

## APPEAL NO. 941753

On November 15, 1994, a contested case hearing was held. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the hearing was whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the first through the eighth compensable quarters. The hearing officer determined that the claimant is entitled to SIBS for the first through the eighth compensable quarters, but he further determined that the respondent (carrier) is liable for payment of SIBS for only the first compensable quarter and for part of the eighth compensable quarter. He determined that the carrier is not liable for payment of SIBS for the second, third, fourth, fifth, sixth, and seventh compensable quarters and for part of the eighth compensable quarter because it is relieved of liability for SIBS for the period during which a Statement of Employment Status (SES or TWCC-52) was not filed. The claimant disagrees with the decision for all quarters except the first quarter. No response was received from the carrier.

### DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant injured his back in the course and scope of his employment with (employer) on (date of injury). He was treated by Dr. O who reported that the claimant reached maximum medical improvement (MMI) on November 12, 1991, with a 15% impairment rating (IR), and that the claimant could return to light duty work. (The first page of the report is not in evidence.) The parties stipulated that the claimant reached MMI on November 12, 1991, with a 15% IR. The claimant said he received 45 weeks of impairment income benefits (IIBS). The parties stipulated that the claimant's IIBS period was from November 13, 1991, to September 22, 1992. The parties stipulated that the claimant did not elect to commute any portion of his IIBS. They also stipulated that the claimant's preinjury average weekly wage (AWW) was \$552.14. The claimant was represented by an attorney from July 1, 1991, to November 24, 1992. The claimant testified that his attorney did not tell him about SIBS and there is no mention of SIBS in the attorney's letters in evidence. In a letter to the Texas Workers' Compensation Commission (Commission) dated December 23, 1992, which was received by the Commission on December 28, 1992, the carrier asked that it be informed of the claimant's current employment status and "whether SIB's are owed." There is no indication in the record that the Commission responded to that letter.

The claimant testified that he obtained a light duty job as head of maintenance for an apartment building on March 15, 1992, and that he has continued to work there. He said he oversees the work of other workers and does no lifting. He also said that he has

continued to treat with Dr. O and that Dr. O has not released him from his light duty restriction. On July 26, 1994, Dr. O noted that the claimant has been under his care and is restricted to light duty work. The claimant testified that he is paid \$900.00 per month at his maintenance job and gets an apartment allowance of \$125.00 per month. The apartment employer also submitted wage information.

The claimant testified that at the expiration of his IIBS period he did not know he was entitled to any additional income benefits and that neither the Commission nor the carrier ever contacted him about SIBS. He said that on April 13, 1994, he contacted the Commission about eligibility for benefits. A Commission Dispute Resolution Information System (DRIS) log recorded that the claimant called the Commission on April 13, 1994, and asked about entitlement to any more benefits, that he told the Commission employee that he had a 15% IR and was making one-half of his preinjury wage, and that the Commission employee sent the claimant a "SIBS application," which we take to mean a SES. In evidence are eight SES's signed by the claimant all of which note that the claimant returned to work making less than 80% of his preinjury wage as a direct result of the impairment from his compensable injury and that he gets paid \$525 on the first and 15th of the month (taking into account the apartment allowance). None of them reference a particular compensable quarter. The one with the earliest date received stamp is dated April 25, 1994, and indicates receipt by the Commission on April 29, 1994.

DRIS logs indicate that the SES received on April 29th was sent to the carrier on May 2, 1994, but that due to a bad address it was again sent to the carrier on May 19th. The DRIS log of May 19th states that the carrier was "denying SIBS." A DRIS log dated June 2, 1994, states that the SES was sent to the carrier for "their determination," because the Commission did not receive it until after the end of the IIBS period. In a Notice of Refused/Disputed Claim (TWCC-21) dated May 19, 1994, and in a TWCC-21 dated May 25, 1994, the carrier notified the Commission that it was disputing SIBS. In a DRIS log dated June 3, 1993, a Commission employee indicated he or she had told the carrier on that date that an error was made in that the Commission is to determine entitlement to SIBS, and that the Commission would be "rejecting SIBS application no documentation for wages in addition past one year from IIBS ending no longer qualifies." In a Notice of Entitlement or Nonentitlement dated June 2, 1994, a disability determination officer (DDO) determined that the claimant was not entitled to SIBS. The notice does not mention the compensable quarter, but it is written on the SES which was received by the Commission on April 29, 1994, which was the earliest SES the Commission received from the claimant. In a letter to the carrier dated June 3, 1994, which shows a copy being sent to the claimant, the DDO notified the carrier and the claimant that "an injured employee initially determined by the commission not to be entitled to [SIBS] will become entitled if the employee, for one filing period . . . ."

A Request for Benefit Review Conference (BRC) form dated June 6, 1994, indicates that the claimant telephoned the Commission and requested a BRC in regard to SIBS entitlement. An unsigned dispute resolution form dated June 6, 1994, notes the disputed issue as "dispute of SIBS entitlement," and at the bottom of the form notes that the claimant called the Commission on April 13, 1994, that he was sent an SES, that he has a 15% IR, and that there was "no notice of SIBS eligibility in file until claimant's call." A DRIS log indicates that a BRC was held on (date of injury), but was reset for the claimant to obtain more wage information. A BRC was held on (date of injury), in regard to entitlement to SIBS for the first seven compensable quarters, and another BRC was held on (date of injury), in regard to entitlement to SIBS for the eighth compensable quarter.

Of the other seven SESs in evidence, six are dated April 25, 1994, and the claimant testified that he filled these out at the Commission field office and filed them with the Commission on April 25, 1994. However, these six SESs are all filed stamped as having been received by the Commission on July 29, 1994. The eighth SES is dated August 5, 1994, and it was date stamped as received by the Commission on August 5, 1994. The claimant said he has not received any SIBS.

The issue at the hearing was whether the claimant is entitled to SIBS for the first through the eighth compensable quarters. The claimant's position at the hearing was that he was entitled to SIBS for all eight quarters because he met the eligibility requirements for SIBS and because his delay in filing for SIBS was due to the Commission's failure to notify him of entitlement to SIBS. The carrier did not contend that the claimant failed to meet the eligibility requirements for SIBS. Rather, it contended that since the claimant did not apply for SIBS for more than one year following the expiration of the IIBS period, the claimant is not entitled to any SIBS.

The hearing officer found, among other things, that the first compensable quarter was from September 23, 1992, to December 22, 1993; the second compensable quarter was from December 23, 1992, to March 23, 1993; the third compensable quarter was from March 24, 1993, to June 22, 1993; the fourth compensable quarter was from June 23, 1993, to September 21, 1993; the fifth compensable quarter was from September 22, 1993, to December 21, 1993; the sixth compensable quarter was from December 22, 1993, to March 22, 1994; the seventh compensable quarter was from March 23, 1994, to June 21, 1994; and the eighth compensable quarter was from June 22, 1994, to September 20, 1994. In the Statement of the Evidence portion of his decision the hearing officer states, among other things, that the claimant completed the SES for the first compensable quarter on April 25, 1994; the Commission received the SES on April 29, 1994; and the Commission determined on June 3, 1994, that the claimant was not entitled to SIBS for the first compensable quarter.

The hearing officer further found that the claimant has a 15% IR, that he did not commute any portion of his IIBS, that the claimant in good faith attempted to obtain and retain employment commensurate with his ability to work, that the claimant's preinjury AWW is \$552.14, that the claimant's AWW for the filing periods for the first through the eighth compensable quarters is \$236.54, and that the claimant has returned to work earning less than 80% of his AWW in the prior quarter to each of the compensable quarters as a direct result of his impairment. He also found that the claimant failed to timely file a SES for the first compensable quarter because the Commission failed to give the claimant notice of the requirements regarding initial determination of SIBS, that the claimant failed to timely file a SES with the carrier for the second, third, fourth, fifth, sixth, and seventh compensable quarters; and that the claimant filed an SES for the eighth compensable quarter with the Commission on August 5, 1994, and with the carrier on August 10, 1994. The hearing officer concluded as follows:

