

APPEAL NO. 000030

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 December 8, 1999. The issues at the CCH were whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 13th, 14th and 15th quarters; and whether the claimant timely filed a Statement of Employment Status (TWCC-52) for the 13th, 14th and 15th quarters. The hearing officer determined that the claimant is entitled to SIBS for the 13th, 14th and 15th quarters, that the appellant (carrier) is excused from liability for the 14th quarter until September 9, 1999, and that the carrier is not excused from liability for the 13th and 15th quarters. The carrier appeals, urging that the record does not support the hearing officer's determinations that during the 13th, 14th and 15th quarter filing periods the claimant made a good faith effort to seek employment commensurate with his ability to work during the filing period and his unemployment was a direct result of his impairment; that the record does not support the hearing officer's determination that the claimant filed a timely application for SIBS for the 13th quarter; and that the hearing officer erred in determining that the good cause exception of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.105 (Rule 130.105), effective January 31, 1999, applies to the dispute regarding the 15th quarter. The appeals file contains no response from the claimant.

DECISION

Affirmed as reformed.

The parties stipulated that the carrier accepted liability for the _____, injury to claimant; that the claimant had an impairment rating of 15% or greater from the _____, injury; that the claimant did not elect to commute any portion of his impairment income benefits; that the 13th quarter was from September 24, 1998, through December 23, 1998; that the 14th quarter was from December 24, 1998, through March 24, 1999; and that the 15th quarter was from March 25, 1999, through June 23, 1999. Given the dates of the quarters, the "old" SIBS rules apply because all of the quarters start before May 15, 1999. See Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). The filing period for the 13th quarter began on June 24, 1998, and ended on September 13, 1998; the filing period for the 14th quarter began on September 24, 1998, and ended on December 23, 1998; and the filing period for the 15th quarter began on December 24, 1998, and ended on March 24, 1999.

The claimant testified that he sustained an injury to his back and neck on _____, when he fell while walking up a flight of stairs. At the time of the injury, the claimant was employed as an insurance salesman. The claimant said that his job duties required him to carry documents and drive extensively to 1,200 client locations. The claimant testified that as a result of his injury he is unable to return to work as an insurance salesman because of chronic pain in his back and neck which prevents him from standing or sitting for a long period of time, continual lifting, and getting in and out of cars. The

claimant's treating doctor is Dr. K. According to the claimant, his treatment has consisted of physical therapy, trigger point injections, psychological treatment, and pain medication which makes him groggy. The claimant testified that he sought employment during each of the filing periods, searching for jobs he felt physically capable of performing and for which he was qualified.

The claimant completed a TWCC-52 for the 13th quarter on September 3, 1998, which indicated he had made three employment contacts and was trying to return to school to expand his work experience. On September 21, 1998, the carrier denied the claimant's SIBS application, stating in part "Incorrect TWCC-52. New form sent to employee." The claimant testified that at a benefit review conference on October 30, 1998, he was told that he did not submit the correct form. According to the claimant and his wife, (Ms. H), the adjuster told them that she was not going to pay anything until a medical dispute was resolved, and they understood that to mean SIBS as well. Ms. H said that in September 1999, when the medical dispute was resolved, she asked the adjuster about SIBS and the adjuster told her that TWCC-52s should have been filed. Ms. H said that she got the dates of the quarters from the adjuster, and the adjuster sent her new forms.

The claimant submitted an amended TWCC-52 for the 13th quarter, and TWCC-52s for the 14th and 15th quarters on September 7, 1999. The claimant's amended TWCC-52 for the 13th quarter documented 15 job searches from September 25, 1998, through December 18, 1998; the TWCC-52 for the 14th quarter documented 12 job searches from December 29, 1998, through March 18, 1999; and the TWCC-52 for the 15th quarter documented 13 job searches from April 4, 1999, through June 21, 1999. The claimant testified that he thought the TWCC-52s should document job searches made during the dates of the quarters contained on the TWCC-52s.

The claimant testified that in June 1998 he contacted the Texas Rehabilitation Commission (TRC) and registered and paid for classes, but the classes were canceled because not enough people were enrolled. In September 1998 the claimant enrolled in A+ Basic Training classes through the TRC which required four hours of class per day and lab time, and he completed the classes on January 21, 1999. The claimant testified that he obtained job leads through referrals, the Texas Workforce Commission, word of mouth, and the newspaper. According to the claimant, he applied for jobs in person, faxed resumes with a cover letter and followed up with a telephone call, and had some interviews, but was not hired. The claimant testified that on April 4, 1999, after the 15th quarter filing period, he obtained a job with (employer) contingent on obtaining a solicitor's license which he received in May 1999.

Rule 130.101 defines a Statement of Employment Status as a "commission[Texas Workers' Compensation Commission]-prescribed form" containing specific information. The carrier asserts that the claimant's filing of an outdated form TWCC-52 for the 13th quarter on September 21, 1998, amounts to a failure to file. On October 30, 1997, the Commission adopted a new version of the TWCC-52. In Advisory 97-07, the Commission stated:

The new form may be used immediately, but the old form will continue to be accepted and must be processed by the Commission and insurance carriers until January 1, 1998. With the third payment made for any [SIBS] quarter ending on any date in December 1997, carrier must provide the new Form TWCC-52 to the injured employees.

We note that the carrier approved the claimant's 11th quarter TWCC-52 on March 26, 1998, and the 12th quarter TWCC-52 on July 7, 1998, which were both filed on the "old" TWCC-52 form. The purpose of the new TWCC-52 form, as stated in Advisory 97-07, was to ensure that required information was provided in a format that could be easily processed by the reviewing authority and to expedite the determination process. We do not interpret Advisory 97-07 as indicating that filing an outdated TWCC-52 amounts to a failure to file, nor is there any statutory or rule basis for such an interpretation. To require the claimant to document his job contacts only on the "new" TWCC-52 would be to elevate form over substance. Section 408.143(c) provides that the failure to file the TWCC-52 relieves the carrier of liability for SIBS for the period during which the statement is not filed. The claimant filed a TWCC-52 for the 13th quarter on a Commission prescribed form, prior to the beginning of the 13th quarter. Accordingly, the hearing officer properly determined that the carrier is not excused from liability for the 13th quarter SIBS.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. Good faith is not established simply by some minimum number of job contacts, but a hearing officer may consider "the manner in which the job search is undertaken with respect to timing, forethought and diligence." *Texas Workers' Compensation Commission Appeal No. 960268*, decided March 27, 1996.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Texas Workers' Compensation Commission Appeal No. 950456*, decided May 9, 1995.

The hearing officer determined that the claimant had some ability to work and made a good faith effort to seek employment commensurate with his ability to work during the filing periods for the 13th, 14th and 15th quarters. The hearing officer found that during the 13th quarter filing period the claimant began participation in a full-time rehabilitation program sponsored by the TRC and made contacts for employment with at least three employers; that during the 14th quarter filing period the claimant participated in a full-time rehabilitation program of the TRC and made 15 job contacts; and that during the 15th

quarter filing period the claimant made 12 job contacts. Whether the claimant made a good faith effort to seek employment commensurate with his ability to work was a question of fact for the hearing officer to resolve. Although the claimant's search for employment reflected only three searches on unknown dates during the 13th quarter filing period, the number of days that searches are made is but one factor that may be considered by the hearing officer in determining whether a claimant made a good faith effort. The hearing officer believed the claimant's testimony that he was cooperating with the TRC and was enrolled in classes, although they were subsequently canceled.

The hearing officer found that the claimant's unemployment during the filing periods for the 13th, 14th and 15th quarters was a direct result of the claimant's impairment, and that the claimant's impairment prevented him from returning to his preinjury job earning his preinjury wages. The claimant testified that he could no longer perform his previous job as an insurance salesman because of lifting and sitting restrictions. The hearing officer's direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing periods, he could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

The carrier argues that the claimant is not entitled to SIBS for the 14th and 15th quarters because his TWCC-52s do not contain documentation supporting the direct result and good faith criteria. The claimant's TWCC-52 for the 14th and 15th quarters did not attach medical documentation, and did not document any work searches during that particular filing period. However, in Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994, the Appeals Panel stated that the Commission is not limited to the information on the TWCC-52 when determining entitlement for SIBS and that both parties may bring forth additional evidence to challenge or defend the Commission's action concerning entitlement for SIBS. We find the evidence sufficient to support the hearing officer's determination that the claimant is entitled to SIBS for the 13th, 14th and 15th quarters.

It was undisputed that the claimant filed his TWCC-52 for the 15th quarter on September 9, 1999. The hearing officer determined that the "good cause" provision in Rule 130.105, effective January 31, 1999, applies to this case because it involves a procedural, not an entitlement, issue. Rule 130.100(a), effective January 31, 1999, states:

- (a) Effectiveness. Entitlement or non-entitlement to [SIBS] shall be determined in accordance with the rules in effect on the date a qualifying period begins.

Rule 130.105(a)(1) states:

- (a) Failure to timely file. An injured employee who does not timely file [a] [TWCC-52] with the insurance carrier shall not receive [SIBS] for the period of time between the beginning date of the quarter and the date on which the form was received by the insurance carrier, unless the following [applies]:
 - (1) the failure of the insurance carrier to timely mail the form to the injured employee as provided by §130.104 of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters).

The hearing officer made the following Findings of Fact and Conclusion of Law:

FINDINGS OF FACT

- 14. The Carrier sent Claimant TWCC-52s [sic] forms for the fourteenth and fifteenth quarters in August 1999 and sent TWCC-52s marked with the dates of the fourteenth and fifteenth quarters on September 22, 1999.

* * * *

- 18. Claimant had good cause for late filing of the TWCC-52 for the fifteenth quarter.

CONCLUSION OF LAW

- 9. Because Claimant has good cause under the Rule for late filing of the application for SIBS for the fifteenth quarter up until September 9, 1999, the day it was filed, Carrier is not excused from liability for benefits.

In Appeal No. 991634, *supra*, we stated that "the new SIBS rules apply to quarters beginning on or after May 15, 1999," because the qualifying period ends on the 14th day before the beginning date of the quarter under the new rule. The Preamble for the Adoption of New Rules for SIBS at 24 Tex. Reg. includes the following:

New §130.100 addresses the question of the effective date of the new rules on entitlement to [SIBS]. Given the nature of the dispute resolution system established by the provisions of the [1989] Act, there will be a number of disputes pending before the Commission and the court when the changes to the rules are adopted and effective. This new section provides that the *rules*

applicable to a particular quarter of potential eligibility are the rules that were in effect on the date the qualifying period began. [Emphasis added.]

The preamble suggests that the rules that govern the dispute are those in effect on the date the qualifying period began. Given that the preamble does not indicate otherwise and recognizing the obvious confusion which would result in both “old” and “new” SIBS rules potentially applying to the same quarter, Rule 130.105, effective January 31, 1999, does not apply to this case.

The claimant argued that he had “cause” for not timely filing the TWCC-52 for the 15th quarter. Pursuant to the “old” SIBS rules, Rule 130.104(b) imposes a duty on the carrier to include a TWCC-52 with its third monthly payment for the prior quarter in cases where the claimant is attempting to establish his or her continuing entitlement to SIBS, and Rule 130.105(f) imposes a duty on the carrier to send the claimant a TWCC-52 where the claimant is seeking reinstated or delayed entitlement to SIBS. The Appeals Panel has held that the carrier’s failure to provide the claimant with a TWCC-52 tolls the claimant’s obligation to file a TWCC-52. Texas Workers’ Compensation Commission Appeal No. 950723, decided June 23, 1995. The carrier did not provide the claimant with a TWCC-52 for the 14th or 15th quarter until August 1999, and it was obligated to do so, regardless of whether the claimant was in continuing or reinstated/delayed entitlement to SIBS. The claimant completed and filed the TWCC-52 for the 15th quarter on September 9, 1999, within one month of receiving the TWCC-52 from the carrier. Although the “new” SIBS rules do not apply, the hearing officer properly determined that the carrier is not excused from liability for the 15th quarter SIBS. We strike the hearing officer’s Finding of Fact No. 18, and reform Conclusion of Law No. 9 to state: The carrier is not relieved of liability because of the claimant’s failure to timely file a TWCC-52 for the 15th quarter. We reform part of the Decision to state: The claimant is entitled to SIBS for the 13th and 15th quarters. The carrier is not relieved of liability for the 13th and 15th quarters because of the claimant’s failure to timely file a TWCC-52 for the 13th and 15th quarters. The claimant is eligible for SIBS for the 14th quarter. The carrier is relieved of liability for the 14th quarter because of the claimant’s failure to timely file a TWCC-52 for the 14th quarter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge