APPEAL NO. 950055
FILED FEBRUARY 23, 1995

On November 28, 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 appellant (carrier A) disagrees with the hearing officer's decision that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first and second compensable quarters and requests that we reverse the decision and render a decision that the claimant is not entitled to SIBS for those two quarters. No response was received from the claimant.

DECISION

Affirmed.

On _____, the claimant was working as a meat bagging machine operator when she slipped on ice in the employer's cooler and fell backwards. She testified that she has been physically unable to work since her injury and that she has not worked since her injury. She was initially seen by (Dr. A), who the parties agreed was the employer's doctor, and he diagnosed a strained right knee. She said that (Dr. P) is her treating doctor and he diagnosed herniated discs at L3-4 and L4-5 for which a lumbar laminectomy was performed on June 25, 1992. On November 3, 1992, diagnostic tests revealed recurrent herniations at L3-4 and L4-5 and Dr. P recommended surgery but wanted the claimant to lose weight prior to surgery. At some point Dr. P was advised that the claimant had reached statutory maximum medical improvement (MMI), which is at the expiration of 104 weeks after income benefits begin to accrue, and he referred the claimant to (Dr. S) for an impairment rating (IR). In a Report of Medical Evaluation (TWCC-69) dated April 27, 1993, Dr. S assigned the claimant a 19% IR for impairment to her back. She noted in her narrative report that the claimant had developed back pain after falling at work, that she had surgery, and that she had reached statutory MMI. The claimant testified that the IR assigned by Dr. S was her first IR; that "19% was what everybody agreed on," and that the carrier paid her benefits in accordance with the 19% IR. She also said she has not had any of her benefits paid in a lump sum.

In a second opinion for spinal surgery report dated June 1, 1993, (Dr. C) noted that the claimant injured her back and knee when she fell at work in February 1991 and he agreed that the claimant should undergo a second back surgery with a spinal fusion from L-3 to S-1 with internal fixation. Dr. C also stated that the claimant is "unable to work in any capacity at the present time." On August 10, 1993, the employer wrote to the claimant stating that it had not received anything to account for her absence from work. In reports dated February 9, 1994, and May 10, 1994, Dr. P reported that it was "undetermined" when the claimant could return to limited or full time work. On June 10, 1994, Dr. P reported that the claimant was scheduled for surgery on June 15, 1994, that he

has been treating the claimant for her work-related injury, and that the claimant "has never been released to return to work following her injury of _____ [sic]." On June 16, 1994, the claimant underwent a second back surgery which consisted of decompression of the 4th and 5th lumbar nerve roots, mass fusion at L4-5, and stabilization at L4-5 utilizing "Texas Scottish Rites rods."

The claimant testified that since 1992, apparently following her surgery, she has worn a back brace and a bone stimulator and that these items restrict her motion and activities. She also said that she cannot bend or stoop and cannot sit for long periods of time. She said that since her injury she is physically unable to work, has not been released to return to work by her doctor, and has not returned to work. She said she continues to see Dr. P every two months and has x-rays taken due to the rods in her back.

The parties agreed at the benefit review conference (BRC) held on October 5, 1994, that the claimant's first compensable quarter for SIBS was from March 24, 1994, to June 15, 1994. This means that the impairment income benefits (IIBS) period expired on March 23, 1994, and it was by that date that the Texas Workers' Compensation Commission (Commission) was supposed to have determined the claimant's initial entitlement to SIBS. *See* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.10 and 130.103 (Rules 130.10 and 130.103). The parties also agreed that the second compensable quarter for SIBS was from June 16, 1994, to September 14, 1994. The claimant testified that on or about June 7, 1994, the Commission sent her a Statement of Employment Status (SES) which she completed on June 13, 1994, and filed with the Commission. There is no evidence that the Commission sent the claimant a SES before June 7, 1994. The Commission received the SES on June 13, 1994, and in it the claimant erroneously noted that Old Republic Insurance Company (carrier B) is the carrier. She also indicated that she had not received any wages in the prior 13-week period and that her doctor had not released her to work and that she was scheduled for surgery on June 15th. The parties agreed at the BRC that carrier A, who is the appellant, is the carrier for the claimant's employer. On June 14, 1994, the Commission determined that the claimant is entitled to SIBS from June 4, 1994, to September 1, 1994, which period does not correspond to either the first or second compensable quarters. In a Payment of Compensation or Notice of Refused/Disputed Claim form (TWCC-21) dated June 20, 1994, carrier B disputed the claimant's eligibility for SIBS on the basis of no good faith effort to obtain employment and underemployment not due to her impairment. On June 20, 1994, carrier B also requested a BRC on the issue of SIBS eligibility.

In an SES dated July 25, 1994, which was received by the Commission on July 25, 1994, the claimant again erroneously noted that the carrier was carrier B and she reported that she had received no wages for the 13-week period from the week ending December 31, 1993, to the week ending March 25, 1994, which roughly corresponds to the filing period for the first compensable quarter. (Rule 130.101 defines "filing period" as a period of at least 90 days during which the employee's actual and offered wages, if any, are

reviewed to determine entitlement to, and amount of SIBS, and under Rule 130.102(b), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period). On July 26, 1994, the Commission made a determination that the claimant was entitled to SIBS for the period from March 25, 1994, to June 23, 1994, which roughly corresponds to the period of the first compensable quarter agreed to by the parties. (We note that the period of the first compensable quarter agreed to by the parties, March 24, 1994, to June 15, 1994, contains only 84 days, or 12 weeks, and is not in accord with the definition of "compensable quarter" which is defined in Rule 130.101 as a period of 13 weeks of entitlement to SIBS). On the Notice of Entitlement or Nonentitlement of July 26, 1994, is the notation "due to Commission error first quarter SIBS was not paid. Please pay as ordered." In a TWCC-21 dated August 1, 1994, which is attached to the SES and Notice of Entitlement, carrier B disputed the claimant's eligibility for SIBS on the good faith and direct result criteria, and on the same date it again requested a BRC regarding SIBS.

In another SES dated July 25, 1994, the claimant again erroneously reported that carrier B was the carrier and she also reported that she did not receive any wages from the week ending April 1, 1994, to the week ending June 24, 1994, which roughly corresponds to the filing period for the second compensable quarter agreed to by the parties. Attached to this SES is a TWCC-21 dated August 1, 1994, wherein carrier B contested eligibility for SIBS on the good faith and direct result criteria, and on the same date it again requested a BRC regarding SIBS. However, in another SES also dated July 25, 1994, which is date stamped as received by the adjusting company on October 5, 1994, the claimant correctly identified carrier A as the carrier and reported that she had not received any wages from the week ending April 1, 1994, to the week ending June 24, 1994.

In a letter to the claimant's attorney dated September 22, 1994, carrier A's attorney stated that they had discussed resubmitting the claimant's SES "against the correct carrier," and that "[t]o date, Carrier's representative has not received a copy of any SES directed to the appropriate carrier." In an SES dated October 5, 1994, which has written on the top "1st Quarter," the claimant identified carrier A as the carrier, reported that she had earned no wages from the week ending March 30, 1994, to June 15, 1994 (roughly corresponding to the filing period for the second compensable quarter), and she noted that her doctor had not released her to return to work. The adjusting company stamped this SES as received on October 10, 1994. In another SES also dated October 5, 1994, which has written at the top "2nd Quarter," the claimant identified carrier A as the carrier, reported that she had earned no wages for the week ending June 22, 1994, to the week ending September 14, 1994 (which corresponds to the filing period for the third compensable quarter), and she noted that her doctor had not released her to return to work. The adjusting company stamped this SES as received on October 10, 1994.

In a TWCC-21 dated October 5, 1994, carrier B disputed claimant's entitlement to SIBS stating that it does not have coverage for the alleged injury, that claimant waived her

rights because the Commission did not make a timely determination of entitlement to SIBS for the first compensable quarter, and that it is not liable for SIBS because the claimant did not make a timely application for SIBS.

All of the aforementioned TWCC-21's and BRC requests were filed by (DR), a claims representative of (adjusting company) on behalf of carrier B.

In a request for BRC dated October 13, 1994, DR, the claims representative for adjusting company who had previously filed TWCC-21's and BRC requests on behalf of carrier B contesting the claimant's entitlement to SIBS, contested claimant's entitlement to SIBS for the first compensable quarter on behalf of carrier A. In addition to disputing on the good faith and direct result criteria, DR stated that the claimant was not entitled to SIBS because the claimant had "improperly defined this quarter," the Commission failed to timely determine entitlement to SIBS for the first compensable quarter, and because "there has never been an initial determination by TWCC the correct carrier owes SIBS." In another request for BRC dated October 13, 1994, DR on behalf of carrier A contested the claimant's entitlement to SIBS for the second compensable quarter on the same grounds as stated in the request for BRC for the first compensable quarter.

Carrier A contends that the hearing officer's finding that the claimant injured her back during a fall at work on _____, and had surgery in June of 1992 and in June of 1994 is not supported by the evidence. Extent of injury was not an issue at the hearing. However, we note that the claimant testified as to how she was injured and the medical reports of Drs. C and S note a back injury from the fall at work for which two surgeries have been performed. We conclude that this finding is supported by sufficient evidence.

Carrier A contends that the hearing officer's finding that claimant remains under the care of Dr. P and that she has not been released to return to work since the date of her injury is not supported by the evidence. In June 1994 Dr. P stated that he has never released the claimant to return to work since her work-related injury and his medical reports indicate that he is still treating the claimant. The claimant testified that she remains under the care of Dr. P and that he has not released her to return to work. We conclude that this finding is supported by sufficient evidence.

Carrier A contends that the hearing officer's finding that the claimant has a 19% IR is not supported by the evidence. Carrier A never disputed the claimant's assertion at the hearing that she has a 19% IR, that Dr. S's 19% IR was the first IR assigned to her, or that "everybody" agreed on that rating. No other IR is in evidence and there is no evidence that either party ever disputed the 19% IR assigned by Dr. S. Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. We conclude that the hearing officer's finding on the claimant's IR is supported by sufficient evidence.

Carrier A contends that the hearing officer's finding that the claimant did not elect to commute any portion of her IIBS is not supported by the evidence. The claimant testified that she has not had any of her benefits paid to her in a lump sum and the carrier has presented no evidence to the contrary. We conclude that this finding is supported by sufficient evidence.

Carrier A contends that the hearing officer's finding that the claimant has not been employed since the date of her injury and has had no wages during the filing period is not supported by the evidence. The claimant testified that she has been off work since her injury and her SES reports indicate that she has received no wages. We conclude that this finding is supported by sufficient evidence.

Carrier A contends that the hearing officer's finding that the claimant has been unable to return to work due to her impairment and his finding that the claimant does not have the ability to work because she has not been released by her treating doctor to return to any type of work are not supported by the evidence. The evidence shows that the claimant had back surgery in June 1992, that she was diagnosed with recurrent lumbar disc herniations in November 1992 for which additional surgery was recommended, that in June 1993 Dr. C agreed that the claimant needed additional back surgery and reported that the claimant is unable to work in any capacity, that in February 1994 and May 1994 Dr. P reported that it was undetermined when the claimant would be able to return to limited or full time work, that in June 1994 Dr. P reported that the claimant has never been released to return to work following her work-related injury, and that in June 1994 the claimant underwent a second major back surgery consisting of decompression, fusion, and placement of rods in her back. In addition, the claimant testified that she has been physically unable to work since her injury, that she must wear a back brace and a bone stimulator, that she cannot bend or stoop, and that her activities have been limited by her injury. We conclude that the hearing officer's findings that the claimant has been unable to work due to her impairment and his finding that the claimant does not have the ability to work are supported by sufficient evidence.

Carrier A also contends that the hearing officer's conclusion that the Commission has jurisdiction to determine the issues in the case and that venue is proper in the field office where the hearing was held is not supported by the evidence. Carrier A raised no issue concerning jurisdiction or venue at the hearing. We observe that the Commission has jurisdiction to determine contests of SIBS by a carrier. Section 408.147. We further observe that the parties' stipulation that the claimant resided within 75 miles of the field office where the hearing was held at the time of her injury supports the determination on venue. Section 410.005.

Carrier A further contends that the hearing officer's conclusion that the claimant is entitled to SIBS for the first compensable quarter and his conclusion that the claimant is entitled to SIBS for the second compensable quarter are not supported by the evidence.

Section 408.142(a) provides that an employee is entitled to SIBS if on the expiration of the IIBS period the employee: (1) has an IR of 15% or more from the compensable injury; (2) has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; (3) has not elected to commute a portion of the IIBS; and (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work. Rule 130.104(a) provides that an injured employee initially determined by the Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period: (1) has been unemployed or underemployed (as defined by Rule 130.101) as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work.

We have concluded that there is sufficient evidence to support the hearing officer's findings that the claimant has a 19% IR, that she has not commuted any portion of her IIBS, and that she has been unable to return to work due to her impairment. Concerning the criteria that the claimant has to make a good faith effort to obtain employment commensurate with her ability to work, we have previously observed that where it is demonstrated that a claimant's ability to work is "no ability," compliance with the statutory provision to make a good faith effort to obtain employment commensurate with the employee's ability to work is effectively met by no search. *See* Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994; Texas Workers' Compensation Commission Appeal No. 94398, decided May 19, 1994; and Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Of course, the burden is on the claimant to prove that she has "no ability" due directly to the physical injury. Appeal No. 941275, *supra*. We have concluded that the hearing officer's findings that the claimant does not have the ability to work and that she has been unable to work due to her impairment are sufficiently supported by the evidence which we have heretofore detailed.

The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we consider and weigh all the evidence, and should set aside the determination only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). An appeals level body is not a fact finder and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the finder of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). We do not substitute our judgment for that of the hearing officer where, as here, his decision is supported by sufficient evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ); Texas Workers' Compensation Commission Appeal No. 950069, decided February 17, 1995.

Carrier A also contends that the hearing officer erred in admitting into evidence claimant's exhibits one and two, which are signed medical reports of Drs. P and C, over its objection as to relevancy. Section 410.165(a) provides, in part, that "[t]he hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence," and Section 410.165(b) provides, in part, that a hearing officer "shall accept all written reports signed by a health care provider." We find no error in the admission of the complained of exhibits.

Carrier A further contends that the claimant should not be entitled to SIBS for the first compensable quarter because it asserts that the Commission has never made an initial determination of entitlement to SIBS "against" it; that the Commission's initial determination of entitlement to SIBS was not timely made; and that the claimant never filed an SES for the first compensable quarter. It asserts that the Commission lacks the authority to determine entitlement to SIBS for the first compensable quarter and that it is relieved of liability for that quarter. Section 408.143(c) provides that "[f]ailure 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." Pursuant to Section 408.143(a), and Rules 130.10, 130.102(a)(1), and 130.103, the Commission is to make the initial determination of entitlement to SIBS prior to the end of the IIBS period, and pursuant to Rule 130.102(a)(2) the carrier is to make subsequent determinations of SIBS. Rule 130.10(d) provides that to conduct the review for entitlement to SIBS the Commission may send the employee a copy of the SES with filing instructions and a description of the consequences of late filing and failing to file. Rule 130.102(e) provides that either party may contest a determination of entitlement to, or calculation of the amount of, SIBS.

There is no evidence that the Commission sent the claimant an SES prior to June 7, 1994, which was several months after the IIBS period expired on March 23, 1994. We do not agree with carrier A's assertion that the claimant never filed an SES for the first compensable quarter. She filed an SES on June 13, 1994, which was the first SES filed and it can reasonably be concluded that it was for the first compensable quarter. Although she named carrier B as the carrier, this discrepancy was resolved by the parties through their BRC agreement that carrier A is the correct carrier. We also do not agree with carrier A's assertion that the Commission never made an initial determination of SIBS. The evidence shows that on June 14, 1994, the Commission made an initial determination that the claimant was entitled to SIBS, albeit the Commission erred in determining the dates of the first compensable quarter. This error was later rectified by the Commission on July 26, 1994, and any error in identifying the correct carrier was rectified by the parties' agreement that carrier A is the correct carrier. We note that this case does not involve any question of a carrier's waiver of the right to contest the Commission's initial determination of entitlement to SIBS under Rule 130.108. If waiver of the right to contest SIBS had been an issue, then the date carrier A was notified of the Commission's initial determination of SIBS would be important; however, no such issue was before the hearing officer for resolution. As to the untimeliness of the filing of the initial SES and the untimeliness of the

Commission's initial determination of entitlement to SIBS, we have previously held in Texas Workers' Compensation Commission Appeal No. 941263, decided November 3, 1993, that such will not preclude entitlement to SIBS. In that case 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.
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> 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.

Carrier A also contends that the claimant is not entitled to SIBS for the second compensable quarter because it asserts that she untimely filed her SES for the second compensable quarter, that the Commission's failure to make an initial determination for the first compensable quarter or its failure to make a timely determination for the first compensable quarter relieves it of liability for all remaining quarters, and that the Commission lacks authority to determine SIBS for the second quarter. We have concluded that the Commission did make an initial determination of SIBS and that the Commission's delay in making that determination does not deprive the claimant of her entitlement to SIBS nor does it relieve carrier A of liability for SIBS.

In this case, the filing period for the second compensable quarter had but one day to run by the time the Commission made its initial determination of SIBS on June 14, 1994. Shortly thereafter, on July 25, 1994, the claimant completed a SES which reported no wages for a period that roughly corresponded to the filing period for the second compensable quarter and, although she erroneously noted that carrier B was the carrier, the TWCC-21 and request for BRC attached to that SES indicates that DR received this SES by August 1, 1994. DR acted as a claims representative for both carrier A and carrier B and the evidence reflects that he was familiar with the claimant's case (he had requested a second surgery opinion from Dr. C in May 1993) and should have been aware that carrier A was the correct carrier (we note that the Commission claim number and carrier A's claim number on DR's letter to Dr. C are the same as the claim numbers on the July 25th SES and that all other SESs in evidence contain one or both of those numbers). Under these circumstances we decline to hold, as requested by carrier A, that the claimant's SES for

the second compensable quarter was not timely filed. *See e.g.* Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1994, wherein we stated:

> 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.

We distinguish our decision in Texas Workers' Compensation Commission Appeal No. 94335, decided May 6, 1994, wherein we held that late filing of the claimant's SES for the third compensable quarter entitled her to SIBS for only the period of the third quarter remaining after the filing of the SES, on the basis that Appeal No. 94335 did not involve a delayed initial determination of SIBS by the Commission.

Carrier A also disputes the hearing officer's decision that it is required to pay any fees approved for claimant's attorney for services regarding the SIBS dispute. The hearing officer's decision regarding Carrier A's liability for claimant's attorney's fees is in accord with Section 408.147(c).

The hearing officers' decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz

Appeals Judge