APPEAL NO. 990668

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Contested case hearings (CCH) were held on November 30, 1998, and February 22, 1999, with (hearing officer 1) presiding at the first session and (hearing officer 2) presiding as the hearing officer at the second session and authoring the decision. The issues at the CCH were whether the appellant/cross respondent's (claimant) compensable injury of _____, is a producing cause of the claimant's current chronic low back pain; what is the correct impairment rating (IR); whether the respondent/cross appellant (carrier) is entitled to a reduction of impairment income benefits (IIBS) and supplemental income benefits (SIBS) based on contribution; whether the carrier was entitled to reduce or suspend income benefits to recoup a previous overpayment; whether the claimant was entitled to SIBS for the first and third compensable quarters; and whether the carrier waived its right to contest the first quarter of SIBS by failing to timely request a benefit review conference (BRC). The hearing officer determined that the compensable injury of _____, was a producing cause of the claimant's current chronic low back pain; that the claimant's IR is 18 percent; that the carrier is entitled to a 5.55 percent reduction in IIBS and SIBS; that the carrier is not entitled to reduce or suspend the claimant's income benefits or to recoup a previous overpayment; that the claimant was not entitled to SIBS for the first or third quarters; and that the carrier did not waive its right to contest the claimant's entitlement to SIBS for the first quarter. The claimant appeals only this last determination of the hearing officer and urges that, under the Texas Workers' Compensation Commission's (Commission) procedures, the carrier did not request a BRC within 10 days. The carrier appeals only the issues involving contribution and recoupment, urging that the great weight of the evidence supports a finding of a 50 percent contribution and that the carrier's overpayment was a result of a changing IR and contribution issue as the claim progressed and not the fault of the carrier, and thus the carrier was entitled to recoup such overpayments. Both parties respond to each other's appeal, essentially urging that there was sufficient evidence to support the hearing officer's determinations on the issue appealed.

DECISION

Affirmed in part and reversed and rendered in part.

Regarding the issue appealed by the claimant, that is, that the carrier failed to timely request a BRC thus waiving its right to contest the first quarter of SIBS, the evidence showed that when the claimant filed for the first quarter of SIBS, the Commission initially determined that he was entitled to SIBS for that quarter. In a letter dated March 19,1998, (Notice of Entitlement to SIBS (EES-22)) from the Commission to the claimant with a copy to the carrier, the Commission advised the parties of the initial determination and the right to request a BRC within 10 days of receiving the correspondence. On April 1, 1998, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21)

stating its disagreement with the determination, and on April 2, 1998, the carrier filed a request for a BRC on a Request for Benefit Review Conference (TWCC-45). Since there was no evidence or date stamped copy as to when the carrier received the EES-22 letter, the hearing officer, who states that the Commission's practice is to actually mail out an EES-22 letter to a carrier, applied the deemed date received provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.3(a), 102.5(h), and 102.7 (Rules 102.3(a), 102.5(h), 102.7) which generally provide that correspondence from the Commission is deemed received five days after mailing. In this case, the deemed receipt date would be March 24, 1998, and thus both notices by the carrier were filed within the 10-day period. The claimant urges that the procedures call for a copy of the EES-22 to be placed in the carrier's Austin representative's box in the central office and thus that the carrier inferentially received a copy of the EES-22 earlier than March 24. Where there is no evidence showing when correspondence from the Commission is received (*e.g.*, a date stamp, a signed receipt, etc.), the Appeals Panel has adhered to the regulatory deemed receipt provisions. *See* Texas Workers' Compensation Commission Appeal No. 982968, decided January 27, 1999; Texas Workers' Compensation Commission Appeal No. 980513, decided April 27, 1998. The determination that the carrier did not waive its right to contest the claimant's entitlement to SIBS for the first compensable quarter is supported by the evidence and is affirmed.

The carrier appeals the findings of facts and conclusions of law that it is only entitled to a reduction of 5.55 percent for contribution and that it is not entitled to reduce or suspend the claimant's income benefits to recoup a previous overpayment. As it affects the contribution issue, the hearing officer found as fact that the IR was 18 percent, based upon the certification of the designated doctor, which was not against the great weight of other medical evidence. These findings are not appealed. In assessing contribution, the hearing officer concludes that the designated doctor's 18 percent IR was a rating for the 1995 back injury in issue and that it did not include any rating for the earlier 1993 back injury except for surgery to remove hardware for which the designated doctor assessed one percent. The hearing officer attributed this one percent to the 1993 injury and treatment and awarded contribution for the one percent. The carrier urges that the hearing officer improperly concluded that the designated doctor is the individual that determines contribution rather than the Commission. We cannot read the hearing officer's discussion and finding to so indicate; rather, it appears clear to us that the hearing officer was examining the report of the designated doctor for the 1995 injury to determine what his rating entailed. There was no medical evidence of an impairment rating for the 1993 injury (although there was evidence about that injury and the treatment therefore), and the carrier apparently relied primarily on a 50 percent contribution rating from a Commission Claims Service Officer who approved a 50 percent reduction on an application by the carrier (Carrier's Request For Reduction of Income Benefits Due to Contribution (TWCC-33)) dated July 1, 1998. The basis for the reduction is not indicated; however, of more significance is the fact that the carrier had submitted an identical request earlier, on January 7, 1998, and contribution was denied by the Field Officer Manager. There is no indication that any dispute resolution process was initiated or requested by the carrier to

dispute this denial of contribution. The hearing officer obviously was not persuaded that 50 percent contribution was established by the evidence before him but that only a contribution of 5.55 percent was shown. Under the circumstances, we are unwilling to conclude that the hearing officer incorrectly applied the contribution provision or that his factual determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Accordingly, we affirm his finding and conclusion on the contribution issue.

The hearing officer determined that the carrier was not entitled to any recoupment for the overpayment of benefits as it failed to demonstrate and prove the amount of the alleged overpayment of income benefits. Clearly, the evidence shows that this was a protracted litigation with various IRs being rendered at various times even by the same doctor. Of course, the IR finally determined is the basis for the number of weeks of IIBS, and an overpayment can reasonably occur if an IR is subsequently changed. The carrier stated in its filings on TWCC-21 forms the reasons for its claim of overpayment and intention to credit future income benefits. As indicated, there was an ongoing dispute over IR and various IR ratings had been made. On an April 1, 1998, TWCC-21, the carrier states that due to the IR dispute, an overpayment of $1,650.00 was made in IIBS. On a later TWCC-21 (date of the form is obliterated by a received stamp on top of the date but the receipt stamp shows July 24, 1998), and after the second determination on contribution of 50 percent was made, the carrier states an overpayment of $10,344.00 had been made because the Commission had now approved a 50 percent reduction for contribution. Of course, the amount of any final overpayment could not be definitively made until such time as the final IR and final percent of contribution, if any, could be determined. Both the IR

and the contribution issues were in dispute at this same CCH. Under these circumstances, we hold that the hearing officer erred in denying any recoupment for overpayment by the carrier. Texas Workers' Compensation Commission Appeal No. 990559, decided April 22, 1999. It will be necessary to calculate the amount of any overpayment taking into consideration the unappealed IR finding and the affirmance of the contribution issue; however, that the carrier did not provide exact amounts under these conditions is not a basis to deny any recoupment whatsoever. We reverse the finding and conclusion that the carrier is not entitled to reduce or suspend income benefits to recoup overpayments and render a new decision that the carrier is entitle to reduce or suspend income benefits to recoup for overpayments to be determined by the Commission.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge