustors and a Commission employee regarding claimant's case, but the documentation (both the self-insured's adjustor's "diary narratives" and Commission Dispute Resolution Information System (DRIS) notes) generally fails to support that contention. The hearing officer determined that the Commission had not acted on claimant's application and specifically determined:

FINDINGS OF FACT

6. The Commission did not review the Claimant's employment status ten (10) days before April 22, 1994, the last day of the entitlement period for impairment income benefits, to determine whether the Claimant was entitled to [SIBS]; the Commission made no determination concerning the Claimants [sic] entitlement to [SIBS] at any time during the first compensable quarter.

7. The Commission sent no written notice regarding the Claimant's entitlement or non-entitlement to [SIBS] during the first compensable quarter to either the Claimant or the Self-Insured at any time during that period.

8. The Commission did not notify the Self-Insured of the amount of monthly payment which should be made to the Claimant if he were entitled to [SIBS] for the first compensable quarter.

Nonetheless, the self-insured paid SIBS for the first compensable quarter in the total amount of $2,358.33 in the form of three checks. It is undisputed the self-insured did so without written direction or authorization. The issue of whether there was any oral or verbal direction to do so is disputed. The hearing officer further determined:

11. The [SIBS] payments made by the Self-Insured in the first compensable quarter were made in error and not made in a good faith reliance on any notification or representation by the Commission.

CONCLUSIONS OF LAW

5. The Self-Insured in [sic] not entitled to suspend the Claimant's income benefits to recoup its overpayment of $2,358.33, because it

made that payment in error.

The self-insured contends that its adjustor had received verbal information regarding the amount of SIBS benefits due the claimant from a Commission employee during "several conversations" with that Commission representative who had "authorized SIBS payments to the claimant. . . ." The self-insured's first assertion is that it is entitled to "recoup or credit the [SIBS] payments made to the claimant during the first compensable quarter" because claimant "should not be unjustly enriched due to the Self-Insured's good faith mistake in payment of [SIBS]. . . ." Self-insured cites several Appeals Panel decisions, none of which are applicable here. The self-insured cites Texas Workers' Compensation Commission Appeal No. 93980, decided December 14, 1993, which held that an adjustment of benefits of a seasonal worker can only be taken against temporary income benefits (TIBS), "but not other income benefits." Texas Workers' Compensation Commission Appeal No. 94134, decided March 16, 1994, was a case where a payment of TIBS to which claimant was not entitled was credited against payment of impairment income benefits (IIBS). In a similar case, Texas Workers' Compensation Commission Appeal No. 94135, decided March 16, 1994, the Appeals Panel concluded that an adjustment to IIBS may be made where TIBS, to which the claimant was not entitled, had been paid. Both these and other cases cited allow an adjustment to IIBS when TIBS have been improperly paid. Those cases both cite Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, along with Appeal No. 94134, which states:

> The key consideration in Appeal No. 92291 was that the carrier attempted to recover previous overpayments from benefits still owed and being paid to the claimant while he continued to suffer disability. The fact that the carrier's mistake resulted in a windfall recovery for the claimant was considered secondary to principles of statutory construction and a desire by the Appeals Panel to ensure that ongoing entitlements were not reduced to the degree that it might leave an injured worker significantly uncompensated, a result that the 1989 Act clearly intended to avoid.

We view the instant case as similar to the situation in Appeal No. 92291 (where carrier miscomputed the average weekly wage resulting in an overpayment of TIBS which carrier sought to recover by reducing future TIBS payments) in that the self-insured seeks to reduce future SIBS payment which will leave the claimant undercompensated for that time period. The Appeals Panel has allowed adjustments in IIBS (payments due to a given percentage of impairment) for overpayment of TIBS. Appeal No. 92291, however, specifies the circumstances under which future TIBS may be reduced. We apply that same rationale to the present case where SIBS are based on claimant's inability to work at 80% of his pre-injury wage. As stated in Appeal No. 92291:

> There is no obvious legislative intent to address all potential unjust enrichment because, as stated previously, Articles 8308-6.15 and 6.42

> [codified in Sections 410.032 and 410.205] show that the legislature would allow some "unjust enrichment" by reimbursement through the subsequent injury fund. In addition, reimbursement thereunder was allowed only after a Commission mistake, not a carrier's mistake.

Self-insured further contends that its evidence of attempts to contact the Commission representative justified the decision to pay SIBS for the first compensable quarter and emphasized that information regarding the amount of the SIBS payments could only have come from the Commission representative. Self-insured argues that the claimant's evidence of the DRIS notes and other log notes which failed to reflect communications that self-insured maintains were had with the Commission were outweighed by the self-insured's adjustor's live testimony that such communications had been made by another adjustor, and that the DRIS notes and Texas COMPASS log "do not negate the possibility that there were in fact representations made by a Commission representative." We would note that the self-insured's adjustor, having authorized the payment of SIBS, was not a disinterested witness. Which evidence carried more weight was a factual determination for the hearing officer to resolve. There was no requirement that claimant presented live testimony on this point and the documentary evidence was admitted without objection. Contrary to the self-insured's argument, the hearing officer could give whatever weight and credibility she felt was appropriate to the evidence.

Self-insured argues that the hearing officer's decision "is void and of no force and effect since the Decision was not filed with the Division of Hearings of the Commission within ten days after the close of the contested case hearing, pursuant to Sec. 410.168 and Rule 142.16 of the ACT." Self-insured seeks to draw an analogy between Appeals Panel decisions holding failure to timely file an appeal as jurisdictional and the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16 (Rule 142.16). Self-insured apparently fails to distinguish between a statutorily mandated time limit necessary to confer jurisdiction and an agency rule. While Rule 142.16(c) does state that all decisions shall be filed with the division of hearings no later than the 10th day after the close of the hearing, neither the 1989 Act nor the Commission rules specify what the consequences of failing to file a decision with the division of hearings might be. By contrast, the Act is clear that the decision of the hearing officer is final in the absence of a timely appeal. Section 410.169. While we agree that the administrative rules of the Commission set up the guidelines for rendering a decision, we do not believe that decision becomes void, nor may the carrier (or self-insured in this case) be relieved of liability, when a decision is issued later than those guidelines provide. Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992; Texas Workers' Compensation Commission Appeal No. 94001, decided February 10, 1994.

Finding no reason to reverse the hearing officer's decision, the decision and order are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge