APPEAL NO. 951975
FILED JANUARY 8, 1996

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 11, 1995. The issue at the CCH was whether respondent (claimant) was entitled to supplemental income benefits (SIBS) for the first through seventh compensable quarters. The hearing officer determined that claimant was entitled to SIBS for the first through sixth compensable quarters, but that he was not entitled to SIBS for the seventh compensable quarter because he did not timely file his Statement of Employment Status (TWCC-52) for that quarter. On appeal, appellant (carrier) contends that the hearing officer erred in determining that claimant is entitled to SIBS for the first through sixth compensable quarters because: (1) the fact that claimant earned less than 80% of his average weekly wage (AWW) was not as a direct result of his impairment; (2) claimant did not make a good faith effort to obtain employment commensurate with his ability to work; and (3) claimant did not timely file his TWCC-52s for the compensable quarters in question. Claimant responds that he agrees with the hearing officer's decision.[1]

DECISION

We affirm in part and reverse and render in part.

There was evidence that claimant said that, on _____, he was working at (employer) when he broke his right lower leg and aggravated a prior back condition. The record reflects that claimant underwent extensive fusion and decompression of his lumbar spine.

The parties stipulated that: (1) claimant had a 22% impairment rating (IR); (2) claimant did not commute any portion of his impairment income benefits (IIBS); and (3) the first compensable quarter began October 6, 1993, and ended January 4, 1994.

Carrier first contends that the hearing officer erred in determining that claimant returned to work but earned less than 80% of his AWW as a direct result of his impairment. Carrier points to evidence from claimant that he was able to do his preinjury job at the time of the CCH. Carrier contends there is nothing to show he is earning less than his preinjury wage because of his impairment. Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or earned less

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[1] Claimant also states that he should not be penalized because the Commission did not make an initial SIBS determination when his impairment income benefits (IIBS) period ended. To the extent that claimant intends this as an appeal, we note that it is not timely as an appeal. Texas Workers' Compensation Commission Appeal No. 951726, decided December 4, 1995.

than 80% of the AWW as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. We note that claimant's ability to work is measured against employment generally, and the issue is not merely whether he is able to do his prior job. Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that the job he had with employer involved supervising groundskeepers at a golf course. He said he tried to return to this supervising job after his injury, but employer terminated him. He later said that employer terminated him because they did not want to risk having him work with a back condition. He said he now works for a corporation driving a truck, collecting trash on the golf course grounds, and loading it into bags. Claimant testified that he had another back surgery pending because his fusion surgery did not "take."

In a Specific and Subsequent Medical Report (TWCC-64) dated April 8, 1992, signed by Dr. P, the doctor said claimant's prognosis was "poor" and that Dr. P did not "think he will be able to return to job [sic]." The record reflects that claimant had back surgery in July and November 1991. In a Report of Medical Evaluation (TWCC-69) dated in April 1992, Dr. P referred to persisting pain and weakness and said claimant told him he does not think he can return to work. In an undated TWCC-69 from Dr. P that is marked "received" on September 2, 1993, Dr. P said he rescinded his previous maximum medical improvement (MMI) certification, noted that a CT scan showed foraminal stenosis and psuedoarthrosis, recommended surgery, and said, "Pt off work until further notice." The record contains an off work slip dated in August 1993 that says claimant is off work pending surgery "poss. 1-1-94."

Here, there was evidence that claimant had a third back surgery pending. This is evidence that supports the hearing officer's direct result determination. Claimant also testified that he looked for 12 or 13 jobs but that no one would hire him because of his back problem.[2] He said he tried to return to work for employer, but they were

[2] Claimant rested, carrier presented closing argument, and then claimant said he had looked for work with 12 or 13 employers. The hearing officer then questioned whether claimant had asked employer for work and claimant responded without objection. We will consider this as evidence concerning direct result.

concerned about his back condition and refused to allow him to return to work. He said he was working and had worked for the same new employer for all qualifying periods in question. There was evidence that claimant was earning less than 80% of his AWW. We conclude that the hearing officer's direct result determination is not against the great weight and preponderance of the evidence in this case.

Carrier next asserts that the hearing officer erred in determining that claimant made a good faith effort to obtain employment commensurate with his ability to work. Carrier contends that claimant did not act in good faith in making a job search as, it contends, is shown by the fact that he did not indicate on his TWCC-52 that he made a good faith effort. However, carrier did not raise the issue of good faith at the benefit review conference (BRC) or at the CCH. We will not address this contention for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92716, decided February 16, 1993.

Carrier contends that the hearing officer erred in determining that claimant was entitled to SIBS because, it asserts, claimant did not timely file his TWCC-52s for the compensable quarters in question. Carrier asserts that claimant knew in March 1994 that he was entitled to SIBS, but that he still failed to apply for SIBS until late December 1994. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (RULE 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee met the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period," is defined 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]."

There is conflicting evidence regarding when claimant learned that he might be eligible for SIBS. Claimant testified that he did not know until December 1994 that he might be eligible for SIBS. He said that when he found out, he then filed a TWCC-52. The record contains a TWCC-52 dated December 29, 1994. A letter of March 1, 1995, from Ms. Mc, the office manager for Dr. P, states that she told claimant that he may be entitled to SIBS and that he had been previously "unaware of this benefit." The record contains TWCC-52s for the remaining quarters that are dated April 1995. In this case, the hearing officer resolved the conflicts in the evidence and apparently found that the claimant first knew he was eligible for SIBS in December 1994. We will not disturb this apparent determination because it is not against the great weight and preponderance of the evidence. Cain, *supra.*

Regarding the second through sixth compensable quarters,[3] there was evidence that the Commission failed to make an initial determination of SIBS prior to the end of the IIBS period, despite the fact that the claimant had a 22% IR and had not commuted any IIBS. Such a determination is required under Rules 130.10 and 130.103. In Texas Workers' Compensation Commission Appeal No. 941263, decided November 3, 1994, 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 [TWCC-52], 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.

It was undisputed that the Commission did not make an initial determination of SIBS in this case until January 10, 1995. The hearing officer noted in the "evidence" portion of the decision and order that the Commission's denial of SIBS was dated January 10, 1995. The TWCC-52s filed by claimant for the second through seventh compensable quarters are dated April 19, 1995, and are marked as received by the Commission on May 25, 1995. Claimant's obligation to file TWCC-52s for those compensable quarters arose after the Commission made its initial determination of SIBS. Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995. A TWCC-52 must be filed quarterly. Section 408.143(b). The hearing officer said in the "discussion" portion of the decision and order that, "claimant filed his [TWCC-52s] for

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[3] Because the hearing officer determined that claimant is not entitled to SIBS for the seventh compensable quarter and claimant did not timely appeal this determination, we need not address it.

the second through sixth compensable quarters within three months after the Commission's initial determination of non-entitlement to [SIBs]. However, claimant did not file TWCC-52s for the second through sixth compensable quarters until more than three months after the Commission's initial SIBS determination and claimant never explained this delay. Therefore, the hearing officer erred in awarding SIBS for the second through sixth compensable quarters. *See* Appeal No. 941753, *supra.*

Regarding the first compensable quarter, there is no evidence that the Commission sent the claimant a TWCC-52 for the first compensable quarter prior to December 1994. Rule 130.10 provides that the Commission shall send the employee a TWCC-52 with filing instructions. In this case, the Commission was over a year late in determining initial entitlement to SIBS. The claimant said he filed his TWCC-52 for the first compensable quarter right after learning that he was eligible for SIBS. We agree that, because of the Commission's delay in making an initial determination, the evidence shows that the claimant did timely file for SIBS for the first compensable quarter. *See* Appeal No. 941753, *supra.*

Carrier also asserts that claimant lost all entitlement to SIBS because he failed to file for SIBS for twelve consecutive months, citing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.106 (Rule 130.106). *See also* Section 408.142(b) and 408.146(c). We note that this argument was addressed in Appeal No. 941753, *supra.* Because of the Commission's delay in making an initial determination in this case, we reject this argument.

We note that the hearing officer did not make key findings of fact regarding the date of the Commission's initial determination or the date that claimant filed his TWCC-52s for each compensable quarter. The hearing officer is required to make findings of fact and conclusions of law. Section 410.168. Although the Appeals Panel may imply findings from undisputed evidence, the better practice is to make relevant fact findings which we may then review on appeal.

We affirm that part of the hearing officer's decision and order that denies SIBS for the seventh compensable quarter and awards SIBS for the first compensable quarter. We reverse that part of the hearing officer's decision and order that awards SIBS for the second through sixth compensable quarters and render a decision that claimant is not entitled to SIBS for those quarters.

Judy L. Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge