APPEAL NO. 991911

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 5, 1999, a contested case hearing (CCH) was held. The issues at the CCH were:

1. Did the Carrier [appellant] waive the right to contest the Claimant's [respondent] entitlement to supplemental income benefits [SIBS], for the first quarter, by failing to timely request a benefit review conference [BRC]?

2. Is the Claimant entitled to [SIBS] for the first quarter?

In response to those issues, the hearing officer determined that carrier had waived its right to contest claimant's entitlement to SIBS, making findings to support that conclusion and that claimant was entitled to SIBS for the first quarter.

Carrier appealed, raising the following points: (1) that the hearing officer impermissibly admitted into evidence a hearing officer exhibit after the record was closed without notice or requesting comment from the parties; (2) that certain findings are not supported by the evidence; and (3) that as a matter of law, the hearing officer's decision ordering the payment of SIBS while claimant is receiving temporary income benefits (TIBS) for a subsequent unrelated injury is incorrect. Carrier requests that we reverse the hearing officer's decision and either render a new decision in its favor or remand the case. Claimant generally responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that claimant sustained a compensable cervical injury on _____ (while working in the oil fields as a "pumper"); that claimant reached maximum medical improvement (MMI) on May 18, 1998, with a 17% impairment rating (IR); that impairment income benefits (IIBS) were not commuted; and that the first quarter began on May 11, 1999, and ended August 9, 1999. The parties agreed that the "old" SIBS rules applied. *See* Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished), for the applicable rules. Basically, the "new" SIBS rules apply to quarters beginning on or after May 15, 1999. The parties stipulated that the filing period was from February 9 through May 10, 1999. Claimant testified that he had had a prior cervical fusion at C5-6 and C6-7 before _____. After claimant's compensable injury, claimant was treated conservatively for a while and then "underwent an ACF on 1/9/98 at C3-4," due to the compensable injury. Claimant apparently made a good recovery, reached MMI on May 18, 1998, and returned to work for another employer (Employer 2) as a service technician (doing much lighter work than his preinjury job) on January 4, 1999. The parties agreed that claimant's preinjury average weekly wage

(AWW) was $655.87. Claimant testified that in his position with Employer 2, he worked 55 hours a week earning $8.00 an hour plus time and a half for overtime. Exactly what claimant's weekly wage was with Employer 2 was unclear and claimant did not have pay stubs or payroll information with him at the CCH. In any event, claimant was subsequently involved in an apparently compensable motor vehicle accident (MVA) on (subsequent date of injury), while working for Employer 2. Claimant sustained injuries including additional cervical injuries which required additional cervical surgery on June 24, 1999. Claimant testified that he has been receiving TIBS from Employer 2's carrier and that he has not worked since (subsequent date of injury).

Claimant's ombudsman represented that the Texas Workers' Compensation Commission (Commission) received claimant's Statement of Employment Status (TWCC-52) on May 10, 1999, and the Dispute Resolution Information System (DRIS) notes indicate that an "EES-22 letter (SIBS Entitlement)" was mailed to carrier on May 13, 1999. Carrier's adjuster, in an affidavit, states that the adjusting firm "did not receive notification" of the "entitlement to SIBS mailed by the Commission on May 13, 1999" and that upon request the Commission "notification was faxed to the [adjusting firm] office June 2, 1999." Section 408.147 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(b) (Rule 130.108(b)) provide that a carrier waives the right to contest the Commission's initial determination of entitlement "if the carrier fails to request a [BRC] . . . within 10 days after receipt of the commission's initial determination . . . ." Carrier represented that 10 days after June 2, 1999, was Saturday, June 12th; that it applied Rules 102.7 and 102.3 and sent the Commission a facsimile transmission (fax) on Monday, June 14, 1999, requesting a BRC. The fax copy in evidence, across the top, seems to indicate the adjusting firm sent the transmission to the Commission at "16:38" on June 14, 1999; however, the document is date-stamped as having been received by the Commission on June 15, 1999. Carrier's adjuster's affidavit also states that the Request for Benefit Review Conference (TWCC-45) was "faxed to the TWCC-Tyler office June 14, 1999"; however, a DRIS note of June 15th recites the "TWCC-45 Form received on 06/15/1999." The hearing officer made the following determinations:

FINDINGS OF FACT

2. The Carrier received the Commission's determination of the claimant's entitlement to [SIBS], for the first quarter, on June 2, 1999, at the latest.

4. The Commission received the Carrier's [TWCC-45] on June 15, 1999.

CONCLUSION OF LAW

1. The Carrier waived their right to dispute the Claimant's entitlement to [SIBS] for the first quarter.

Carrier appeals those determinations, citing the adjuster's affidavit and asserting that its

evidence outweighs the evidence of the date-stamp and DRIS notes. Without belaboring the point that another fact finder could have reached a different conclusion, we hold that the hearing officer's findings on this issue are sufficiently supported by the evidence and accordingly affirm the hearing officer's decision on this point.

Carrier also appeals the determination that claimant, although undisputedly drawing TIBS for the second (subsequent date of injury) injury during the filing period, from another carrier, was entitled to SIBS. Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's AWW as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. The parties stipulated that claimant has an IR of more than 15% and has not commuted IIBS. Equally clear from the testimony is that claimant returned to work for Employer 2, on January 4, 1999, enjoyed his work and was able to perform that work for Employer 2 "without any problems." The hearing officer made a finding of fact:

> 10. The Claimant's unemployment was a direct result of the impairment from his compensable injury.

We hold that finding unsupported by the evidence. Claimant's unemployment (not underemployment) during the filing period was solely due to the MVA claimant had on (subsequent date of injury), which eventually necessitated additional cervical surgery in June 1999. Consequently, we reverse that finding of fact as not supported by the evidence.

Another issue presented to us is whether claimant can receive TIBS (for a subsequent injury) and SIBS for the compensable injury at the same time. Carrier cites Texas Workers' Compensation Commission Appeal No. 93989, decided December 16, 1993. Although that case is not analogous to the instant case, it did cite Section 4.23 of Montford, A Guide to Workers' Compensation Reform, to say: "TIBS are designed to assist the employee with respect to a 'shortfall', so to speak, in the employee's wages due to a compensable injury (i.e., to replace those lost wages) during rehabilitation or until the employee reaches [MMI]." Similarly, the purpose of SIBS under the 1989 Act is to assist an employee who has suffered loss of wages due to a compensable injury, under certain circumstances, after IIBS have been paid. TIBS and SIBS have both been characterized as income replacement benefits. *See* Texas Workers' Compensation Commission Appeal No. 981608, decided August 28, 1998 (Unpublished). In Texas Workers' Compensation Commission Appeal No. 990849, decided May 26, 1999, the injured employee was receiving SIBS for one injury when she sustained a subsequent injury which also potentially made her eligible for SIBS; the Appeals Panel cited and followed Texas Workers' Compensation Commission Appeal No. 972018, decided November 17, 1997 (Unpublished), which stated:

A claimant may be eligible for SIBS for two separate injuries but he or she would not be entitled for more than one SIBS payment at a time. The Appeals Panel has said that the SIBS provisions do not allow double SIBS payments to the same individual at the same time even if there were two or more injuries or an accumulation of injuries. A carrier is not liable to pay double SIBS, even if a claimant's two injuries each reach the 15% IR threshold. [Appeal No. 93989, *supra*.] Appeal No. 93989 has also been cited for the proposition that a claimant cannot concurrently draw TIBS for two separate injuries at the same time. This line of cases would suggest that an injured employee may not draw more than one income replacement benefit at a time, as opposed to receiving both IIBS (which is based on permanent impairment) and SIBS at the same time and potentially IIBS for one injury and TIBS for another subsequent injury at the same time. A somewhat similar case, Texas Workers' Compensation Commission Appeal No. 94234, decided April 7, 1994, suggests (and has been referenced as holding) that a claimant may not receive both TIBS and SIBS at the same time. In that case, claimant contended "that the occurrence of the later injury does not under the 1989 Act preclude SIBS for the first injury and that to deny him SIBS under these circumstances would 'penalize' him simply because he has met eligibility requirements for separate benefits for separate injuries." The Appeals Panel, in that case, cited Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, and decided Appeal No. 94234, *supra*, on the basis that claimant could not receive SIBS because her unemployment was not as a direct result of her impairment and affirmed the hearing officer that claimant's unemployment was the direct result of the second injury rather than the impairment from the first injury. In the present case, we hold that claimant may not receive two income replacement benefits at the same time. Claimant was receiving TIBS for the (subsequent date of injury) injury and since we have reversed the hearing officer's finding that claimant's unemployment was a direct result of his compensable impairment (from the _____ injury) as being unsupported by the evidence, we also reverse the hearing officer's decision that claimant is entitled to SIBS for the first compensable quarter and render a new decision that claimant is not entitled to SIBS for the first quarter.

The record at the CCH reflected that the hearing officer admitted one hearing officer exhibit. As previously noted, there was some confusion and uncertainty about claimant's earnings with Employer 2 and claimant testified that his wage record was at home and that he did not have those records with him. The hearing officer subsequently closed the record without any discussion or mention about leaving the record open for the development of additional evidence. Nonetheless, in the hearing officer's recitation of evidence presented, the hearing officer lists Hearing Officer's Exhibit No. 2 and in the Statement of the Evidence, comments:

> Payroll Information, obtained after the hearing, established that during the pay period ending January 15, 1999, the Claimant worked 33.5 hours and earned $268.00. During the pay period ending January 22, 1999, the Claimant worked 46.5 hours and earned $398.00. (See H.O. Ex. 2)

Examination of Hearing Officer's Exhibit No. 2 shows it to include a "fax cover sheet" from Employer 2 to claimant's ombudsman including certain check stubs and payroll information. How this information was imparted to the hearing officer and whether it may have been an ex parte communication is not clear. Carrier, in its appeal, contends that it "never had an opportunity to review the Hearing Officer's Exhibit No. 2 prior to admission and never had an opportunity to offer objections." Carrier went on to state that it was not able to determine whether it had a copy of the exhibit or whether it was timely exchanged. Although carrier contends that by this action "the hearing officer became an advocate for Claimant" we are unwilling to go that far. We do, however, hold that the admission of this document without notice to the parties (or in this case, to the carrier) and without explanation of the circumstances of how the hearing officer came to admit the document, apparently by his own action, or worse, at claimant's request, constitutes error. However, in light of our reversal of the hearing officer's decision on the entitlement or payment of SIBS, we hold that it is harmless error and does not require a remand. We further hold that without this document, and based only on claimant's testimony, the hearing officer's finding (Finding of Fact No. 7) that claimant worked approximately 40 hours per week is unsupported by the evidence because it was claimant's testimony that he worked 55 hours a week.

We affirm the hearing officer's decision on the issue that carrier waived its right to contest claimant's entitlement to SIBS for failing to timely request a BRC, and we reverse the hearing officer's decision that claimant is entitled to SIBS (and orders payment of SIBS) for the first compensable quarter and render a new decision that claimant is not entitled to receive both TIBS and SIBS for two injuries concurrently.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Alan C. Ernst
Appeals Judge