### **CONCLUSIONS OF LAW**

3. Claimant was entitled to [SIBS] for the first compensable quarter beginning September 23, 1992.
4. There is no provision in the applicable statute or rule that would in any way mandate a denial of an initial quarter of [SIBS] as a result of tardiness in the [Commission's] sending notice to Claimant for filing the [SES].
5. Claimant was entitled to SIBS for the second, third, fourth, fifth, sixth, and seventh compensable quarters beginning December 23, 1992 and ending June 21, 1994.
6. Carrier is not liable to Claimant for [SIBS] for the second, third, fourth, fifth, sixth, and seventh compensable quarters because Carrier is relieved of liability for [SIBS] for the period during which a [SES] is not filed.
7. Claimant was entitled to [SIBS] for the eighth compensable quarter beginning June 22, 1994 and ending on September 20, 1994.
8. Carrier is liable to Claimant for the [SIBS] for the period during the eighth compensable quarter beginning August 10, 1994 and ending September 20, 1994, because Carrier received Claimant's [SES] on August 10, 1994 which date was during and prior to the end of the eighth compensable quarter.

In his appeal the claimant states that he agrees with the hearing officer's determination regarding the first compensable quarter but disagrees regarding the determinations on the remaining quarters because "1. I was not informed by the local TWCC office that I was entitled to any SIBS benefits as per Rule 130.10 [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ANN. § 134.10] until a year had passed from my last IIBS check. 2. I am working commensurate with my injuries and restrictions, but earning less than wages previous to my injuries at work."

Section 408.142(a) provides as follows:

- (a) An employee is entitled to [SIBS] if on the expiration of the [IIBS] period computed under Section 408.121(a)(1) the employee:
  - (1) has an [IR] of 15 percent or more as determined by this subtitle from the compensable injury;
  - (2) has not returned to work or has returned to work earning less than 80 percent of the employee's [AWW] as a direct result of the employee's impairment;
  - (3) has not elected to commute a portion of the [IIBS] under Section 408.128; and
  - (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Section 408.143 provides as follows:

- (a) After the commission's initial determination of [SIBS], the employee must file a statement with the insurance carrier stating:
  - (1) that the employee has earned less than 80 percent of the employee's [AWW] as a direct result of the employee's impairment;
  - (2) the amount of wages the employee earned in the filing period provided by Subsection (b); and
  - (3) that the employee has in good faith sought employment commensurate with the employee's ability to work.

- (b) The statement required under this section must be filed quarterly on a form and in the manner provided by the commission. The commission may modify the filing period as appropriate to an individual case.
- (c) Failure to file a statement under this section relieves the insurance carrier of liability for [SIBS] for the period during which a statement is not filed.

Rule 130.10 (Commission Review of Employment Status During the IIBs period) provides as follows:

- (a) The commission shall review the employment status of each injured employee who received an [IR] of 15% or greater, and who has not commuted any impairment income benefits, to determine:
  - (1) whether the employee is unemployed, or underemployed as defined in § 130.101 of this title (relating to Definitions); and if so;
  - (2) whether the unemployment or underemployment is a direct result of the impairment from the compensable injury.
- (b) The commission shall conduct this review:
  - (1) at least annually during the [IIBS] period; and
  - (2) no later than the 10th day before the last day of the [IIBS] period.
- (c) [what commission may require to conduct the review]
- (d) To conduct the review under subsection (b)(2) of this section, the commission shall send the employee a copy of the [SES] with filing instructions and a description of the consequences of late filing and failing to file. The commission shall use the results of this review to make the initial determination of entitlement to [SIBS], as provided in Section 103.103 of this title (relating to Initial Entitlement to [SIBS]).

Subsections (a) and (b) of Rule 130.102 (Determination of Entitlement to [SIBS]; Calculation of Amount), provide as follows:

- (a) Determination of entitlement and calculation of amount.
  - (1) The commission will make the initial determination and calculation, as provided by § 130.103 of this title (relating to Initial Entitlement to [SIBS]).
  - (2) The carrier will make subsequent determinations and calculations, as provided by § 130.104 and § 130.105 of this title (relating to Continuing Entitlement to [SIBS] and Reinstated or Delayed Entitlement to [SIBS]).
- (b) Entitlement. Entitlement to [SIBS] is determined prospectively for each potentially compensable quarter, based on criteria met by the injured employee during the prior filing period. Once determined, entitlement continues for the duration of the compensable quarter.

Subsections (b) and (c) of Rule 130.103 (Initial Entitlement to [SIBS]) provide as follows:

- (b) Review of employment status. As provided by § 130.10 of this title (relating to Review of Employment Status During the [IIBS] period), not later than 10 days before the last day of the [IIBS] period, the commission shall review the employment status of each injured employee who received an [IR] of 15% or greater, and who has not commuted an [IIBS].
- (c) Notice of determination. Not later than the last day of the [IIBS] period, the commission shall:
  - (1) determine entitlement or non-entitlement to [SIBS]; and
  - (2) send written notice of this determination to the injured employee and the carrier by first class mail or personal delivery.

We note that Rule 130.103(d) provides, in part, that if the Commission determines that the employee is entitled to SIBS the notice shall contain, among other things, instructions for filing the SES, a filing schedule, and a description of the consequences of late filing and failing to file, and that Rule 130.103(f) provides, in part, that if the Commission determines that the employee is not entitled to SIBS, the notice shall contain, among other things, a SES and filing instructions for claiming delayed entitlement to [SIBS]. Rule 130.104 relates to Continuing Entitlement to SIBS. Rule 130.104(b) provides that, unless this requirement has been expressly modified by the Commission,

an employee claiming continuing entitlement to SIBS must send the carrier a SES, and Rule 130.104(c) provides that the employee shall file the statement with the carrier by first class mail or personal delivery and that to ensure no lapse in benefits, the statement should be filed no later than the 15th day after receipt of the statement. Rule 130.104(g) provides that, if the employee is entitled to SIBS under this section the benefits begin to accrue on the later of: (1) the day after the last day of the prior compensable quarter; or (2) the date the statement is filed with the carrier.

Rule 130.105 relates to Reinstated or Delayed Entitlement to SIBS. Rule 130.105(b) provides that, except as provided by Section 130.106, an injured employee initially determined by the Commission not to be entitled to SIBS will become entitled if the employee, for one filing period is unemployed or underemployed (as defined by Rule 130.101) as a direct result of the impairment from the compensable injury; and has made good faith efforts to obtain employment commensurate with the employee's ability to work. Rule 130.105(c) provides that an injured employee seeking reinstated or delayed entitlement to SIBS must send the carrier a SES by first class mail or personal delivery. Rule 130.105(g) provides that, if the employee is entitled to SIBS under this section, the benefits begin to accrue on the date the statement is filed with the carrier.

Rule 130.106(a) provides that, except as provided in § 130.109 (relating to Reinstatement of Entitlement if Discharged with Intent to Deprive of SIBS), an injured employee who is not entitled to SIBS for a period of 12 consecutive months permanently loses entitlement to such benefits.

In Texas Workers' Compensation Commission Appeal No. 941263, decided November 3, 1993, we stated:

We do not find merit in the carrier's position on appeal that since the Commission failed to give timely notice (prior to the end of the IIBS period) to the parties and since the claimant thereby failed to timely file a [SES], the Commission lacked authority to determine entitlement to SIBS for the first quarter and the claimant waived her rights to SIBS. While there appears to be a failure to timely comply with the procedural provisions of the 1989 Act and implementing rules regarding the initial determination of SIBS, that is not a basis to conclude that the claimant's entitlement to SIBS was thereby extinguished. We rejected a carrier's position that SIBS would be wiped out in Texas Workers' Compensation Commission Appeal No. 94188, decided March 31, 1994, where an assertion was made that a claimant had not timely filed a request for a second quarter of SIBS, noting that Rule 130.104(c) specifies no time limit on a claimant; rather, it indicates that to ensure no lapse in benefits the statement should be filed within a certain time frame. *Cf.* Texas Workers' Compensation Commission Appeal No.



94335, decided May 6, 1994, where a modification in the time frame of a subsequent quarter of SIBS was made. We find no provision that would in any way mandate a denial of an initial quarter of SIBS as a result of tardiness in the Commission's sending notice or the claimant filing his statement. See *also* Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994.

In this case the record reflects that the Commission failed to make an initial determination of SIBS prior to the end of the IIBS period, which period ended on September 22, 1992, despite the fact that the claimant had a 15% IR and had not commuted any IIBS. Such a determination is required under Rules 130.10 and 130.103. The undisputed evidence shows that the Commission did not make an initial determination of SIBS until June 2, 1994. There is no evidence that the Commission sent the claimant an SES for the first compensable quarter prior to April 13, 1994. Rule 130.10 provides that the Commission shall send the employee an SES with filing instructions. Under Section 408.143(a), after the Commission makes the initial determination of SIBS, the employee must file an SES with the carrier for subsequent quarters. The carrier did not contend that it did not receive the SESs for the second through the seventh compensable quarters at or about the time they were date stamped as having been received by the Commission on July 29, 1994, and receipt of those documents by the carrier is indicated by the July 29, 1994, BRC wherein entitlement to SIBS for the first through the seventh compensable quarters was in issue. The hearing officer's finding that the claimant filed the SES for the eighth compensable quarter with the carrier on August 10, 1994, stands unrefuted. Section 408.143(b) provides that the SES must be filed quarterly. The evidence shows that the claimant filed SESs for the second through the eighth compensable quarters well within three months of the Commission's initial determination of SIBS. The claimant's obligation to file SESs for those compensable quarters arose after the Commission made its initial determination of SIBS because, as previously noted, Section 408.143(a) provides that "[a]fter the commission's initial determination of [SIBS], the employee must file a statement with the insurance carrier . . . ." We observe that Section 408.143(b) specifically provides that "[t]he commission may modify the filing period as appropriate to an individual case."

Under the particular facts of this case wherein the Commission was over one and one-half years late in determining initial entitlement to SIBS and the claimant filed SESs for the second through the eighth compensable quarters well within three months of the initial determination, we believe that the great weight and preponderance of the evidence shows that the claimant did timely file for SIBS for the second through the eighth compensable quarters and that there is no sound basis under Section 408.143(c) to relieve the carrier of liability for SIBS for those compensable quarters.

At the hearing the carrier contended that the claimant had permanently lost entitlement to SIBS because he was not entitled to SIBS for a period of 12 consecutive months and cited Sections 408.141(b) and 408.146(c), and Rule 130.6(a) in support of its contention. The uncontested findings are that the claimant is entitled to SIBS for the first eight compensable quarters, and the carrier never asserted that the claimant did not meet eligibility requirements for SIBS for those quarters. The fact that the Commission failed to make an initial determination of SIBS for over a year and one-half does not mean that the claimant was not entitled to SIBS during that period. Thus the carrier's reliance on the provisions it cited at the hearing was misplaced.

We affirm the hearing officer's decision and order that the claimant is entitled to SIBS for the first through the eighth compensable quarters and his decision that the carrier is liable to claimant for payment of SIBS for the first compensable quarter. We reverse the hearing officer's decision and order that the carrier is not liable to the claimant for payment of SIBS for the second through the seventh compensable quarters and his decision and order that the carrier is not liable to the claimant for payment of SIBS for a portion of the eighth compensable quarter and we render a decision that the carrier is liable to the claimant for payment of SIBS for the second through the eighth compensable quarters. We affirm the hearing officer's decision and order that the monthly SIBS rate is \$713.72.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge