

APPEAL NO. 000872

On March 29, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issue by deciding that appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 17th quarter. Claimant requests that the hearing officer's decision be reversed and that a decision be rendered in her favor. Respondent (carrier) requests that the hearing officer's decision be affirmed.

DECISION

Reversed and remanded.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The new SIBs rules effective January 31, 1999, apply to this case. The parties made no stipulations but did agree that the issue was "whether [claimant] is entitled to [SIBs] for the 17th quarter which runs from January 21 to April 28, 2000." It is undisputed on appeal that claimant sustained a compensable injury on \_\_\_\_\_; that as a result of her compensable injury, she has an impairment rating (IR) of 15% or greater; and that she did not commute impairment income benefits. There is no appeal of the hearing officer's finding that during the qualifying period for the 17th quarter, claimant's unemployment was a direct result of the impairment from her compensable injury. What is in question is whether claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period. Rule 130.102(b). Claimant testified that she broke her foot at work on \_\_\_\_\_, while working as a department store manager and that she has had 16 or 17 surgeries on her foot. Claimant said that she worked for a few weeks after her injury, was then taken off work by a doctor, and has not worked since then. Dr. B wrote in February 2000 that claimant is under his medical care for a work-related injury to her left foot, that she is only able to perform sedentary-type work, that she is unable to stand for more than two hours in an eight-hour workday, and that he has recommended her for retraining because he does not feel that she will be able to return to retail-type work. A two-hour standing/walking limitation in an eight-hour workday was also in a physical capacities evaluation form signed by Dr. B in July 1999.

The issue from the benefit review conference (BRC) was "[i]s claimant entitled to the 17th quarter of [SIBs] from January 21, 2000 through April 28, 2000," and that is the issue that was agreed to by the parties at the CCH. Claimant states in her appeal that the carrier sent her the Application for SIBs (TWCC-52) for the 17th quarter with the dates of the quarter and the qualifying period filled in. Rule 130.104(b) provides that on the TWCC-52 sent by carrier to claimant for subsequent quarters, carrier shall fill in the number of the applicable quarter, the dates of the qualifying period, the dates of the quarter, and the deadline for filing the TWCC-52 with carrier. The TWCC-52, which was in evidence, states

that the 17th quarter is from January 21, 2000, to April 28, 2000, and that the qualifying period for the 17th quarter is from October 16, 1999, to January 14, 2000. In the TWCC-52 for the 17th quarter, claimant listed 126 job contacts from October 22, 1999, to January 21, 2000, with 105 of those contacts being made between October 22, 1999, and January 7, 2000, and 116 of those contacts being made between October 22, 1999, and January 14, 2000. Claimant said that she obtained job leads from the newspaper and from the Texas Workforce Commission (TWC) and that she contacted the listed employers by sending them a resume. She said that no employer she sent a resume to contacted her. Claimant said that the Texas Rehabilitation Commission (TRC) had sent her to computer school but that she was unable to complete that program because of another foot surgery. She said her last foot surgery was in November 1997. Carrier's vocational consultant testified that claimant did not do a very good job at looking for work and stated his reasons for his opinion. He reported that the vast majority of the claimant's job contacts could not be verified because of insufficient information provided by claimant.

There was discussion at the CCH as to what the dates of the 17th quarter and qualifying period for that quarter are. The hearing officer said that she was going by what the BRC report stated as to the dates of the quarter, January 21, 2000, to April 28, 2000, and claimant said that that was what she was told and carrier agreed to use those dates. Based on those dates, the hearing officer said that the qualifying period was from October 9, 1999, to January 7, 2000, and carrier's questions to claimant on cross-examination were based on that qualifying period.

Claimant appeals the hearing officer's findings that the 17th quarter was from January 21 to April 28, 2000; that the qualifying period for the 17th quarter was from October 9, 1999, to January 7, 2000; that claimant made no job contacts during the week of October 9 through October 15, 1999; and that during the qualifying period claimant did not make a good faith search for employment commensurate with her ability to work, as a good faith search is defined in Rule 130.102(e). Claimant also appeals the hearing officer's conclusion that claimant is not entitled to SIBs for the 17th quarter. The hearing officer states in her decision that although claimant applied for numerous jobs which were commensurate with her activity restrictions and vocational qualifications, documented her job search, and worked with the TWC and the TRC, claimant did not make her first job contact for the 17th quarter until October 22, 1999, the last day of the second week of the qualifying period. The hearing officer correctly noted that Rule 130.102(e) requires that a job search be conducted during every week of a qualifying period. The hearing officer stated that since claimant failed to demonstrate that her job search began prior to the end of the second week of the qualifying period, she had to determine that claimant did not make a good faith search for employment commensurate with her ability to work during the qualifying period. The hearing officer also stated in her decision that since claimant testified that all of her job-seeking activities for the 17th quarter were documented in her TWCC-52 and since claimant indicated agreement with the proposition that the 17th quarter ran from January 21 to April 28, 2000, there was, regrettably, no reason to infer that any of claimant's relevant job-seeking activities were omitted from the record of the CCH.

Claimant states in her appeal that January 21, 2000, is an incorrect starting date for the 17th quarter; that that was the starting date for the quarter that the adjustor put on the TWCC-52; that based on beginning and ending dates of prior quarters, the beginning date for the 17th quarter was January 28, 2000; that the qualifying period found by the hearing officer, January 21, 2000, to April 28, 2000, is a 14-week period and not a 13-week period; that the 17th quarter ending date, April 28, 2000, and the dates for the qualifying period, October 16, 1999, to January 14, 2000, that were listed on the TWCC-52 are correct; that the hearing officer changed the dates of the qualifying period based on an incorrect beginning date of the 17th quarter which resulted in a finding that she made no job contacts during the week of October 9 through October 15, 1999; that her job search for the week of October 9 through October 15, 1999, is listed on her TWCC-52 for the 16th quarter which was not entered into the record as an exhibit; that her agreement at the CCH with the proposition that the 17th quarter ran from January 21 to April 28, 2000, is true, but that at that particular time the error had not been caught; and that she does not feel that it is fair that she should be penalized for that error. Carrier states in its response that it agrees that January 21 to April 28, 2000, is a 14-week period but that it does not agree that the 17th quarter started on January 28, 2000. Carrier contends that the parties stipulated that the 17th quarter was from January 21 to April 28, 2000, when they agreed with the disputed issue as announced by the hearing officer and that claimant has waived any right to object to those dates and that those dates were tried by consent at the CCH.

Rule 130.101(4) provides that the qualifying period is a period of time for which the employee's activities and wages are reviewed to determine eligibility for SIBs and that the qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. Rule 130.101(6) provides that a subsequent quarter is a 13-week period beginning on the day after the last day of a previous quarter and that the term subsequent quarter applies to all quarters after the first quarter. Rule 130.102(e) provides in part that, except as provided in subsections (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

In the instant case, the time period for the 17th quarter as stated in the disputed issue, January 21 to April 28, 2000, is a 14-week period. It appears that the carrier's mistake in identifying a 14-week quarter on the TWCC-52 was carried forward into the BRC and CCH and was a mistake which was not caught by the parties until the hearing officer issued her decision. A 14-week subsequent quarter is contrary to the definition of a subsequent quarter in Rule 130.102(6), which provides for a 13-week period. Since calculation of the qualifying period depends on the beginning date of the quarter, the 14-week quarter may have resulted in an incorrect qualifying period and may also have resulted in an erroneous finding regarding whether claimant looked for work during the first week of the qualifying period. In addition, incorrect dates for the 17th quarter may cause subsequent quarters to have incorrect dates. Under these particular circumstances, we cannot agree with carrier's contention regarding waiver and believe it necessary to remand

the case to the hearing officer. We note that the TWCC-52 for the 15th quarter was in evidence and it states that the 15th quarter was from July 30 to October 28, 1999. If those dates are correct, then, according to the author judge's calculations, it appears that the 16th quarter would have been from October 29, 1999, to January 27, 2000, and the 17th quarter would have been from January 28, 2000, to April 28, 2000, with a qualifying period for the 17th quarter of October 16, 1999, to January 14, 2000 (as was stated on the TWCC-52 for the 17th quarter).

We reverse the hearing officer's decision and remand the case to the hearing officer for further consideration and development of the evidence. On remand, the hearing officer should give the parties an opportunity to present evidence and argument as to the correct beginning and ending dates of the 17th quarter and the qualifying period for the 17th quarter. Based on the information regarding the dates of the 15th quarter, we believe that the dates for the 17th quarter and the qualifying period for that quarter will probably be changed from what the hearing officer had previously found and thus the parties should be given an opportunity to present evidence and argument regarding SIBs entitlement based on a changed qualifying period. The hearing officer should make additional findings of fact regarding the dates of the quarter and its qualifying period as well as additional findings of fact on the issue of claimant's entitlement to SIBs for the 17th quarter. The 14-week quarter cannot stand. We note that in Texas Workers' Compensation Commission Appeal No. 962562, decided February 3, 1997, which involved the issue of claimant's entitlement to SIBs for the third quarter, the Appeals Panel stated that claimant reached maximum medical improvement (MMI) on March 30, 1995, with a 15% IR, but that decision does not state where that information came from. If necessary, the hearing officer may have to obtain stipulations from the parties regarding MMI and IR in order to determine the correct dates for the 17th quarter and its qualifying period. See Rules 130.102(2), (3), (4), and (6).

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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts  
Appeals Judge

CONCUR:

Elaine M. Chaney  
Appeals Judge

Alan C. Ernst  
Appeals Judge