APPEAL NO. 980143
FILED MARCH 11, 1998

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 December 7, 1997. The issues as restated and agreed upon by the parties were:

1. Is Claimant entitled to supplemental income benefits [SIBS] for the first, second, third, fourth, and fifth compensable quarters?

2. Did Claimant timely file a statement of employment status for the second, third, fourth, and fifth quarters of [SIBS]?

3. Did the Carrier timely request a benefit review conference [BRC] to contest [SIBS] for the first, second, third, fourth, and fifth quarters of [SIBS]?

The hearing officer determined that claimant was not entitled to SIBS for any of the compensable quarters, that claimant had not timely filed a Statement of Employment Status (TWCC-52) for the second, third, fourth, and fifth quarters and that carrier had not requested and was not required to request a BRC for any of the compensable quarters at issue.

Claimant, in his appeal, contends that neither the Texas Workers' Compensation Commission (Commission) nor carrier had ever provided claimant with a TWCC-52, and that carrier, in fact, had erroneously continued to pay impairment income benefits (IIBS) for some 14 months after the IIBS period ended, that carrier is equitably estopped (claimant does not use the work estoppel) from now denying entitlement to SIBS and that carrier had a duty to request a BRC within 10 days of receipt of the claimant's first TWCC-52, in accordance with Section 408.147(b). Claimant contends that carrier failed to do so and therefore carrier has waived the right to contest entitlement to any future SIBS and claimant's ability or inability to work during the applicable filing periods is "moot" due to carrier's failure to request a BRC. Claimant attaches a letter, six SIBS questionnaires and six TWCC-52s, all dated September 2, 1997 (it appears only one of the TWCC-52s, without the questionnaire was admitted at the CCH), and requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, questioning whether claimant's appeal was timely and contending that claimant was not entitled to SIBS for the compensable quarters on the merits, that claimant had not timely filed his TWCC-52(s) for quarters two through five and that the carrier was not required to request a BRC where the initial determination was for nonentitlement for the first compensable quarter, citing Appeals Panel decisions in support of its position. Carrier urges affirmance.

DECISION

Affirmed.

First addressing carrier's suggestion that claimant's appeal was not timely, Commission records indicated that the hearing officer's decision and order were distributed on January 2, 1998. Claimant does not indicate when the decision was received so we apply the provisions of the five day "deemed receipt" rule of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) which would make Wednesday, January 7, 1998, the deemed date of receipt. Section 410.202 provides that an appeal must be filed within 15 days of the date of receipt of the hearing officer's decision, which in this case would be Thursday, January 22, 1998. Claimant's appeal is dated and postmarked January 21, 1998, and was received January 23, 1998. Claimant's appeal was timely filed.

On the merits, pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the IIBS period, the employee: has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Rule 130.102(b), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior 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 parties stipulated that claimant sustained a compensable (back) injury on _____, that he reached maximum medical improvement on August 6, 1993, with a 41% IR, that IIBS were not commuted, that the IIBS period "was scheduled to expire" on December 15, 1995, that the carrier continued to pay IIBS "for some period of time after December 15, 1995" (it is undisputed that carrier erroneously continued to pay IIBS until mid-January 1997), and that the Commission's initial determination of SIBS was made on February 28, 1997, with a determination that claimant was not entitled to SIBS. It is undisputed that during the filing periods at issue (even after claimant requested a finding of the first compensable quarter filing period, the hearing officer failed to obtain a stipulation or make a finding on the filing periods, referring instead to the dates of the compensable quarters) claimant was unemployed and the parties stipulated that claimant's unemployment was a direct result of his impairment from the compensable injuries.

Other facts are largely undisputed. Claimant sustained a serious low-back injury which required multiple surgeries, at least one of which resulted in an infection which in turn resulted in one or more other surgeries. Claimant began receiving IIBS and continued receiving IIBS after December 15, 1995. It is undisputed that no initial determination on SIBS was made at that time and that neither the Commission nor carrier contacted claimant at that time. Carrier continued paying IIBS until sometime in January 1997 when carrier notified claimant that it was stopping IIBS. Claimant contacted an attorney for assistance. It is undisputed that claimant filed a TWCC-52 dated January 20, 1997, together with a SIBS questionnaire, with the Commission on February 6, 1997. The Commission, as evidenced in a Dispute Resolution Information System (DRIS) note dated February 28,

1997, denied entitlement to SIBS stating "[d]enied initial quarter of SIBS due to IIBS should have ended on 121595. No medical was submitted for entitlement period of 091795 through 121695." Another DRIS note dated August 26, 1997, states "claimant req a BRC on first Qtr of SIBS. We denied the Qtr in Feb, he is now sending medical to support his position." Claimant requested a BRC on July 29, 1997, and apparently filed another TWCC-52 with the Commission's (city) field office on September 2, 1997. Some unknown individual made a handwritten notation at the top of the form "qtr. 3/17/96 - 6/15/96." It is undisputed that carrier's attorney was given a copy of this form at an October 2, 1997, BRC. Apparently no other TWCC-52s were filed.

Most of the fairly extensive medical evidence, briefly summarized by the hearing officer, deals with claimant's initial injury, course of treatment and IR and has marginal relevance to the issue of claimant's ability to work during the filing periods of mid-September 1995 through December 13, 1996. In any event, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and its weight and credibility. Section 410.165(a). We are satisfied that the hearing officer considered all of the medical evidence. The reports most relevant to the time period in question include a progress note dated January 12, 1996, by (Dr. T), who apparently began treating claimant that day and who stated in the progress note that claimant "can't do anything" explaining all the things claimant cannot do. Dr. T explains this further in a report dated October 9, 1997:

> [Claimant] at the time I saw him for the first time last January 12, 1996 had multiple problems as a result of failed back surgery that ended up into multiple complications. At that time I considered him as permanently totally disabled for any activity that requires any lifting or bending, prolonged sitting and prolonged standing.

Claimant's testimony also developed that apparently during the applicable filing periods claimant's wife was working and that claimant was involved in the caring for four children, the youngest being about six years old at the time. Claimant testified that he did not attempt to seek employment during the applicable filing periods because he was receiving income benefits from the carrier and was unaware of SIBS and the requirements for obtaining SIBS. The hearing officer made multiple factual determinations; however, we will address only those which are specifically or inferentially appealed.

Claimant contends that he was unaware that he would be required to prove his entitlement to SIBS. Further, claimant contends that carrier "continued to pay him the entirety of his [IIBS], thus obviating the need for [claimant] to file a [TWCC-52] to gain eligibility for [SIBS]." Claimant cites no authority for the proposition that, if a carrier erroneously makes overpayments of IIBS, this relieves the claimant of filing for other benefits to which he may be entitled. If a carrier makes an erroneous overpayment there are only very limited methods by which it may obtain recoupment or reimbursement. *See* Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992. We know of no situation where an erroneous overpayment by carrier might entitle a claimant to other unrelated income benefits.

Claimant also contends that he was "completely disabled and unable to perform any job at the time of his initial eligibility for [SIBS]." One of the statutory elements that a claimant is required to prove is he (or she) has made a good faith effort to obtain employment commensurate with his or her ability to work. Section 408.142(a)(4). *See also* Rule 130.103(a)(2). The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. We find the hearing officer's determinations on this point supported by the evidence, including claimant's own testimony.

It is undisputed that the Commission failed to conduct a Review of Employment Status, pursuant to Rule 130.10(b), and failed to send the TWCC-52 with the review documents, as outlined in Rule 130.10(d). Claimant alleges that the carrier has a duty "to insist the [claimant] file an initial SES [Statement of Employment Status also referred to as a TWCC-52]" and that claimant is "relieved of the obligation to file additional SESs until such a time as the initial SES had been adjudicated." Claimant apparently believes that a requirement to file additional TWCC-52s had been tolled until eligibility for the first quarter had been finally determined and appealed to the Appeals Panel. Claimant cites no authority in statute, rule, or prior decision for this proposition. The Commission made its initial determination of nonentitlement on February 28, 1997. Texas Workers' Compensation Commission Appeal No. 970396, decided April 18, 1997, pointed out the filing requirements and also noted that the late filing of a TWCC-52 is not always an absolute bar to recovery for SIBS, further noting that the requirement may be tolled where the Commission fails to make an initial determination, as in this case, of the entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 950055, decided February 23, 1995. Also the time may be tolled where the Commission or carrier fails to provide the claimant with a TWCC-52. Texas Workers' Compensation Commission Appeal No. 950534, decided May 19, 1995. In this case the requirement for timely filing was tolled until the Commission made its initial determination on February 28, 1997. Carrier at that point

was not required to continue to provide TWCC-52s to the claimant until such a time as claimant's entitlement was reinstated.

Claimant further contends that he had "in fact timely file[d] SESs for all pertinent periods" referring to the TWCC-52s and SIBS questionnaires attached to his appeal. That evidence was not offered at the CCH and, in that the forms are all dated September 2, 1997, it appears that they were in existence even before the BRC on October 2, 1997. We do not normally consider evidence raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; *see also* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In view of that fact that the forms were apparently in existence on September 2, 1997, and there was no explanation why they were not exchanged at the October 2, 1997, BRC or offered at the December 4, 1997, CCH, we will not now consider them for the first time on appeal.

Claimant next contends that the carrier "waived its right to contest [claimant's] eligibility for [SIBS] . . . (2) by failing to request a [BRC] in December 1995 . . . ." Citing Section 408.147(b). We note that Section 408.147(a) begins by providing that a carrier may request a BRC to contest an employee's entitlement to SIBS. Subsection (b) goes on to state that if the carrier fails to make a request for a BRC within 10 days after the date of the expiration of the IIBS benefit period or within 10 days after receipt of the employee's statement, whichever is later, carrier waives the right to contest entitlement to SIBS. We have previously addressed this provision under like circumstances in Texas Workers' Compensation Commission Appeal No. 960801, decided June 11, 1996. In that case, the hearing officer determined that the carrier had not waived its right to contest SIBS, noting that such a waiver would occur only if the carrier were disputing continuing entitlement to SIBS. The Appeals Panel, in that case, noted that at that time there was no authority for the proposition, however, going on to research and analyze Rules 130.104, 130.105, and 130.108 as well as Section 408.147. Statutory provisions should be read to harmonize with the implementing rules insofar as possible. The Appeals Panel then concluded:

> After comparing the requirements of Rule 130.104 to those of Rule 130.105, it becomes apparent that where the determination has been made that a claimant is entitled to SIBS in a prior quarter, the burden is on the carrier to request a BRC in a subsequent quarter, if it elects to contest the claimant's continuing entitlement to those benefits. However, if the claimant has been determined not to be entitled to SIBS in the prior quarter and the carrier determines that the claimant is not entitled to reinstated or delayed SIBS, then the claimant is required to request a BRC to contest that determination. Because the claimant was not determined to be entitled to SIBS in the first

> quarter in this case, the hearing officer correctly determined that the carrier was not under an obligation to contest continuing entitlement and was, therefore, not subject to the waiver provisions of Rule 130.108(c).

In subsequent cases, having slightly different facts, we have continued to follow the precedent of Appeal No. 960801, *supra.* In Texas Workers' Compensation Commission Appeal No. 970612, decided May 21, 1997, we noted that the 1989 Act could be read to provide that the carrier waives its right to dispute SIBS when it fails, in any quarter, to request a BRC within 10 days of receiving a claimant's TWCC-52. In Appeal No. 970612 we followed our decision in Appeal No. 960801, *supra*, that this requirement did not apply to a quarter when the claimant sought a reinstatement of SIBS. *See also* Texas Workers' Compensation Commission Appeal No. 971201, decided August 11, 1997. Accordingly, applying the precedent established in our prior cases, and in the absence of judicial review to the contrary, we affirm the hearing officer's determinations that, because claimant was determined by the Commission not to have been entitled to SIBS for the first quarter, carrier was not under an obligation to contest continuing entitlement (because there was none) and therefore was not subject to the waiver provisions of Section 408.147. We further note that the hearing officer, in this case, right or wrong, determined that service of another TWCC-52, on carrier's attorney, at a BRC, "did not constitute a proper filing of the [TWCC-52] with the carrier." Further, subsequent TWCC-52s dated September 2, 1997, did not identify the quarter for which SIBS was being sought.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Christopher L. Rhodes
Appeals Judge