APPEAL NO. 951081
FILED AUGUST 18, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in _____, Texas, on June 7, 1995, with (hearing officer) presiding as hearing officer. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first through the seventh quarters. The claimant appealed urging that the evidence shows that he made a good faith effort to seek employment commensurate with his ability to work and requesting that the Appeals Panel render a decision that he is entitled to SIBS for the first through the seventh quarters. The respondent (carrier) responded urging that the determination of the hearing officer that the claimant is not entitled to SIBS for the first through the seventh quarters is supported by sufficient evidence. The carrier also stated that it does not agree with a finding the fact that the claimant had been unable to work or earned less than 80% of his average weekly wage for each of the filling periods for the seven SIBS quarters as a direct result of his impairment and does not agree with some comments of the hearing officer in his statement of the evidence. The response filed by the carrier was timely filed to be considered as a response, but since it was not filed within 15 days of the carrier having received the decision of the hearing officer it will not be considered as an appeal. Texas Workers' Compensation Commission Appeal No. 92532, decided November 13, 1992. In the absence of a timely request for review, the complained of finding of fact became final. Section 410.169.

DECISION

We reverse and remand.

The claimant's employment involved heavy lifting. On (date of injury), he injured his low back and neck. The evidence on maximum medical improvement (MMI) and impairment rating (IR) is not well developed. The claimant introduced a Report of Medical Evaluation (TWCC-69) dated August 29, 1994, in which Dr. W, the designated doctor, certified that the claimant reached MMI on July 16, 1992, with a 16% IR. The carrier introduced a TWCC-69 dated February 27, 1995, in which Dr. S, a carrier-selected doctor, reported that the claimant reached MMI on February 16, 1992, with a nine percent IR. On March 22, 1995, Dr. M, the claimant's treating doctor, indicated on the TWCC-69 dated February 27, 1995, that he agreed with the nine percent IR assigned by Dr. S. The record does not reflect if or when the Texas Workers' Compensation Commission (Commission) determined that the claimant reached MMI on February 16, 1992, with a 16% IR. The parties stipulated that the claimant's IR is 16%; however, the record does not contain a stipulation as to when the claimant reached MMI. The parties did stipulate that the SIBS quarters stated in the issues are correct, and a date the claimant reached MMI may be inferred from that stipulation. Dr. M signed numerous certificates with dates from February 18, 1993, through January 5, 1995, stating that the claimant was unable to return to work until further notice. In a letter dated January 27, 1995, Dr. M stated that the claimant should

seek medical retirement since he is unable to do any significant amount of meaningful or repetitive lifting, bending, or stooping. The hearing officer did not make a finding of fact concerning when the claimant reached MMI or claimant's IR percentage. In view of the TWCC-69 from Dr. S dated February 27, 1995, with an agreement as to the nine percent IR signed by Dr. N on March 22, 1995, it is not clear when the Commission determined that the claimant reached MMI on July 16, 1992, with a 16% IR.

The claimant testified that he began working for the employer in June 1974 soon after graduating from high school. He said that he was injured and sought light duty work with his employer, that he has been told that he cannot return to work until he passes all tests without limitations, and that his treating doctor has not released him to return to work. The claimant testified that his employer kept health insurance for him and his children until September 1, 1994, that he was told by the employer that if he obtained employment elsewhere he would be terminated and he would no longer have health insurance provided by the employer, and that as far as he knows, he is still an employee of the employer but that the employer has no work for him. He said that he started taking college courses in the fall of 1990, that during each of the qualifying periods he was a full- time college student, that even though he was a full-time student attending classes and studying, he did not attend class and study every hour of the day, and that he received his degree on December 16, 1994. He stated that during each of the qualifying periods he attempted to get light duty work with the employer and that he had weekly contact with the union president who was trying to obtain light duty employment for him with the employer. The claimant testified that even though the designated doctor reported that he reached MMI on July 16, 1992, with a 16% IR, this was done in August 1994 and he did not learn of it until September 16, 1994. He stated that up until that time he had been assigned a 12% IR and did not know anything about SIBS. He said that in October 1994, he contacted the city field office of the Commission and was told by an ombudsman that he may be entitled to SIBS and that he needed to make a good faith effort to get employment to be eligible to receive SIBS. He said that he told the ombudsman that he was still an employee of the employer and was told by the ombudsman to seek work from the employer. The claimant testified that he made some mistakes completing the forms and filed applications for SIBS in December 1994. On cross-examination the claimant testified that he had been a full-time student, that he had sought employment only with the employer because he did not want to lose his benefits, and that he did his practice teaching during the fall of 1994.

The Appeals Panel has previously addressed factual situations in which the claimant did not learn of SIBS until a considerable length of time after reaching MMI. In Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995, the claimant reached MMI on November 12, 1991, with a 15% IR; however, the claimant did not did not learn of his possible entitlement to SIBS until April 13, 1994, when he called the Commission to ask about entitlement to additional benefits. The claimant had obtained light duty work on March 15, 1992, while he was still receiving impairment income benefits (IIBS), but he did not file an application for SIBS until he learned that he might be eligible to receive SIBS. The hearing officer found that the claimant was entitled to SIBS for the

second through the seventh quarters starting December 23, 1992, and ending June 21, 1994, but that the carrier was not liable for SIBS for those quarters because the claimant had not timely applied for SIBS. The Appeals Panel set forth the provisions of Section 408.142(a), Section 408.143, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.10 (Rule 130.10), Rule 130.102(a) and (b), and Rule 130.103(b) and (c) and reversed the determination of the hearing officer that the carrier was not liable for SIBS for the second through the seventh quarters and rendered a decision that the carrier was liable for SIBS for those quarters. The Appeals Panel wrote:

> 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 [Statement of Employment Status] 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 eight 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.

In Texas Workers' Compensation Commission Appeal No. 941277, decided November 4, 1994, the claimant was examined by a designated doctor on December 22, 1993, and the designated doctor certified that the claimant reached MMI on September 2, 1992, with a 15% IR. The Appeals Panel noted that Rule 130.103 appears to follow Section 408.143 "which only calls for the claimant to file a statement 'after the commission's initial determination. . . .'" The Appeals Panel cited Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992, stating that the Commission should not impose requirements of a rule on a party unless the Commission has complied with its own duties relative to that rule. In Appeal No. 941277, *supra*, the claimant was unable to work during the first qualifying period because he had not been released to work by his treating doctor during that time, and the hearing officer determined that the claimant made good faith efforts to seek employment commensurate with his ability to work during the other qualifying periods. The Appeals Panel wrote that because of the impossibility of performance the claimant was not required to file forms prior to the start of certain periods and that because of the facts in that case the Appeals Panel did not have to decide whether the impossibility of performance that it recognized would affect the requirement that a claimant seek employment commensurate with his ability to work. In another case involving the application of a Commission rule, we held that even though Rule 130.5(e) states 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, the 90-day period begins to run when the party received notice of the rating. Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993.

In an unpublished decision, Texas Workers' Compensation Commission Appeal No. 951080, decided July 24, 1995, the claimant had been released to light duty by her treating doctor on June 28, 1993, and the claimant testified that during the qualifying quarters her IR

was in dispute and she did not know what her IR would be, and therefore, she did not look for work because she did not know that she had to and because she did not need to work because her husband was supporting her. The hearing officer determined that she was not entitled to SIBS and the claimant appealed urging that she had good cause for not seeking employment commensurate with her ability to work. The Appeals Panel noted that there is no good cause exception in the SIBS eligibility criteria in the statute and that even if there were a good cause exception the fact that the claimant did not have a final decision that her IR was 15% during the qualifying quarters does not excuse her from demonstrating compliance with the statutory eligibility criteria in order to sustain her burden of proving entitlement to SIBS. In Appeal No. 951080, *supra*, the claimant did not seek employment. In the case before us the claimant was a full-time student, actively sought work with the employer including seeking the assistance of the union president, and did not seek employment elsewhere for fear of losing medical benefits for himself and his children.

We recognize the desirability of having injured workers return to work as soon a practicable. The claimant testified that he sought employment with his employer and that he knew that two other employees were performing light duty for the employer. He said that he wanted to return to work. At least prior to September 16, 1994, he did not know that he had been certified as having reached MMI over two years before and may be entitled to SIBS. While the claimant testified that he does not know much about workers' compensation laws and ignorance of the law is not an excuse, any limitations on the claimant's seeking employment resulted from the information available to him, lack of information available to him, and his ignorance of the law.

In a fact situation such as the one before us, neither party is in an ideal situation. The general scheme of the 1989 Act is that a seriously injured employee who because of a compensable injury is unable to obtain and retain employment at wages equivalent to the preinjury wage (Section 401.011(16)) will receive temporary income benefits (TIBS) until he reaches MMI (Section 408.101(a)), that if the injured worker receives an IR the carrier shall begin to pay IIBS not later than the fifth day after receiving the report certifying MMI (Section 408.121(b)), and that if the injured worker is entitled to SIBS the carrier shall begin paying SIBS not later than the seventh day after the expiration of the IIBS period (Section 408.145). Apparently, the drafters of the 1989 Act anticipated an orderly and timely transition from TIBS to IIBS to SIBS and did not contemplate a fact situation such as the one in this case. Assuming that the claimant met the criteria in Section 408.142 and would be entitled to SIBS, the IIBS for 48 weeks would clearly have been exhausted before the designated doctor examined the claimant and certified that he reached MMI.

The parties stipulated that the claimant's IR is 16%, but they did not stipulate to the date that the claimant reached MMI. The hearing officer wrote in the Statement of the Evidence that the claimant reached MMI on July 16, 1992, with a 16% IR. Determinations of the MMI date and IR are not included in the findings of fact or conclusions of law. The record contains the TWCC-69 from Dr. W dated August 29, 1994, and the TWCC-69 from Dr. S dated February 27, 1995, with the comments of Dr. M dated March 22, 1995. One

could infer from this that the dispute over MMI and IR had not been resolved as late as March 1995, and the record does not reveal if or when a determination was made that the claimant reached MMI on July 16, 1992, with a 16% IR. The hearing officer did not specifically determine when the Commission issued its initial determination concerning entitlement to SIBS or when claimant was required to begin his good faith effort to seek employment commensurate with his ability to work. In most cases, such determinations are not necessary. However, considering the unusual circumstances in the case before us, determinations of how and when the requirement was placed on the claimant must be made before a determination can be made on whether the claimant made a good faith effort to seek employment commensurate with his ability to work. It appears that additional evidence will be required to make the required determinations.

Also, the claimant testified that in October 1994 the ombudsman told him to seek employment from the employer. Each case must be decided on its facts. Should the decision of the hearing officer reveal that the advice of the ombudsman was not correct, such advice would not excuse the claimant from making a good faith effort to seek employment commensurate with his ability to work as established by Appeals Panel decisions when he was required to make such as effort.

We reverse the decision of the hearing officer and remand for the hearing officer to receive evidence, make findings of fact and conclusions of law, and determine whether benefits are due not inconsistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file the request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge