

APPEAL NO. 991354

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 24, 1999. The record was closed on June 1, 1999. The issues concerned whether the respondent (claimant), was entitled to supplemental income benefits (SIBS) for his second quarter of eligibility, and whether the appellant (carrier) had timely filed a request for a benefit review conference (BRC) to dispute the second quarter of SIBS.

The hearing officer determined that the claimant had some ability to work during the applicable period for the second quarter, but he did not make a good faith effort to seek employment commensurate with his ability to work (although the claimant returned to work full time on March 1, 1999). However, the hearing officer found that the carrier failed to request a BRC within 10 days, as required by the statute, after receiving the application of the claimant for SIBS. The hearing officer determined that the claimant was unemployed during the filing period as a direct result of his impairment.

The carrier has appealed. It argues that the request for BRC was timely filed and that, while there is a date-stamp on the application for SIBS showing it was received on February 12th "by someone," the hearing officer's inference that it is the carrier's date-stamp is characterized as not reasonable given the lack of evidence as to who placed the stamp on the document. The carrier also briefly appeals the direct result finding in favor of the claimant, arguing that the evidence supports the contrary. There is no response from the claimant.

DECISION

Reversed and remanded.

The filing period for the second quarter ran from approximately November 13, 1998, through February 13, 1999. According to the claimant, he worked until sometime in September 1998, and then left work because of increasing pain. During his time of work, he was treated with a series of three injections. The claimant returned to work for the same employer on March 1, 1999. He did not otherwise look for work. The determination that he had not made a good faith search for employment has not been appealed. The claimant stated that until sometime late in September 1998, and after March 1, 1999, he worked for a telecommunications company on assignments, and this involved traveling out of state as requested. The record is silent on whether the claimant received any amount of SIBS for his first eligible quarter. He was paid impairment income benefits through November 13, 1998.

In evidence is the claimant's Statement of Employment Status (TWCC-52) that he filed during the quarter; a second TWCC-52 was generated when the carrier responded that it lacked medical evidence to prove that the claimant had no ability to work. The original TWCC-52 was date-stamped by the Texas Workers' Compensation Commission

(Commission) field office on February 8, 1999. The claimant said that he delivered this copy to the Commission on that day, and also mailed a copy to Mr. T, the city-based adjuster for the carrier. A second, one-line date-stamp is on this document, and it says "Feb 12, 1999." In addition, the February 12th date-stamp is included on a copy of a handwritten statement that the claimant says he mailed separately in conjunction with the first TWCC-52 (apparently a forgotten attachment). The carrier's position was that it was unknown whose date-stamp this was. There was some evidence and argument that a February 16th "fax" line on the document represented the date it was received by the attorney for the carrier (who was also the (City 1) representative for the carrier), and the attorney argued that his officer in turn "faxed" this to the adjuster on that same day. An unsworn letter from the adjuster asserts a similar sequence of events, indicating that the form was faxed to him on February 16th. There is no comment in this letter about the February 12th date-stamp; however, no samples of the carrier's date-stamp are in evidence. There was simply the assertion, uncorroborated by testimony, that the origin of the date-stamp was unknown. The adjuster disputed the claimant's entitlement to second-quarter SIBS on February 25, 1999, and requested a BRC.

A new SIBS rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.108 (Rule 130.108), codifies previous Appeals Panel decisions which found a distinction in the rules (in effect prior to January 31, 1999), between those situations involving continuing entitlement to SIBS, and those quarters where there had been no previous payment of SIBS for the preceding quarter. In summary, waiver does not apply against a carrier where there has been no SIBS payment in the preceding quarter. Rule 130.108(e); Texas Workers' Compensation Commission Appeal No. 960801, decided June 11, 1996. The obligation to request a BRC where there is no continuing entitlement is on the claimant. While it appears to us in this case that the claimant may not have been entitled to SIBS for the first quarter because he was employed, this information was not further developed. In order to review the hearing officer's application of waiver to the facts here, we must know whether the situation here involved continuing entitlement. We reverse and remand for further development of the record on this point.

Under the facts of this case as developed, we cannot agree that the hearing officer's inference that the stamp was placed there by the carrier was unreasonable. While the SIBS rules in effect at the time of this filing period did not expressly require a TWCC-52 to be date-stamped (as does the rule for periods beginning after January 31, 1999), the hearing officer could conclude that it was unlikely that anyone but the carrier would have reason to date-stamp the TWCC-52. The hearing officer could believe that there would be little reason for the claimant, or the Commission, to send the TWCC-52 to the (City 1) attorney, bypassing the adjuster, and it was more likely than not that the attorney first received its facsimile transmission of the TWCC-52 from the carrier, not the Commission. Clearly, someone put the February 12th date-stamp on the TWCC-52, and the adjuster does not appear to have been present to explain. His letter is not responsive to this particular date-stamp.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge