

APPEAL NO. 952179
FILED FEBRUARY 12, 1996

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 (CCH) was held on November 14, 1995. She (hearing officer) determined that the respondent (claimant herein) was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. The appellant (carrier herein) appeals, arguing that the hearing officer committed prejudicial error in an evidentiary ruling and that her decision is otherwise against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Reversed and rendered.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the average weekly wage (AWW) as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. 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 meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing 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]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. The relevant filing period for the eighth compensable quarter was from June 23, 1995, through September 20, 1995. On_____, the claimant sustained a compensable injury. He reached maximum medical improvement (MMI) on December 3, 1992, with a 19% whole body impairment rating (IR).

In Texas Workers' Compensation Commission Appeal No. 951829, decided December 15, 1995, the Appeals Panel reversed the decision of the same hearing officer which awarded the claimant SIBS for the seventh compensable quarter and rendered a decision that the claimant was not entitled to seventh quarter SIBS. In doing so, it found the hearing officer's determination that the claimant was unable to work during the filing period for the seventh quarter to be against the great weight and preponderance of the evidence. That evidence, with additions discussed below, was essentially the same evidence introduced at the CCH to establish the claimant's entitlement to eighth quarter SIBS and from which the hearing officer again found that the claimant was unable to work during the filing period for the eighth quarter SIBS. For this reason, we need only supplement the discussion of the facts in Appeal No. 951829 as necessary for purposes of this decision.

We first address the challenged evidentiary ruling of the hearing officer. The claimant admitted at the CCH that he received certain interrogatories from the carrier on October 25, 1995. He said he consulted "a friend" about them and was told they were "not important." And so, he simply ignored them. At the same time, he conceded he signed the response to interrogatories in the prior, seventh quarter SIBS case and returned those interrogatories, but denied he knew what the answers were since someone else prepared them. The hearing officer found that the claimant did not have good cause for not timely answering the interrogatories and the claimant has not appealed this determination. The hearing officer, nonetheless, allowed the claimant to testify about matters not covered in the interrogatories and about matters contained in documents which had been timely exchanged and which were in evidence. (These consisted essentially of medical reports and a Statement of Employment Status (TWCC-52) which reflected no efforts to obtain employment during the filing period.)

Section 410.160 requires the exchange of documentary information and the identity and location of persons with knowledge of the relevant facts. Section 410.158 provides for additional discovery by way of depositions and interrogatories. Interrogatories "may not seek information that may readily be derived from documentary evidence" and answers to interrogatories "need not duplicate information that may readily be derived from documentary evidence" Section 410.158(b). A party which fails to provide the required answers to interrogatories "may not introduce the evidence at any subsequent proceeding" absent a determination of good cause for the failure. Section 410.161. Rule 142.13 further provides for the orderly progression of discovery. Documents are to be exchanged before interrogatories and "[a]dditional discovery shall be limited to evidence not exchanged, or not readily derived from evidence exchanged." Rule 142.13(b). In Texas Workers' Compensation Commission Appeal No. 951136, decided August 28, 1995, the Appeals Panel wrote that "interrogatories must be directed at information not exchanged or disclosed," and Texas Workers' Compensation Commission Appeal No. 93629, decided September 10, 1993, stated that "the failure to answer interrogatories could not be used to exclude evidence that was required to be exchanged." Finally, in Texas Workers' Compensation Commission Appeal No. 94143, decided March 21, 1994, we noted that "[n]either the 1989 Act nor Texas Workers' Compensation Commission rules provide a specific remedy against a party who fails to comply with discovery . . . except information not exchanged will not be admitted because of such failure."

In its appeal, the carrier asserts that the "proper remedy for failure to answer interrogatories is to exclude evidence not provided in answers to interrogatories," *citing* Texas Workers' Compensation Commission Appeal No. 92309, decided August 19, 1992. To the extent that the carrier is seeking to exclude broad subject areas from testimony just because these subjects were raised in an interrogatory, without regard to the limitations on the proper subject matter for interrogatories and provisions that answers to interrogatories need not simply duplicate information otherwise readily available, we disagree and do not believe that Appeal No. 92309 supports such a proposition. Because the interrogatories directed to the claimant dealt with such basic matters as his identity, the nature of the claimed injury and the physical effects of the injury, it was at best a fine distinction whether

they properly addressed matters not already disclosed or exchanged. At worst, the nature of these interrogatories rendered a determination of what new information they sought, as distinguished from that already disclosed, nearly impossible. While we thus approve the hearing officer's finding of no good cause for the claimant's failure to answer the interrogatories and in no way condone the claimant's "cavalier" attitude, Texas Workers' Compensation Commission Appeal No. 931178 (Unpublished), decided February 8, 1994, toward those interrogatories, we find any error in not excluding all or part of the claimant's testimony harmless.¹

The carrier also appeals, as against the great weight and preponderance of the evidence, the following Findings of Fact and Conclusion of Law:

FINDINGS OF FACT

No. 7. Claimant was not released to return to any type of work by his treating doctor, [Dr. P], in the filing period for the eighth compensable quarter, and continued to receive treatment for his back and right shoulder injury during this filing period.

No. 8. Claimant did not have the ability to work in the filing period for the eighth compensable quarter, and his unemployment was a direct result of his impairment.

CONCLUSIONS OF LAW

No. 3. Claimant is entitled to [SIBS] for the eighth compensable quarter.

In Appeal No. 951829, *supra*, we discussed the concept that, for an employee who is unable to work at all, a good faith effort to obtain employment is no effort at all. We also stressed that a determination of no ability to work at all must be based on medical evidence or be so obvious as to be irrefutable. We also cautioned that the absence of a release from a treating doctor to return to full or light duty is not dispositive of the question of no ability to work. The evidence in Appeal No. 951829, *supra*, on the question of ability to work came exclusively from Dr. P and was virtually identical to the evidence in the case we now consider. The only exception deals with the condition of the claimant's shoulder. During the filing period for the seventh quarter SIBS, shoulder surgery was pending. On September 17, 1995, just three days before the end of the filing period for the eighth quarter, Dr. P performed subacromial decompression and right rotator cuff repair.

¹For example, the claimant testified that his only effort to find employment during the filing period was a vague inquiry of his former employer. His TWCC-52 reflected no employment contacts. The hearing officer clearly did not consider such actions in themselves to have constituted a good faith effort to obtain employment and, instead, found no efforts were required because the claimant was unable to work at all. Similarly, the carrier objected to the claimant even identifying himself. This subject was hardly in dispute or otherwise unknown to the carrier. See Section 410.158 and Rule 142.13.

However, none of Dr. P's additional medical reports concerning the shoulder mention in any way, directly or indirectly, the effect of the shoulder condition and operation on the claimant's inability to work at all for the remainder of the filing period. It was as if the effects were obvious or presumed. We are thus left with the same evidence to support the hearing officer's finding of no ability to work during the qualifying period for the eighth quarter that we found insufficient to support the correlative findings for the seventh quarter. For the same reasons articulated in Appeal No. 951829, *supra*, we find the hearing officer's determination that claimant had no ability to work during the filing period for the eighth quarter to be so against the great weight and preponderance of the evidence as to be manifestly unjust and clearly wrong. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer also determined that the claimant's failure to return to work was the direct result of his impairment. In Appeal No. 951829, *supra*, we observed that there was no evidence that Dr. P regarded the claimant as having any impairment from his right shoulder. Indeed, the Report of Medical Evaluation (TWCC-69) of January 26, 1995, offered into evidence for both the seventh and eighth quarters, refers to the compensable injury by diagnosis code only and this code does not pertain to the upper extremity or shoulder. The 19% IR consists solely of a specific disorder of the lumbar spine and loss of range of motion of the lumbar spine. The claimant testified that he started feeling pain immediately after his injury on_____, and that it has been treated continually since. We have no reason to question this, but can only wonder why as late as January 1995, Dr. P had not assigned a rating to the shoulder. Arguably, had the claimant responded to the carrier's interrogatory that asked about the nature of his injury and persons with knowledge of the relevant facts, more information would have been produced about a rating for his shoulder. As stated above, the claimant had the burden to prove he was entitled to eighth quarter SIBS. He failed to present evidence that his unemployment was the direct result of a shoulder impairment. This was the only additional consideration for entitlement to SIBS for the eighth quarter beyond what was considered for the seventh quarter.

For the foregoing reasons, we reverse the decision of the hearing officer and render a new decision that the claimant is not entitled to SIBS for the eighth compensable quarter.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge