APPEAL NO. 000177

Following a contested case hearing (CCH) held on October 27, 1999, and November 1, 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/cross-appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 11th and 12th compensable quarters; that claimant would be entitled to SIBS for the 13th quarter, except that he is no longer entitled to any income benefits for this claim in accordance with "Section 408.145(e)"; that claimant has permanently lost entitlement to SIBS because he was not entitled to SIBS for 12 consecutive months in accordance with "Section 408.145(e)"; that appellant/cross-respondent (carrier) is relieved of liability for benefits for the 11th and 12th quarters because claimant did not timely file a Statement of Employment Status (TWCC-52) or application for SIBS; and that the compensable injury sustained by claimant does not extend to a follow-on injury to the right foot and an additional injury to the cervical area. The carrier appeals a factual finding by the hearing officer that its adjuster provided a sworn affidavit which affirmed that she denied the claimant's applications for SIBS for the 11th, 12th and 13th quarters without consideration of the merits of each application in violation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(e) (Rule 130.104(e)). The carrier argues that this finding was beyond the hearing officer's jurisdiction, outside the issues before him, not supported by the evidence and a retroactive application of rules that were not in effect during the 11th and 12th compensable quarters. There is no response from the claimant to the carrier's request for review in the appeal file. The claimant files a request for review disputing the hearing officer's resolution of all the disputed issues and arguing that he is entitled to SIBS for the 11th, 12th, and 13th compensable quarters and that his injury extends to a follow-on injury to his right foot and an additional injury to his cervical spine. The claimant also argues that the carrier has not properly adjusted his claim. The carrier responds that the hearing officer's resolution of the disputed issues is supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Neither party raises a question concerning the timeliness of the appeals. However, whether or not an appeal is timely is jurisdiction, and questions of jurisdiction are always in issue. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was received by the carrier's (city) representative on January 12, 2000. The carrier recites in its request for review that the carrier's attorney received the decision on January 14, 2000. We do not question or doubt the representation of the carrier's attorney. However, we have held that the date of receipt by a party and not its attorney is controlling as to the date of receipt. Texas Workers' Compensation Commission Appeal No. 92219, decided July 15, 1992; Texas Workers' Compensation Commission Appeal No. 93327, decided June 3, 1993. Thus, in the present

case, the carrier received the hearing officer's decision on Wednesday, January 12, 2000, as reflected by Commission records. Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and on the same date serve a copy of the request for appeal on the other party." *See also* Rule 143.3(a). The carrier hand-delivered its request for review to the Commission on January 31st, and the Commission received it on Monday, January 31, 2000. Thus, since it did not mail its request for review to the Commission within 15 days of the date it received the hearing officer's decision,[1] the carrier's request for review is not timely. *See* Section 410.202(a); Rule 143.3(c). We do not have jurisdiction to consider an untimely appeal and cannot consider the carrier's appeal. The finding of fact which the carrier challenges in its appeal[2] was not appealed by the claimant and has become final pursuant to Section 410.169.

During the CCH the parties stipulated that the claimant's impairment rating (IR) was 38%; that the claimant did not elect to commute any portion of his impairment income benefits (IIBS); that the 11th compensable quarter began on January 12, 1999, and continued through April 12, 1999; that the claimant's 12th compensable quarter began on April 13, 1999, and continued through July 12, 1999; and that claimant's 13th compensable quarter began on July 13, 1999, and continued through October 11, 1999. The hearing officer summarized the evidence in his decision and neither party challenges the accuracy of the hearing officer's rendition of the evidence. The hearing officer summarized the evidence as follows:

> Claimant testified that he was working on a construction site on _____, when he tripped and fell forward hitting his head against a wall. Claimant stated that he injured his neck, right upper extremity and right knee. Claimant testified that he had neck surgery following the injury. The surgery records were not offered into evidence. The parties stipulated that Claimant received a 38% [IR] for this injury however, the medical report concerning this [IR] was not offered into evidence.
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> In regard to the 11th quarter, Claimant contends that he was unable to work during the qualifying period of October 13, 1998, through January 11, 1999. He stated that he was in considerable pain and that no doctor had released him to work. In the alternative, Claimant argued that he made a good faith effort to find employment commensurate with his ability to work because he

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[1]Fifteen days from January 12, 2000, was Thursday January 27, 2000.

[2]This is Finding of Fact No. 31, which reads as follows:

31. The Claims Adjuster for the Carrier provided a sworn affidavit dated November 4, 1999, which affirms that she denied Claimant's application for [SIBS] for the 11th, 12th and 13th quarters without consideration of the merits of each application and in violation of Commission Rule 130.104(e).

assisted his wife in her real estate business and he worked on a correspondence course to be a private investigator.

Claimant contends that he mailed the application for 11th quarter [SIBS] to the Carrier on January 19, 1999. Claimant testified that he was having problems sending letters to the Carrier and receiving mail from the Carrier during this time frame. Claimant stated he sent this application by regular mail.

In regard to the 12th quarter, Claimant contends that he was unable to work during the qualifying period of January 12, 1999, through April 12, 1999. He stated that he continued to experience pain and that no doctor had released him to work. In addition, Claimant began treating with [Dr. D] on January 26, 1999, and [Dr. D] diagnosed Claimant with long term chronic neck, upper extremity and hand pain. [Dr. D] did not recommend additional surgery but did recommend a dorsal column stimulator. Claimant had a temporary dorsal column stimulator implanted on March 24, 1999, and was advised by [Dr. D] to not have physical activity.

Claimant also contends that he made a good faith effort to find employment commensurate with his ability to work during the qualifying period for the 12th quarter. He testified that he sought employment because the Carrier had said that he was required to look for work.

Claimant contends that the application for the 12th quarter was sent to [Dr. D's] office on April 19, 1999.

In regard to the 13th quarter, Claimant contends that he was unable to work during the qualifying period of March 31, 1999, through June 29, 1999. He testified that he had a permanent dorsal column stimulator implanted from [Dr. D]. He offered no medical records as to when this implant was done except a note from [Dr. D] on July 2, 1999, which states that Claimant has a spinal cord stimulator implanted in the right upper chest and that he was doing well until 2 days ago when he felt a jolt which caused him to fall and break a foot.

Claimant contends he filed an application for [SIBS] for the 13th quarter on August 31, 1999.

Claimant contends that he has not permanently lost entitlement to [SIBS] because he has not gone 12 consecutive months without entitlement. He believes he is entitled to [SIBS] for the 11th, 12th and 13th quarters. In addition, Claimant believes he timely filed his application for each of the 11th, 12th and 13th quarters and the Carrier is not relieved of liability.

Claimant contends that he injured his right foot in late _____, when he felt a jolt from the spinal column stimulator causing him to stumble and fracture his foot. He believes the foot injury was caused by the medical treatment for his compensable neck injury and the foot injury should be compensable as well.

Overriding all of the disputed issues, is the Claimant's complaint that the Carrier has not dealt with him fairly. For example, Claimant argues that the Carrier did not change his address and continued to send letters to his old address. In deed [sic], he presented some evidence supporting his position that the Carrier did not timely update their file in regard to his new address. He argues that this affects the credibility of the Carrier.

Carrier argues that Claimant has presented insufficient evidence to establish that he has no ability to work at any position for the qualifying periods for the 11th, 12th and 13th quarters. Carrier relies on a Functional Capacity Evaluation [FCE] dated October 1, 1998, which concludes that Claimant could do sedentary work with an opportunity to change positions. The FCE was concurred in by [Dr. C], the surgeon who was following Claimant's case pending a change of treating doctors.

Carrier argues that it received Claimant's application for [SIBS] for the 11th and 12th quarters on August 2, 1999. Because the 12th quarter ended on July 12, 1999, no benefits are due even if Claimant is determined to be entitled to benefits. The Carrier contends that it received the Claimant's application for [SIBS] for the 13th quarter on September 2, 1999, and this should be the accrual date for the 13th quarter if Claimant is determined to be entitled to [SIBS] for this quarter.

Carrier believes Claimant has permanently lost entitlement to [SIBS] because he is not entitled to [SIBS] for the 9th, 10th, 11th and 12th compensable quarters, a period of 12 consecutive months. Carrier believes that in accordance with Texas Labor Code, Section 408.146(e), Claimant is not entitled to any additional benefits for this compensable injury.

Carrier contends that Claimant has failed to establish that his right foot fracture was caused by his medical treatment. It notes that Claimant had been treating at the (hospital) for foot problems. In addition, Carrier notes that Claimant's present treating doctor states that there is no way to tell if the battery of the spinal cord stimulator caused the patient to fall and break his ankle.

Section 408.142(a) outlines the requirements for SIBS eligibility as follows:

> An employee is entitled to [SIBS] if on the expiration of the [IIBS] period computed under Section 408.121(a)(1) the employee:
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> (1) has an [IR] of 15 percent or more as determined by this subtitle from the compensable injury;
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> (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
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> (3) has not elected to commute a portion of the [IIBS] under Section 408.128; and
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> (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Pursuant to (Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS] for any quarter claimed." On January 31, 1999, Rule 130.102 was changed with the passage of the "new" SIBS rules. Pursuant to Rule 130.100(a), entitlement or nonentitlement to SIBS shall be determined in accordance with the rules in effect on the date a qualifying period begins. We addressed the question of how to calculate a quarter subject to the old as opposed to the new SIBS rules in Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). Applying the precepts set out in that case, the "old" SIBS rules apply to the 11th and 12th compensable quarters and the "new" SIBS rules apply to the 13th compensable quarter.

Under the "new" SIBS rules, Rule 130.102 provides that an injured employee who has an IR of 15% or greater and who has not commuted any IIBS is entitled to SIBS if, during the qualifying period, the claimant has earned less than 80% of the employee's preinjury wage as a direct result of the impairment from the compensable injury and has made a good faith effort to obtain employment commensurate with the employee's ability to work. "Qualifying period" is defined in Rule 130.101 as the 13-week period ending on the 14th day before the beginning of a compensable quarter.

The fact that the claimant met the first and third of the requirements of Section 408.142(a) was established by stipulation. The hearing officer found that the claimant met the second requirement for each quarter under consideration and neither party has appealed these determinations. The hearing officer found that the claimant failed to make a good effort to seek employment during the filing period for the 11th and 12th

compensable quarters,[3] but did make a good faith effort during the qualifying period for the 13th compensable quarter because he was totally unable to work. The claimant appeals the hearing officer's determinations in regard to the 11th and 12th compensable quarters. We have previously held that the question of whether the claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is "firmly on the claimant" and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred." We have likewise noted that medical evidence affirmatively showing an inability to work is required, if a claimant is relying on such inability to work to replace the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers'

[3] In his decision the hearing officer used the term "qualifying period" in regard to all the compensable quarters. As a matter of practice, prior to the promulgation of the "new" SIBS rules, the terms "filing period" and "qualifying period" were often used interchangeably.

Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool, *supra*; Cain, *supra*.

Applying the standards under the "old" SIBS rules, which apply to the 11th and 12th quarters, we find no ground to reverse the decision of the hearing officer that the claimant did not attempt in good faith to find employment commensurate with his ability to work. The hearing officer found that the claimant had some ability to work during the filing period for the 11th compensable quarter and was unable to work during a portion of the filing period for the 12th compensable quarter. There is medical evidence to support these findings. While the claimant points to, arguably, contrary medical evidence on appeal, it was up to the hearing officer to resolve conflicts in the evidence. Also, the hearing officer found that the claimant made some efforts to find employment during both the 11th and 12th compensable quarters, but that these efforts did not constitute a good faith attempt to find employment commensurate with his ability to work. We find that there was sufficient evidence in the record to support these determinations.

The hearing officer also found that the claimant was not entitled to SIBS for the 11th and 12th compensable quarters, as well as a portion of the 13th compensable quarter, because he did not timely apply for SIBS. The Appeals Panel has stated that SIBS payments are due as of the date the application for SIBS is filed and that a late filing precludes liability for SIBS until the application is filed. Texas Workers' Compensation Commission Appeal No. 951351, decided September 27, 1995, and Texas Workers' Compensation Commission Appeal No. 94335, decided May 6, 1994. The hearing officer's decision is consistent with this. The claimant argues that he sent his application for SIBS to the carrier much earlier than the carrier contended it was received. The date that the claimant sent and the carrier received, his application for SIBS are factual matters. In the present case, there was conflicting evidence concerning these matters and it was the province of the hearing officer to resolve the conflicting evidence. We do not find the overwhelming evidence contrary to the hearing officer's findings in regard to these matters.

The hearing officer determined that the claimant would have been entitled to SIBS for a portion of the 13th compensable quarter,[4] but the claimant was precluded from SIBS for the entirety of the 13th compensable quarter because he had lost permanent eligibility to SIBS because he had not been entitled to SIBS for 12 consecutive months. Section 408.146(c)[5] provides as follows:

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[4]This is the portion of the 13th compensable quarter after September 2, 1999, which is the date on which the hearing officer found that the carrier received the claimant's application for SIBS for the 13th compensable quarter.

[5]We note that the hearing officer's decision contains a typographical error in Conclusion of Law No. 5, which refers to this section as Section 408.145(e). We reform the hearing officer's Conclusion of Law No. 5 to read Section 408.146(c).

> Notwithstanding any other provision of this section, an employee who is not entitled to [SIBS] for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury.

The hearing officer determined that the claimant had not been entitled to SIBS during the four compensable quarters prior to the 13th compensable quarter. The hearing officer took official notice of the fact that pursuant to the decision of the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 991651, decided September 16, 1999 (Unpublished), the claimant was not entitled to SIBS for the ninth compensable quarter. In that case, we affirmed a decision that the claimant was not entitled to SIBS for the 10th compensable quarter. The hearing officer also takes official notice that a prior CCH decision, which was unappealed and has become final, determined that the claimant was not entitled to SIBS for the 10th compensable quarter. In fact, there was a hearing officer's decision that the claimant was not entitled to SIBS for the ninth compensable quarter which was affirmed in Texas Workers' Compensation Commission Appeal No. 982705, decided January 4, 1999 (Unpublished). In spite of some confusion surrounding the taking of official notice, it is clear that there have been prior final Commission determinations that the claimant was not entitled to SIBS for the 9th and 10th compensable quarters, and that linked with the hearing officer's determination in the present case that the claimant was not entitled to SIBS for the 11th and 12th compensable quarters, the claimant had lost eligibility for SIBS pursuant to Section 408.146(c) prior to the 13th compensable quarter.

The claimant challenges the hearing officer's determination by arguing that he has sought judicial review of the decision of the Appeals Panel in Appeal No. 982705 and that the determination he was not entitled to SIBS for the ninth compensable quarter is thus not final. While a judicial reversal of our decision in Appeal No. 982705 could reopen the issue, for purposes of administrative review of the hearing officer's decision in the present case, our decision in Appeal No. 982705 is final until and unless it is overturned. Thus, we find no error in the hearing officer's application of Section 408.146(c) in barring the claimant from SIBS for the 13th compensable quarter.

Next, we address the extent-of-injury question. The claimant argues that his injury extends to an injury to his right foot and an additional injury to his cervical spine because he fell and injured these body parts when he received an electrical jolt from the spinal stimulator implanted to treat his compensable injury. We have held that the question of an extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 14, 1993. We have also held this to be true of so-called "follow-on" injuries. Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993. It was the claimant's burden to establish the extent of his injury and we do not find error as a matter of law in the determination of the hearing officer that the claimant's injury did not extend to his right foot or to an additional injury to his cervical spine, which is sufficiently supported by the evidence.

Finally, while we note the claimant's complaints concerning how his claim was adjusted, the matters he raises are beyond the scope of our review.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge