

APPEAL NO. 991228

Following a contested case hearing held on April 27, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first through the eighth compensable quarters, that the appellant (carrier) is not relieved of liability for SIBS because of claimant's failure to timely file a Statement of Employment Status (TWCC-52) for the first through the eighth compensable quarters, and that the carrier did not waive the right to contest claimant's entitlement to SIBS for the first through the eighth compensable quarters by failing to timely request a benefit review conference (BRC). The carrier has appealed, asserting that it is not liable for SIBS for the second, third, fourth, part of the fifth, and the sixth compensable quarters because of the untimeliness of claimant's TWCC-52 forms for those periods. The carrier asserts that claimant's obligation to begin filing TWCC-52 forms began in March 1998 following receipt of the Texas Workers' Compensation Commission's (Commission) EES-23 letter dated December 4, 1997, the Commission's "initial determination" of claimant's entitlement to SIBS for the first compensable quarter. Claimant responds that the evidence is sufficient to support the challenged findings and conclusion, pointing out that his statutory maximum medical improvement (MMI) date and impairment rating (IR) remained in dispute until resolved by agreement of the parties at a BRC on January 14, 1999, after which he refiled the TWCC-52 forms and the Commission, on March 1999, made an "initial determination" of his entitlement to SIBS for the first compensable quarter.

DECISION

Affirmed.

We note at the outset that the hearing officer's decision is unsigned. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.16(a)(3) (Rule 142.16(a)(3)) provides that the decision shall be signed by the hearing officer. However, since the lack of signature is not appealed, we need not take any action on this omission.

The facts pertinent to the resolution of the disputed issues were not in dispute. The carrier has not appealed findings of fact that on _____, claimant sustained a compensable injury; that he reached MMI on July 8, 1996, with an IR of 15%; that claimant has not elected to commute any portion of his impairment income benefits; that claimant's unemployment during the filing periods for the first through the eighth compensable quarters was a direct result of his impairment from his compensable injury; that claimant had no ability to work during the filing periods for the first through the eighth compensable quarters; that claimant did not look for work during the filing periods for the first through the eighth compensable quarters; that Dr. E was appointed as the designated doctor to resolve a dispute of the MMI date and IR on this claim; that on April 10, 1996, Dr. E certified that claimant reached MMI as of that date with an IR of 11%; that claimant underwent back surgery as a result of his injury on February 5, 1997; that claimant's medical records were

resubmitted to Dr. E and Dr. E revised his opinion on September 22, 1997, concluding that claimant reached MMI on May 17, 1996 (indicating that date was the date of statutory MMI), with a 23% IR; that on December 4, 1997, the Commission made an initial determination based on the 23% IR that claimant was not entitled to SIBS because he failed to make the requisite good faith search; that the MMI and IR dispute was again submitted to Dr. E and on March 25, 1998, Dr. E submitted his final certification that claimant reached MMI on May 17, 1996, with a 15% IR; that on December 24, 1998, the carrier requested a BRC, indicating on the Request for Benefit Review Conference (TWCC-45) that the request was made because "Carrier disputing SIBS entitlement; the MMI/impairment issues were never resolved from the designated doctor's reevaluation. SIBS eligibility never determined initially. Carrier had requested BRC over the proper MMI/impairment assessment & the correct dates for SIBS for quarters 1 thru 7"; that there was a BRC on January 14, 1999, at which the parties executed a Benefit Dispute Agreement (TWCC-24) resolving the issues of MMI and IR; that the parties agreed that claimant reached statutory MMI on July 8, 1996 (which is different from the date of statutory MMI indicated by the designated doctor), with a 15% IR; that the Commission determined on March 4, 1999, that claimant was entitled to SIBS for the first compensable quarter as determined using the agreed upon date of MMI and IR; and that the carrier was under no obligation to request a BRC regarding entitlement to SIBS until the initial determination of entitlement by the Commission dated March 4, 1999, was received, and, at that point, the carrier had 10 days to request a BRC.

Also not appealed are conclusions of law that claimant is entitled to SIBS for the first, seventh, and eighth compensable quarters, and that the carrier did not waive the right to contest claimant's entitlement to SIBS for the first through the eighth compensable quarters by failing to timely request a BRC.

The carrier has appealed Finding of Fact No. 24 that claimant submitted his TWCC-52 form to the carrier on April 30, 1998, for the first quarter; on June 4, 1998, for the second through the fifth quarters; on June 12, 1998, for the sixth quarter; on September 11, 1998, for the seventh quarter; and on December 16, 1998, for the eighth quarter. The carrier states that while it agrees that the TWCC-52 forms were mailed by claimant on the respective dates found by the hearing officer, based on the "green cards" in evidence, the TWCC-52 for the first quarter was actually received by the carrier on May 1, 1998; the TWCC-52 forms for the second through the fifth quarters were received by the carrier on June 5, 1998; there was no proof of receipt ("green card") for the sixth quarter TWCC-52, (prior to receipt of claimant's amended TWCC-52 on January 15, 1999); the TWCC-52 for the seventh quarter was received on September 16, 1998; and the TWCC-52 for the eighth quarter was received on December 17, 1998. The carrier further states that the evidence shows that claimant, on January 15, 1999, submitted amended TWCC-52 forms for the first through seventh quarters.

The carrier appeals Finding of Fact No. 28 which states that on March 1, 1999, claimant requested an initial determination from the Commission regarding whether or not he was entitled to SIBS. The carrier states that while it agrees that claimant did request

another determination from the Commission, this was not the initial determination regarding entitlement.

The carrier appeals Finding of Fact No. 30 which states that claimant was not under any obligation to file a TWCC-52 until the date of MMI and the IR had been finally determined, which was not until January 14, 1999. The carrier contends that claimant was obliged to begin filing TWCC-52 forms in March 1998 following receipt of the Commission's EES-23 letter dated December 4, 1997, which was the Commission's initial determination regarding claimant's entitlement to SIBS for the first quarter.

The carrier has also appealed conclusions of law that claimant is entitled to SIBS for the third, fourth, fifth, and sixth compensable quarters and so much of a conclusion of law that concludes that the carrier is not relieved of liability for SIBS because of claimant's failure to timely file TWCC-52 forms for the second, third, fourth, fifth, and sixth compensable quarters.

Claimant testified that he was injured at work on _____, when he was cleaning a machine and his back "popped." He said that he was first seen by Dr. E in 1996, that he underwent spinal fusion surgery by Dr. B in 1997, that he still receives treatment from Dr. B, and that Dr. B has told him he will "probably be disabled for life." Claimant said that because of his back pain, he cannot lift much, cannot carry objects, uses a cane and cannot walk far, and does not drive much. He said a typical day is mostly staying at home in pain and that he would work if he could. As noted, the carrier has not appealed findings that claimant had no ability to work during the filing periods for the eight quarters at issue nor the finding that his unemployment during those periods was a direct result of his impairment from the compensable injury. See Sections 408.142 and 408.143.

As previously stated, the facts are not in dispute. The entirety of the carrier's appeal turns on the question of whether any of claimant's TWCC-52 forms for the eight compensable quarters at issue were untimely, in whole or in part, because he was obligated to file them after receipt in March 1998 of the Commission's December 4, 1997, EES-23 letter which stated the determination of his nonentitlement and which was issued by the Commission before his statutory MMI date and IR was finally determined. In her discussion of the evidence, the hearing officer states that claimant was not under any obligation to file a TWCC-52 until the date of MMI and the IR were finally determined, which was not until January 14, 1999; that, similarly, the carrier was under no obligation to request a BRC regarding entitlement to SIBS until the date of MMI and the IR had been finally determined; and that "[t]o conclude otherwise would be absurd as the pertinent filing periods cannot be determined until the issues of MMI and IR are finally resolved." No stipulation or finding of fact was made which sets out the dates of the filing periods for the eight compensable quarters.

Section 408.143 provides in part that "[a]fter the commission's initial determination of [SIBS], the employee must file a statement with the insurance carrier," i.e., the TWCC-52 form; that the statement must be filed quarterly on a form and in the manner provided by

the Commission; and that failure to file relieves the carrier of liability for SIBS for the period during which a statement is not filed. *And see* Rules 130.103 and 130.104.

The documentary evidence reflects that on September 22, 1997, Dr. E, who had previously determined, before claimant's surgery, that he reached MMI on "4-10-96" with an IR of 11%, signed a Report of Medical Evaluation (TWCC-69) certifying that claimant reached MMI on "5-17-96 Statutory" with an IR of 23% and his accompanying narrative report states that the 23% IR consists of 10% for specific disorders of the spine and 14% for abnormal range of motion (ROM); that the carrier wrote the Commission on October 8, 1997, stating that a review of the designated doctor's report raised several issues which "must be addressed" before it can be accepted including spinal surgery after the statutory MMI date, the validity criteria for ROM, and the neurological component of the IR; that in a TWCC-45, dated October 21, 1997, claimant requested a BRC, stating that the carrier is not willing to pay benefits based on the 23% IR; that in a memo to the parties, received by claimant on November 20, 1997, a Commission benefit review officer stated that the ROM was invalid based on the straight leg raise test, that three percent for lateral flexion is valid and, when added to the 10% for the Table 49 impairment (Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association), would yield an IR of 13%, and that a BRC will be reset for late December or early January; that the Commission sent claimant a form letter, Notice of Non-Entitlement to SIBS (EES-23), dated December 4, 1997, advising that the Commission found that claimant was not entitled to SIBS because he had not made a good faith effort to obtain employment equal to his ability to work; that on March 25, 1998, Dr. E signed another TWCC-69 which certified that claimant reached MMI on "5-17-96 Statutory" with an IR of 15% and which was accompanied by a narrative report reflecting that Dr. E reduced the rating for ROM from 14% to six percent (three percent each for right and left lateral flexion) and added it to the 10% rating under Table 49 which combined to a 15% IR; that the carrier's TWCC-45 forms of December 24, 1998, and January 4, 1999, requesting a BRC both state that the carrier is disputing SIBS entitlement, that the MMI date and IR issues "were never resolved from the designated doctor's re-evaluation," that "SIBS eligibility never determined initially," and that the carrier has requested a BRC over the proper MMI date and IR assessment and that the correct dates for SIBS quarters one through seven; that in the TWCC-24 dated January 14, 1999, the parties agreed that claimant's MMI date is "7-8-96, statutory MMI" and his IR is 15%; that claimant submitted his amended TWCC-52 forms for the first through seventh compensable quarters to the carrier and the Commission on January 14, 1999, and for the eighth compensable quarter on February 2, 1999; and that on March 4, 1999, the Commission issued its EES-22 letter, subject "Initial Determination of [SIBS]," stating, among other things, that the Commission found claimant entitled to SIBS for three months beginning May 20, 1997, and ending August 18, 1997.

We are satisfied that, under the particular circumstances of this case, the hearing officer did not err in determining that the Commission's initial determination of claimant's entitlement to SIBS was made in its March 4, 1999, EES-22 letter and that, accordingly, none of claimant's TWCC-52 forms were untimely. We are satisfied that the appealed

findings of fact, as well as the conclusions of law, are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We note that in Texas Workers' Compensation Commission Appeal No. 991035, decided June 28, 1999, the hearing officer determined that the employee was not entitled to SIBS for the first through 11th quarters because he did not make the required good faith job search and the Appeals Panel affirmed that determination. The hearing officer further determined that the employee timely filed the TWCC-52 forms for the 11 quarters and the insurance carrier appealed, contending legal error and factual insufficiency. The Appeals Panel decided that the hearing officer's determination was error as a matter of law and reversed and rendered that the employee did not timely file for these quarters. The decision stated that the Commission's initial determination that the employee was not entitled to SIBS because he failed to make a good faith job search was contained in a letter deemed received by the employee on January 14, 1998; that the initial determination was based, presumably, on a 38% IR assigned by a Dr. K, a prior designated doctor, on August 27, 1997; and that the employee's TWCC-52 forms were received by the carrier a year later and some two months into the 11th SIBS quarter. The decision also reflects that the employee's IR was 40%, assigned by a Dr. B, the designated doctor, on August 10, 1998. We cited Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995, for the proposition that where the Commission fails to make an initial determination regarding SIBS due to no fault of the claimant, so that the claimant's delays in applying for SIBS, the late filing of the application, may result in delayed payment of SIBS but does not extinguish the entitlement altogether and that such an application may be considered timely if filed within a calendar quarter (three months) of the initial determination of SIBS eligibility. Our decision stated that whether the Commission's initial determination was one of entitlement or nonentitlement to first quarter SIBS, what is required is that a claimant file a TWCC-52 for each filing period or part thereof that has already passed within 90 days of the Commission's initial determination. Because the employee waited more than 90 days to file the TWCC-52 forms for the quarters already passed, we concluded they were untimely and that the hearing officer's determination to the contrary was erroneous as a matter of law. Rejecting the employee's contention that he had to file his TWCC-52 forms in the 90-day period that only began after 90 days from the date Dr. B signed the TWCC-69 in August 1998 and the carrier's position that the employee had to file his TWCC-52 forms within 90 days of Dr. B's report, our decision stated that "[t]he timing of the Commission's SIBS entitlement determination is critical, not the date of the designated doctor's report." We distinguish the decision in Appeal No. 991035, *supra*, because that decision does not reflect that the Commission redetermined the employee's initial entitlement to SIBS after the MMI date and IR were finally resolved as occurred in the case we here consider.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge