

APPEAL NO. 951487
FILED OCTOBER 19, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 1, 1995, to determine the claimant's entitlement to supplemental income benefits (SIBS) for the first through the sixth compensable quarters; the hearing officer, determined that the claimant was not entitled to SIBS for any of those quarters. In his appeal the claimant contends that he was never informed of his possible right to receive these benefits, and hence did not look for work prior to the first compensable quarter; he also said he was unable to work due to his physical impairment. The carrier responds that at all times at issue the claimant has been able to perform at least light duty work, but that he has failed to look for work.

DECISION

Affirmed.

The claimant, who had done roofing and construction work, injured his back in the course and scope of his employment; the date of injury is stated in the records below as both _____, and _____. A large herniation at L5-S1 was diagnosed, for which he underwent surgery (partial hemilaminectomy and decompressive foraminotomy and disc excision) in August 1992. His treating doctor, Dr. P, wrote in December 1992 that claimant was pain free and that he saw no reason why claimant could not return to full work duties. However, in March 1993, Dr. P reported that claimant had begun re-experiencing back and leg pain one month before; a myelogram and CT scan revealed a recurrent disk rupture, for which repeat surgery was performed. Dr. P certified that claimant reached maximum medical improvement (MMI) on January 17, 1993, with a 20% impairment rating (IR). This IR was accepted by both the claimant and carrier, and the claimant received impairment income benefits (IIBS) until March 13, 1994.

The claimant was arrested on June 18, 1994, and has been incarcerated ever since. At the hearing he testified by telephone from a correctional facility in (state), where he had been since March 1995.

At the hearing the claimant did not contend that he had looked for employment during the filing periods for the SIBS quarters at issue here. The claimant testified, however, that he was never notified by either the Texas Workers' Compensation Commission (Commission) or the carrier about his eligibility for SIBS benefits. He stated that he called the carrier inquiring about further benefits and was sent two forms, both of which denied further benefits. (It was not clear whether the claimant was referring to a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) in evidence, sent to the claimant on March 14, 1994, and indicating that IIBS had expired.) He also said he applied for an advance and was notified by mail that such had been denied. In evidence were two Employee's Request for Payment of Advance

Compensation (TWCC-47) forms dated May 14, 1994, and August 3, 1994. The first stated it had been denied because the claimant had provided no description of financial hardship. The second, which apparently was a resubmission, stated that the claimant could not work, that he was still under a doctor's care, and that he needed financial assistance. This was rejected because Commission records showed that the claimant was no longer receiving any type of income benefits.

The claimant also said that he contacted the Commission several times after he was incarcerated. The earliest correspondence in evidence is a December 23, 1994, letter in which he noted that he had last received a check from the carrier approximately 90 days prior to his incarceration, and requested that the Commission advise him of any recourse whereby he could "continue compensation in any form." On January 25, 1995, the claimant again wrote the Commission stating that he had not received a response from his previous letter; he reiterated that the Commission had authorized benefit payments until 1994 but "subsequently denied all requests for extension payments" and asked what further recourse he had.

On May 17, 1995, the claimant wrote a Commission disability determination officer, referencing her letter of April 11, 1995, which apparently enclosed some written materials. (At the hearing the claimant said he received a "packet" containing applications for SIBS which was sent to his home after he was incarcerated and after he wrote inquiring about benefits.) Among other things, the claimant asked in the letter whether his IIBS would resume after he was released from custody, and what steps he should take to qualify for SIBS. He also asked whether he was under any time limits with regard to IIBS or SIBS.

Also in evidence were Statement of Employment Status (TWCC-52) forms signed by the claimant on April 23 and 24, 1995, and May 11 and 24, 1995. No time period is indicated on any of the forms, although they presumably relate to the first through fourth quarters. The TWCC-52 dated April 24th states that the claimant had applied for two jobs during the preceding 90-day period but was not hired; the other three forms state that the claimant applied for no jobs, and claimant's testimony at the hearing was that he had not looked for work. At the bottom of the April 23rd TWCC-52 a Commission representative wrote that the claimant's application for SIBS had been denied because of "Rule 130.106 - an injured employee who is not entitled to [SIBS] for a period of 12 consecutive months permanently loses entitlement to such benefits." The May 24th request was denied because of Rule 130.106 and because the claimant "had not made a good faith effort."

While the parties did not stipulate as to the precise time periods for the quarters at issue, there appeared to be no disagreement that the first quarter ran from March 14, 1994, to June 12, 1994, and that the filing period for that quarter ran from December 13, 1993, to March 13, 1994. The claimant stated that he did not apply for work during the first filing period, both because he did not know he was required to and because he physically could not work. He said he was still under a doctor's care at that time; he said Dr. P talked with him about going back to work, and had told him he could try light duty, but he said he was unable to do anything. As noted earlier, claimant was incarcerated shortly

after the beginning of the first quarter of SIBS. He also stated that while there were jobs available at the prison, they involved work he was not able to do, such as outdoor maintenance and kitchen work. The claimant also introduced documentary evidence showing he had complained of back pain while incarcerated and that in April and July 1995 a doctor had given him restrictions of no prolonged standing, climbing, pushing, pulling, or lifting over 15 pounds.

In denying claimant SIBS for the first through sixth compensable quarters, the hearing officer stated her reasoning as follows:

Insofar as claimant's good faith search for employment is concerned, it is evident from claimant's own testimony that during the ninety-day time frames which preceded claimant's first three quarters of [SIBS] eligibility, claimant made no search for employment, whatsoever. However, claimant's failure to search for employment will be considered a search for employment commensurate with his ability if claimant can demonstrate that he had absolutely no capacity for gainful employment during the time frames at issue. Although claimant testified that he had no such capacity, he also stated that his treating doctor would have permitted him to return to work on a light-duty status; for this reason, it seems highly unlikely that claimant's capacity for gainful employment was totally nonexistent. Since claimant did not demonstrate that he sought employment commensurate with his ability, he is not entitled to [SIBS] for the first, second, and third compensable quarters.

During the entirety of the ninety-day time frames which preceded the start of the fourth, fifth, and sixth compensable quarters, claimant was incarcerated. Since claimant's testimony tends to indicate that the only jobs available to incarcerated inmates require rather heavy manual labor, which is outside claimant's physical capability, the hearing officer does not determine claimant's [SIBS] entitlement for the fourth, fifth, and sixth quarters based on the requirement that claimant seek employment commensurate with his ability. However, it appears that claimant's unemployment during these quarters is not the direct result of the impairment caused by the compensable injury which is the basis of this case, but is caused by claimant's incarceration.

Although the hearing officer did not address the claimant's argument, both below and on appeal, that the Commission failed to inform him about potential SIBS entitlement, we believe this is a significant argument under the facts of this case. The 1989 Act provides in Section 408.142(a) that an employee is entitled to SIBS if on the expiration of the IBS period he has an IR of 15% or more, has not returned to work or has returned to work earning less than 80% of his average weekly wage as a direct result of his impairment, has not elected to commute a portion of his IBS, and has attempted in good faith to obtain employment commensurate with his ability to work. Further, Section 408.143 states that after the Commission's initial determination of SIBS, the employee

must file with the insurance carrier a quarterly statement stating that the employee has earned less than 80% of his average weekly wage as a direct result of his impairment, the amount of wages earned in the filing period, and that the employee has in good faith sought employment commensurate with his ability to work.

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 [IIBS], 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.

* * * *

(d) To conduct the review under subsection (b)(2) of this section, the Commission shall send the employee a copy of the [TWCC-52] 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 by ? 130.103 of this title (relating to Initial Entitlement to [SIBS]).

Likewise, Rule 130.102, Determination of Entitlement to [SIBS]; Calculation of Amount, provides in pertinent part:

(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.

And Rule 130.103 provides in pertinent part:

(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 impairment rating of 15% or greater, and who has not commuted any [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.

In the instant case, there appears to have been adduced no evidence to rebut the claimant's testimony and evidence that the Commission never complied with the above requirements for the first quarter of SIBS.

The Appeals Panel has in several cases considered situations where a claimant's initial and subsequent SIBS filings occurred later than the actual quarter following the end of the IIBS period, in some cases due to the Commission's failure to inform. In Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995, the claimant, whose IR was 15%, received IIBS until September 22, 1992, but was never contacted by the Commission concerning SIBS. He began working at a light duty job on March 15, 1992, although he earned less than 80% of his preinjury wage. After contacting the Commission on April 13, 1994, he was sent the appropriate forms and filed TWCC-52s for the first eight quarters, which ran from September 23, 1992 to September 20, 1994. The hearing officer held that the claimant was entitled to SIBS for the first through seventh quarters, but that the carrier was not liable for the second through seventh quarters because the claimant did not timely apply for SIBS (claimant was also awarded SIBS for that portion of the eighth quarter for which he had filed a TWCC-52). In reversing the hearing officer's determination that the carrier was not liable due to the claimant's untimely filing, the Appeals Panel stated as follows:

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 TWCC-52s 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.

See also Texas Workers' Compensation Commission Appeal No. 950055, decided February 23, 1995, and Texas Workers' Compensation Commission Appeal No. 951376, decided October 2, 1995, which reached a similar result.

Texas Workers' Compensation Commission Appeal No. 941263, decided November 3, 1994, concerned a claimant who had not been informed of SIBS by the Commission until well into the first compensable quarter. The Appeals Panel rejected the carrier's argument that the claimant had waived her rights to SIBS due to her failure to timely file her TWCC-52, stating that it found "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." However, it reversed the hearing officer's determination that the claimant was entitled to SIBS for the first quarter, stating that the evidence demonstrated only some working restrictions (rather than no ability to work), but there was no evidence that the claimant ever sought any type of employment.

We have also addressed situations where the Commission did not fail to inform a claimant about SIBS, but the claimant for other reasons did not learn of SIBS for some time after the expiration of IIBS. In Texas Workers' Compensation Commission Appeal No. 941277, decided November 4, 1994, a designated doctor certified MMI 15 months earlier than the date of his examination which, we said, "telescoped the sequence of events . . . making it impossible to follow applicable rules." We therefore upheld the hearing officer's determination that the claimant was not required to file statements prior to the SIBS periods. That case also referred to the "impossibility of performance" issue--similar to that raised in the instant case--but stated such issue did not have to be decided because of the facts of the case, which showed that prior to the first SIBS quarter, when the claimant had not looked for work, his doctor had placed him in a no-work status and that thereafter, when he was released to limited duty status, the claimant attempted to return to work but was not successful. The Appeals Panel thus found that the evidence supported the hearing officer's determination that the claimant was entitled to SIBS. Similarly, in Texas Workers' Compensation Commission Appeal No. 951131, decided August 25, 1995, the claimant learned, apparently in early 1995, that his doctor revised his IR to 27% although left intact his earlier MMI date of December 16, 1992. The first of the SIBS quarters began on July 7, 1994, and the claimant's first TWCC-52 was filed on January 14, 1995. The Appeals Panel reversed the hearing officer's decision awarding SIBS for that quarter, stating that the evidence showed the claimant did not look for work at all during this period, nor did it contain medical evidence establishing no ability to work. Further, the panel reversed the hearing officer's award of SIBS for the second and third quarters because, it said, the evidence showed that claimant's underemployment was not the direct result of his impairment, and it reversed the award of SIBS for the fourth quarter because the claimant stated he only looked for good paying jobs. However, it rejected the carrier's argument that the claimant was not entitled to SIBS because he did not timely file his TWCC-52s.

And in an unpublished case, Texas Workers' Compensation Commission Appeal No. 951080, decided July 24, 1995, the Appeals Panel affirmed the hearing officer's decision denying SIBS for the first through fourth compensable quarters in the face of the claimant's argument that she did not look for work during those quarters because she did not know she had to do so; the panel noted that there is no good cause exception to the SIBS eligibility criteria and that ignorance of the law is no excuse. In that particular case, a lengthy period of time elapsed between the claimant's date of MMI and first SIBS period; the decision does not state that the claimant lacked knowledge about entitlement to SIBS.

There is no doubt in the instant case that the Commission breached its duty to timely inform the claimant about his potential entitlement to SIBS--a situation made even more egregious by the fact that the claimant sought assistance from the Commission about benefits very shortly after his IIBS expired. However, the foregoing cases indicate that while a claimant does not waive his right to SIBS due to untimely filing under such circumstances, the actual SIBS period itself is not tolled. Therefore, whether or not a claimant met eligibility requirements will be due to the circumstances--including medical condition and good faith job search--that existed prior to the compensable quarters which occurred in the past. Thus, despite the claimant's contention that he genuinely did not know he was required to look for a job prior to each quarter, we do not find error in the hearing officer's determination of SIBS based upon the facts that existed in each filing period. Entitlement to SIBS is determined prospectively for each potentially compensable quarter, based on criteria met during the prior filing period. Rule 130.102(b). We would also distinguish the procedures for determining entitlement to SIBS from the actual criteria for entitlement itself; as we have written in many cases where a claimant honestly was unaware of the requirement to dispute an IR within 90 days, pursuant to Rule 130.5(e), ignorance of statutory requirements does not excuse compliance. Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994.

The Appeals Panel has held that where it is demonstrated that a claimant's ability to work is "no ability," compliance with the requirement to make a good faith effort to obtain employment commensurate with the ability to work is effectively met by no search. Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994. However, an employee's inability to work must be supported by medical evidence or be so obvious as to be irrefutable. Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994. Whether a claimant has met his burden to prove no ability to work is generally a question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 950023, decided February 16, 1995.

Upon our review of the evidence, we cannot say it does not support the hearing officer's decision in this case. While the hearing officer could have found genuine claimant's complaints of continued pain, she nevertheless could find that the medical evidence did not support a determination that the claimant was totally unable to do any type of work; the good faith job search analysis is not limited to a claimant's prior job. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. As to subsequent periods of time following claimant's incarceration, he testified that

there were paying prison jobs he could be performing but for his condition resulting from the compensable injury. However, the evidence can also support the hearing officer's determination that it was the incarceration which was the reason for the claimant's unemployment during this period. See Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993.

In short, we will not reverse the hearing officer's decision where it is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

CONCURRING OPINION:

I concur with the well-reasoned majority decision in this case. I write separately only to express certain concerns about the situation illustrated by the facts of this case and to express my opinion that our decision in this case not be interpreted to mean a hearing officer is necessarily powerless to provide a remedy in the situation where a claimant through no fault of his or her own is unaware of the rules surrounding eligibility for SIBS.

I have the same type of concern here as I did when I dissented in Texas Workers' Compensation Commission Appeal No. 941639, decided January 20, 1993. My major concern in that case was that by determining the standards of what constituted a good faith job search retroactively we were holding claimants to a standard of which they were not aware. Specifically, in that case the hearing officer decided that the claimant had not made a good faith job search at least arguably because he looked for work for only a short time during the qualifying period. My argument was that without a rule or other guidance providing that the job search be conducted over a longer period, it was unfair to hold the claimant to such a requirement because he was only made aware of it after the fact when it was no longer possible to comply. In my view this case presents a similar, and even worse, problem. If a claimant is entirely unaware of the SIBS system or its requirements, or is unaware that he or she is now subject to those requirements, how can a claimant be expected to qualify for SIBS, other than by chance?

As the majority points out, this is a two-fold problem. First, we have claimants like the one in the present case, who were not told anything about SIBS or the requirements to qualify because the Commission failed to make the initial determination of eligibility timely. The second type of situation is one in which the claimant is going through the dispute

resolution process and has an MMI date and an IR determined that places the qualifying period in the past. The majority illustrated this latter situation by citing cases where the designated doctor finds that the claimant attained MMI at some time in the relatively distant past, meaning that the initial qualifying period and a number of SIBS quarters may have passed by the time the initial qualifying period was determined. In both these situations we have relieved that claimant of timely filing for SIBS benefits. We are holding in the present case that neither the qualifying period nor the computation of the time of the SIBS eligibility quarters is changed in such situations. The problems remains what do we do about the fairness about holding people to rules of which they are informed after the fact.

I think part of the solution is for Commission personnel to attempt to inform claimants at the earliest possible time of the requirements to qualify for SIBS and warn claimants that it is possible that the MMI date could be shifted backwards. One of the things that makes the present case so egregious is that the Commission's action in this case was just the opposite. Rather than warning or informing the claimant, the Commission first failed to make a timely determination of the claimant's SIBS eligibility and then compounded this error by misinforming and misleading the claimant when he sought the Commission's assistance. The claimant in the present case also sought information from the carrier. While arguably under no legal duty to act prior to the initial determination, the carrier is now benefiting, in the sense of being relieved from paying benefits, for lying behind the log.

It would seem to me that a hearing officer could consider the fact that a claimant was not informed or was misinformed concerning SIBS eligibility and rules in determining whether the claimant met the requirements for eligibility. Certainly, there could be room for more liberally construing what would constitute a good faith job search or the direct result under such circumstances. The hearing officer in the present case did not choose to apply such a construction here and I do not believe there are sufficient grounds to overturn this decision. In my view, in the present case a liberal construction would have only made a difference in regard to the first quarter as the claimant was incarcerated in subsequent quarters. However, I do not believe that the decision in the present case precludes hearing officers in other cases where the claimant is not informed of SIBS rules or requirements from applying a liberal construction to finding a claimant has met these requirements.

Gary L. Kilgore
Appeals Judge