

APPEAL NO. 980106

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 19, 1997, a contested case hearing was held. She (hearing officer) determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the seventh compensable quarter. Claimant asserts that the burden of proof was improperly placed on the claimant; that the hearing officer improperly added issues at the hearing; and that certain findings of fact are not findings of fact, adding that the respondent (carrier) should be limited to the grounds it provided in its notice of nonentitlement. Carrier replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer). Claimant provided no indication of how she was injured; in addition there were no stipulations as to what her impairment rating (IR) was or whether she had commuted any benefits. Neither party appealed the absence of findings of fact on these two points.

Section 408.142 states an employee is entitled to SIBS if the employee has an IR of 15%, has not commuted any benefits, is unemployed or underemployed as a direct result of the impairment, and has attempted in good faith to obtain employment commensurate with the employee's ability to work. For SIBS periods after the initial one (each SIBS period is approximately 90 days), Section 408.143 does not require the claimant to show the IR or that no benefits have been commuted, so the absence of such a showing in this case is not controlling. Section 408.143 does require a claimant to file a statement each quarter showing that the unemployment or underemployment is a direct result of the impairment and that an attempt in good faith to find work has been made.

Claimant testified that she attempted to find work with the employers listed on her Statement of Employment Status (TWCC-52), which constitutes the quarterly request for SIBS. The seventh quarter began on August 21, 1997, so the filing period during which a claimant qualifies for SIBS to be paid during the compensable quarter began approximately 90 days before August 21st, or on May 23, 1997, and that filing period ran until the start of the quarter. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). While claimant's TWCC-52 listed several places contacted outside the filing period, 12 employers were listed within the filing period. The record discloses no added detail from claimant about the jobs sought but claimant does state therein that she made some other job contacts not listed, but she could not recall specifics.

Claimant did acknowledge that she was attending cosmetology school approximately 40 or more hours a week during the filing period. She described cosmetology as including the cutting of hair, manicures, facials, and coloring hair. In answer to the hearing officer's question, claimant stated that she is "constantly in pain" during her training. She acknowledged that her injury was bilateral carpal tunnel syndrome (CTS) and said that her restrictions from the impairment involved lifting. She also agreed that she did not refer to her schooling on her TWCC-52, the form used to request payment of SIBS.

Claimant had earlier referred to the lifting restriction mentioned above in direct examination; the restriction was identified as placed on her by "your doctor" and was said to be 10 pounds. There are only two doctor's records in evidence; (Dr. T) identified his report as an examination to determine whether claimant could return to work. The other, (Dr. F), in his report of November 4, 1996, refers to Dr. T's evaluation and states that he disagrees with it. From reading all medical records in evidence, we conclude that Dr. F is the "your doctor" referred to in direct examination. While claimant only alluded to a lifting limit imposed, Dr. F in his November 4, 1996, report also says "I do not believe she can do any kind of repetitive work with her hands. " While he does not set this restriction out in a format of "no repetitive use," neither does he set out the lifting limit in such a manner. In regard to lifting, Dr. F only disagrees with Dr. T and says, "I believe that this patient would have problems picking up 10 lbs once let alone on a frequent basis" after he had disagreed with Dr. T's "20-50 pounds occasionally" and "10-25 pounds frequently." (Dr. F's reference to "repetitive work" by claimant came immediately after his comment that she could not do the type of work she did before the accident.)

The hearing officer found that the claimant attempted in good faith to find work, but found against her by determining that her unemployment was not a direct result of her impairment after discussing Dr. F's restrictions as including repetitive motion and claimant's testimony as to repetitive motion "throughout her training to be a beautician." (The hearing officer was in effect finding that claimant's impairment did not result in unemployment because her own actions in doing cosmetology training for 40 hours a week, which involved repetitive hand and arm motions, showed that her impairment did not limit her ability to work.) On appeal claimant did not attack the accuracy of this determination or assert that the evidence did not support the determination, but argued that the hearing officer should not have added this issue, that the carrier should be restricted to disputing only on the basis of its reason stated for nonentitlement on the TWCC-52 (claimant had returned to work), and that the hearing officer had shifted the burden of proof improperly to claimant.

Previously, a Texas Workers' Compensation Commission (Commission) rule was mentioned which applied to the filing period as governing the payment of SIBS for the quarter in question. Claimant's appeal is also affected by other rules. Rule 130.102(b) also states that "once determined, entitlement continues for the duration of the compensable quarter," not entitlement continues so long as claimant continues to file quarterly reports or any other reference to a time beyond the compensable quarter in question. The same rule at 130.102(e) provides that "either party may contest a determination of entitlement or

calculation . . . ." Rule 130.103 provides that the Commission will determine the initial quarter's entitlement, but does not indicate that such determination will have any effect on subsequent quarters. Rule 130.104 then addresses "Continuing Entitlement." Rule 130.104(a) provides:

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: [Emphasis added.]

- (1) has been unemployed or underemployed . . . as a direct result of the impairment from the compensable injury; and
- (2) has made good faith efforts to obtain employment . . . .

This rule does not state that the employee will continue to receive SIBS simply by providing a TWCC-52 used to apply for SIBS. There is no indication that benefits accrue simply by a claimant stating that the requirements have been met, rather the language indicates a determination will be made because a substantive provision is attached to the continuation of SIBS, "if the employee . . . has been unemployed . . . as a direct result; and has made a good faith effort"; these denote conditions placed on the claimant. Rule 130.104(f) then addresses not whether a carrier "disputes" the claimant's assertion of entitlement to a subsequent quarter of SIBS, but rather addresses, "Determination of non-entitlement or reduced amount. If the carrier determines that the employee has lost entitlement to [SIBS], or continues to be entitled to an amount less than that paid during the prior compensable quarter, the notice shall: (1) state the grounds for this determination; and (2) request the commission to set a benefit review conference [BRC] . . . ."

Returning to the 1989 Act, Section 408.147(b) does provide that a carrier must "make a request for a [BRC] within 10 days after" the impairment income benefit period or receipt of the claimant's statement (TWCC-52). There is no limit imposed on what then takes place at the BRC. Section 408.147(a) does use the words, "contest an employee's entitlement" when saying that the carrier must request a BRC, but it does not indicate that the carrier has to state any grounds for its action. The only waiver or limitation imposed by Section 408.147 is that the carrier "waives the right to contest entitlement" if it fails to request a BRC within 10 days (as stated).

BRCs are authorized and guided by Section 410.021 to 410.034. These applicable sections do not indicate that the issue (or the defense regarding an issue) to be discussed, informally, at a BRC is limited to anything set forth on the request for a BRC or on any preceding form provided by either claimant or carrier. Rules 141.1 to 141.7 describe the BRC; "disputed issues" are repeatedly referred to with no limitation imposed except that the party requesting the conference is to "identify and describe the disputed issue or issues." (We note that Section 410.003 provides that the Administrative Procedure and Texas Register Act does not apply to proceedings under Chapter 410.) Also see Texas Workers' Compensation Commission Appeal No. 92169, decided June 17, 1992. Neither do the

Texas Rules of Civil Procedure apply. See Texas Workers' Compensation Commission Appeal No. 92079, decided April 14, 1992.

While the carrier indicated on claimant's TWCC-52 that the claimant was not entitled to SIBS because she had returned to work, the carrier's request for a BRC checked a box on a form which said that it was contesting the determination of "entitlement to, or amount . . . or whether the injured employee's underemployment is a direct result of the impairment." From this reason set forth in the request for a BRC the BRC report then stated that the issue raised but not resolved was "is the claimant entitled to SIBS for the seventh compensable quarter . . . ," with the carrier's position stated therein to be "there is no medical evidence showing the underemployment is due to the impairment from the compensable injury. Further the claimant did not tell potential employers of her limitation for the unemployment is not a direct result of her injury." Texas Workers' Compensation Commission Appeal No. 91123, decided February 7, 1992, refused to limit a claimant to the date of injury he set forth and allowed evidence to be considered that the injury occurred during a four-day period, nine days after the date alleged, saying, "pleadings as such, are not required by the 1989 Act except that a [BRC] may be requested . . . ." Also see Texas Workers' Compensation Commission Appeal No. 950275, decided March 28, 1995, which said that defects in a TWCC-52 filled out by a claimant would not preclude a carrier's waiver of its ability to act on a claimant's request if it took over 10 days to request a BRC. Appeal No. 950275 then added that "matters of substance are exactly among the matters that should be raised in the requested [BRC]."

The issue reported from the BRC was stated at the hearing by the hearing officer to be whether the claimant is entitled to SIBS for the seventh quarter, and both parties agreed that was the issue. As stated, Rule 130.104 says that SIBS continue if the claimant has been unemployed as a direct result of the impairment and has made good faith efforts to find work. Texas Workers' Compensation Commission Appeal No. 94714, decided July 15, 1994; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994; Texas Workers' Compensation Commission Appeal No. 941364, decided November 2, 1994; and Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994, all state that the burden of proof is on the claimant to show that entitlement to SIBS should be found. Also see Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993. Texas Workers' Compensation Commission Appeal No. 94437, decided May 31, 1994, specifically said that a determination as to "each succeeding quarter [is] based on whether the claimant met the requirements for the receipt of SIBS in the [filing period]"; that case also stated that SIBS are "re-established each quarter." We conclude that the burden of proof, as shown by Rule 130.104 and other relevant rules plus the cited Appeals Panel decisions, is on the claimant in each compensable quarter to show entitlement to SIBS.

Since entitlement to SIBS must always include a showing of direct result and good faith (see Rules 130.103 and 130.104), the issue at the hearing of whether claimant was entitled to SIBS necessarily required that findings of fact be made on these two

requirements for payment of SIBS. See Appeal No. 941275, *supra*, which remanded for a finding of fact as to whether a direct result was shown when the issue therein had also involved entitlement to SIBS. With an issue duly reported from the BRC as to entitlement to SIBS and with both parties agreeing that such was the issue, the hearing officer did not enlarge or add issues by making findings of fact as to direct result and good faith.

While Rule 130.104(f) does require the carrier to state why it has determined a claimant not entitled to SIBS, it also requires the carrier to file a request for BRC. Nothing in any rule, the 1989 Act, or any Appeals Panel decision then imposes a limitation upon the carrier of only arguing what it had stated on the TWCC-52 in determining not to pay SIBS. On the contrary, the 1989 Act and applicable rules, along with Appeals Panel decisions, encourage an informal resolution of issues at the BRC without strict rules of pleading even being required at the subsequent CCH. The issue for the hearing is formulated at the BRC, not in the request made to the Commission to have a BRC.

We note that there is an area in which the 1989 Act specifically states that a carrier's defense is limited. Sections 409.021 and 409.022 provide for disputing compensability of an injury within 60 days and require the carrier to defend only on the reasons it stated for disputing compensability. Those sections are devoted to compensability and indicate that 60 days, not 10 as is set forth in the SIBS sections, is provided for investigation and action. In addition, with these sections setting forth in clear terms that a defense must be limited to that stated, the absence of such terms in the SIBS sections of the 1989 Act and the relevant rules adds another reason why the carrier's reason(s) set forth on the TWCC-52 may be changed, enlarged, or adapted depending on the discussion at the informal BRC that is mandated when the carrier determines that SIBS should not be paid. The carrier is not necessarily limited to the defense set forth on the TWCC-52 throughout the dispute resolution process in regard to the SIBS quarter in issue.

While claimant did not appeal based on the sufficiency of the evidence, if she had, that evidence would be found to be sufficient to support the decision. The hearing officer is the sole judge of the weight and credibility of the evidence, and conformity to legal rules of evidence is not necessary. See Section 410.165.

Claimant also contends that the hearing officer erroneously addressed claimant's burden of proof regarding direct result and good faith along with carrier's ability to dispute in Findings of Fact Nos. 12 and 13. While these subjects could have been addressed in a conclusion of law, the placement of them does not constitute reversible error. Neither statement reflects a misstatement of the law. See Texas Workers' Compensation Commission Appeal No. 93147, decided April 12, 1993, which said that findings of fact were not controlled by the Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. § 6252-13a (Vernon Supp. 1993). In addition, neither of the statements found in Finding of Fact No. 12 or 13 needed to be expressed as findings of fact and, as such, those findings were not necessary to a determination of the issue. See Texas Indemnity Insurance Co. v Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940). The

determination that claimant is not entitled to SIBS for the seventh quarter is sufficiently supported by the evidence and Findings of Fact No. 8, 9, 10, and 11, which address the direct result criterion for payment of SIBS, and which are not asserted on appeal to be in error.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta  
Appeals Judge

CONCUR:

Robert W. Potts  
Appeals Judge

Thomas A. Knapp  
Appeals Judge