

APPEAL NO. 000770

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 March 10, 2000. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is 10% as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission) in his initial report, and that she is not entitled to supplemental income benefits (SIBs) for the second through the eighth quarters because she does not have a 15% IR. In her appeal, the claimant asserts error in the hearing officer's determination that her IR is 10%, contending that her IR is 16% as certified by the designated doctor in his amended report. In addition, the claimant argues that the hearing officer erred in determining that she is not entitled to SIBs. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and rendered in part and reversed and remanded in part.

Initially, we will consider the carrier's assertion that the claimant's appeal was not timely filed. Commission records demonstrate that the hearing officer's decision and order were distributed to the parties on March 22, 2000, under a cover letter of the same date. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 102.5(d) (Rule 102.5(d)), as amended effective August 29, 1999, the claimant is deemed to have received the hearing officer's decision five days after it was distributed or on Monday, March 27, 2000. Under Section 410.202 and Rule 143.3(c), the claimant's appeal is timely if it is mailed no later than 15 days after the date of receipt of the hearing officer's decision and received by the Commission no later than 20 days after the date of receipt. Those deadlines are Tuesday, April 11, 2000, and Monday, April 17, 2000, in this instance. The claimant's appeal was mailed to the Commission on April 10, 2000, and received by the Commission on April 12, 2000; thus, the claimant's appeal is timely. The carrier also asserts that the claimant's appeal was not timely because she did not properly serve it with a copy of her appeal. We find no merit in this assertion because we have long held that failure of a party to serve the other side with a copy of the appeal does not affect timeliness; rather, it extends the time to respond until service is properly made. Texas Workers' Compensation Commission Appeal No. 92051, decided April 30, 1992; Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992.

The parties stipulated that the claimant sustained a compensable low back injury on February 13, 1995; that the claimant reached maximum medical improvement (MMI) pursuant to Section 401.011(30)(B) on February 18, 1997, 104 weeks after the date income benefits began to accrue; that Dr. U is the doctor selected by the Commission to serve as the designated doctor in this case; and that the claimant did not commute impairment income benefits (IIBs). The parties also stipulated that if the claimant's IR is 16%, she is entitled to SIBs for the first through sixth quarters. However, the carrier maintained that the claimant would not be entitled to SIBs for the seventh and eighth quarters, to which the "new" SIBs rules

apply because the claimant failed to satisfy the good faith job search requirements of Rule 130.102(d)(3).

On May 30, 1996, Dr. D performed spinal surgery on the claimant. On January 5, 1998, the claimant was examined by Dr. M, who certified that she reached MMI on February 18, 1997, with a 13% IR. The claimant disputed Dr. M's certification and Dr. U was chosen by the Commission to serve as the designated doctor. On February 18, 1998, Dr. U examined the claimant and assigned a 10% IR. On November 12, 1998, Dr. D performed a second surgery on the claimant's spine, specifically an anterior interbody fusion at L5-S1. On July 29, 1999, Dr. U reexamined the claimant and completed a second Report of Medical Evaluation (TWCC-69), in which he assessed a 16% IR. It is undisputed that the carrier paid additional IIBs based on the 16% IR and that the carrier also paid the first quarter of SIBs after the Commission made its initial determination that the claimant was entitled to those benefits. Although the Commission's initial determination was made in favor of the claimant, the Commission did not enter an interlocutory order to pay first quarter SIBs.

The hearing officer determined that the claimant's IR is 10% as certified by Dr. U in his initial report. The hearing officer further determined that although the designated doctor's report was amended for a proper reason, subsequent surgery, the amendment did not occur within a reasonable time. Accordingly, the hearing officer determined that the designated doctor's first certification was entitled to presumptive weight and concluded that the claimant's IR is 10% in accordance with that report. We do not specifically reach the hearing officer's determinations in that regard based upon our determination that the carrier has waived its right to contest the IR in this case. In Texas Workers' Compensation Commission Appeal No. 941521, decided December 23, 1994, we determined that where a carrier waives its right to contest the Commission's initial determination of entitlement to first quarter SIBs by failing to request a benefit review conference within 10 days after the later of the expiration of the IIBs period or the date of its receipt of the Commission's determination, it also waives the right to dispute the IR in conjunction with a dispute of a claimant's entitlement to a subsequent quarter of SIBs. Specifically, Appeal No. 941521 stated:

Pursuant to Rule 130.104(a), an injured employee initially determined by the Commission to be entitled to [SIBs] continues to be entitled to [SIBs] for subsequent compensable quarters if the employee meets the criteria of having been unemployed or underemployed as a direct result of the impairment from the compensable injury, and had made good faith efforts to obtain employment commensurate with the employee's ability to work. There is no requirement in Rule 130.104 concerning continuing entitlement to [SIBs] that the claimant having been initially determined by the Commission to have an IR of 15% or greater to re-establish that criteria for each subsequent compensable quarter. As we read Rule 130.104(a) in conjunction with rule 130.108(c), a carrier's contest of continuing entitlement to [SIBs] is limited to the criteria that the claimant has to establish for continuing entitlement to [SIBs], and Rule 130.108(c) does not contemplate that the carrier can reopen in contests of subsequent compensable quarters the Commission's initial determination of a 15% or greater IR after it fails to timely contest the Commission's initial determination of entitlement to [SIBs].

Similarly, in Texas Workers' Compensation Commission Appeal No. 951713, decided November 27, 1995, we determined that the carrier waived its right to dispute the IR by not raising the issue until after it had already paid IIBs and had begun to pay SIBs. See *also* Texas Workers' Compensation Commission Appeal No. 960321, decided April 2, 1996, and the cases cited therein. Under the guidance of Appeal Nos. 941521, 951713, and 960321, *supra*, the carrier in this instance has likewise waived its right to contest the 16% IR by failing to raise its dispute to the amended IR either at the time of the amendment or at the time that the Commission made its initial determination of the claimant's entitlement to SIBs for the first quarter. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 10% and render a new decision that the claimant's IR is 16%.

As noted above, the carrier stipulated that if the claimant's IR were 16%, she is entitled to SIBs for the second through sixth quarters; however, it maintained that the claimant was not entitled to seventh and eighth quarter SIBs because she failed to satisfy the good faith requirement of the new SIBs rules. Thus, we reverse the hearing officer's determination that the claimant is not entitled to second through eighth quarter SIBs and render a new decision that the claimant is entitled to SIBs for the second through sixth quarters. We remand for the hearing officer to determine the claimant's entitlement to seventh and eighth quarter SIBs under Rule 130.102. Accrued benefits are to be paid in a lump sum with interest.

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.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge