

APPEAL NO. 990180

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 January 4, 1999. The only issue on appeal from the CCH was whether the appellant (carrier) failed to timely contest respondent's (claimant) entitlement to supplemental income benefits (SIBS) for the 11th compensable quarter thus waiving its right to contest. The hearing officer determined that the claimant did not make a good faith effort to seek or obtain employment commensurate with her ability to work and thus was otherwise not entitled to SIBS for the 11th quarter. There is no appeal on the latter determination. The carrier appeals the determination that it waived the right to contest entitlement to SIBS for the 11th quarter urging that since the Appeals Panel had reversed a hearing officer's decision finding entitlement to 10th quarter SIBS, this case was not a situation of continuing entitlement as found by the hearing officer which would bring the case under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c)). No response has been filed.

DECISION

Affirmed.

Not in issue was the fact that the claimant was paid SIBS for the first through ninth quarters. The claimant was also paid SIBS for the 10th quarter following a hearing officer's August 11, 1998, CCH decision awarding benefits, although the carrier had contested the entitlement. However, that case was appealed by the carrier and the Appeals Panel, in an October 12, 1998, decision, reversed and remanded to the hearing officer for further factual findings on the issues of any ability to work and good faith effort to seek or obtain employment commensurate with the ability to work. Texas Workers' Compensation Commission Appeal No. 982052, decided October 12, 1998. The hearing officer reconsidered the case and again awarded SIBS for the 10th quarter. On appeal, the Appeals Panel reversed and in a decision decided December 17, 1998, rendered a decision that the claimant was not entitled to 10th quarter SIBS. Texas Workers' Compensation Commission Appeal No. 982599, decided December 17, 1998. In the meantime, the claimant filed for 11th quarter SIBS, the filing period for which ran from May 27, 1998, to August 25, 1998. The claimant's application for 11th quarter SIBS was received by the carrier on September 1, 1998, and the carrier did not file a dispute and request for a benefit review conference (BRC) until September 22, 1998.

Rule 130.108(c) provides that: "A carrier waives the right to contest continuing entitlement to amount of [SIBS] for that compensable quarter if the carrier fails to request a [BRC] within 10 days after receipt of the employee's Statement of Employment Status [TWCC-52]." The carrier's argument goes that since the entitlement to 10th quarter SIBS was ultimately denied by the Appeals Panel in its December 17, 1998, decision, that the 11th quarter was no longer a situation of continuing entitlement and thus the carrier did not waive its right to contest compensability. We note that the record of the CCH reflects that

the claimant had not, as of January 4, 1999, decided whether to seek judicial review of the second Appeals Panel decision.

Carrier cites Texas Workers' Compensation Commission Appeal No. 960801, decided June 11, 1996, as authority for the proposition that if SIBS is ultimately denied for a quarter (here, the 10th quarter by the second Appeals Panel decision) then the case is not one of continuing entitlement under Rule 130.108(c) and that the waiver provisions would not apply since it would be a reinstated or delayed entitlement case under Rule 130.105 which do not provide for waiver. In Appeal No. 960801, the Appeals Panel upheld a hearing officer's determination that the carrier had not waived its right to contest compensability. However, that case is markedly different from the situation under review. In that case, the Texas Workers' Compensation Commission (Commission), all the way through the Appeals Panel, determined that the claimant's impairment rating (IR) was 10%, thus not qualifying for SIBS at all. This was later reversed on judicial review and a 20% IR was rendered. Subsequently, on August 28, 1995, the claimant filed for first, second, and third quarter SIBS and the Commission's initial determination on October 3, 1995, was that the claimant was not entitled to SIBS (albeit for the wrong reason, continuing to rely on a 10% IR). On October 25, 1995, the carrier requested a BRC contesting any entitlement to SIBS. The request was denied by the Commission, again on the erroneous basis of a 10% IR. The Appeals Panel stated that since the claimant was determined not to be entitled to SIBS in the first quarter, the hearing officer correctly determined that the carrier was not under an obligation to contest continuing entitlement and was not subject to the waiver provisions. The case at hand is markedly different.

We agree with the hearing officer's reliance on Texas Workers' Compensation Commission Appeal No. 980427, decided April 15, 1998, in holding that under the circumstances present in this case the provisions of Rule 130.108(c) apply and that the carrier waived its right to contest claimant's entitlement to SIBS for the 11th compensable quarter. In Appeal No. 980427, at the time the carrier received the application for SIBS (TWCC-52) for the 12th compensable quarter it had not received the determination on the contest of entitlement of the 11th compensable quarter, and failed to request a BRC on the 12th quarter application within 10 days under Rule 130.108(c). The hearing officer found that at the time the carrier received the TWCC-52 for the 12th quarter on July 25, 1997 (the determination on the 11th quarter not being decided until September 17, 1997, and received by the carrier on September 26, 1997), that the claim was in a continuing entitlement status and rejected the argument that the claim for SIBS was in a reinstated or

delayed entitlement status. We find that to be the situation in this case. In our view, whether a determination on entitlement to a quarter of SIBS is ultimately modified or reversed at a much later date in the appellate or judicial review of that quarter, or if the application for the next quarter of SIBS is considered a continuing entitlement, is determined by the status of the prior quarter at the time of the application for the next quarter. Appeal No. 980427, *supra*. At the time of the application for the 11th quarter here, there was no basis to assume or conclude that the situation involved reinstated or delayed entitlement; to the contrary, all the indications were that this was a continuing entitlement situation that invoked the provisions of Rule 130.108(c). We do not find error in the hearing officer's findings or conclusions. Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge