

APPEAL NO. 001100

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 April 17, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) did not timely file his Application for [SIBs] (TWCC-52) for the 8th quarter; that claimant met his burden regarding good faith and direct result for the 8th quarter; and that claimant is entitled to SIBs for the 9th quarter. The appellant/cross-respondent self-insured ("carrier" herein) appeals the determination that claimant is entitled to SIBs for the 9th quarter, appealing both the good faith and direct result determinations. The file did not contain a response from claimant. Claimant appealed the determination that he did not file his TWCC-52 on time for the 8th quarter, contending that the evidence shows he mailed it to carrier on June 16, 1999. Carrier responds that there was no error in the complained-of determination.

DECISION

We affirm as reformed.

Initially, we consider the carrier's assertion that claimant's appeal was untimely filed. Texas Workers' Compensation Commission (Commission) records state that the decision was distributed to the parties on April 28, 2000. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), the decision is deemed to have been received by claimant on Wednesday, May 3, 2000. An appeal is timely if it is filed within 15 days from the date of receipt of the hearing officer's decision. The 15-day period expired on May 18, 2000. The claimant's appeal was postmarked May 18, 2000, and was received by the Commission on May 22, 2000. Therefore, it was timely filed. Section 410.202; Rule 143.3.

Carrier contends the hearing officer erred in determining that claimant is entitled to SIBs for the 9th quarter. Carrier asserts that claimant did not look for work every week of the qualifying period for the 9th quarter, so he did not act in good faith. Carrier also asserted that claimant's underemployment during the qualifying period was due to being off work for personal business and not due to his impairment. The hearing officer summarized the evidence in this case. Briefly, the 9th quarter qualifying period was from June 12, 1999, to September 12, 1999. Claimant completed vocational school for computer-operated design on May 27, 1999. He looked for work, interviewed with his current employer on July 1, 1999, and began working July 8, 1999. Claimant testified that, after he began working in July 1999, he missed several days of work due to pain or doctors' appointments. Claimant said he also missed work during the qualifying period due to a funeral and a dental appointment. One day when claimant had a doctor's appointment, he worked late and still worked eight hours that day. Claimant's rate of pay was \$13.50 per hour for 40 hours per week, or \$540.00 per week. Claimant's average weekly wage (AWW) was \$677.02 and 80% of that amount is \$541.62.

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 great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

One way a claimant may establish entitlement to SIBs is by proving that he or she "has returned to work in a position which is relatively equal to the injured employee's ability to work." Rule 130.102(d)(1). The use of the phrase "relatively equal" permits some discretion to the fact finder. Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000. This standard for establishing entitlement to SIBs stands somewhat alone and does not require that a claimant must look for work in each week leading up to the "relatively equal" employment or that the claimant work some minimum part of the qualifying period. Texas Workers' Compensation Commission Appeal No. 000616, decided April 26, 2000.

In this case, the hearing officer found that claimant had returned to work full time during the qualifying period. Carrier does not contend that claimant's work did not meet the "relatively equal" requirement. In its appeal, carrier asserted that claimant still had to prove that he looked for work every week of the qualifying period before he was hired. However, we have held otherwise. Appeal No. 000616. We have reviewed carrier's contention and we conclude that the hearing officer's good faith determination regarding the 9th quarter is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

Regarding direct result, carrier contends that the reason why claimant earned less than 80% of his AWW is because he missed days from work for personal reasons. However, this is not a case where the claimant went back to work and then abandoned the job for personal reasons. See Appeal No. 000616. The hearing officer could and did find from the record that claimant's impairment was at least a reason for his underemployment. We have reviewed the record and we conclude that the direct result determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra. We conclude that the hearing officer did not err in determining that claimant is entitled to 9th quarter SIBs.

In his cross-appeal, claimant contends the hearing officer erred in determining that he did not file his TWCC-52 for the 8th quarter with carrier in a timely manner. The hearing officer determined that claimant filed his TWCC-52 in January 2000. The 8th quarter started on June 25, 1999, so at the latest, claimant was required to file his TWCC-52 seven days before that date. Claimant said he filed the TWCC-52 on June 16, 1999.

Rule 130.104(c) states, in pertinent part:

The employee shall file the [TWCC-52] and any applicable documentation with the carrier by first class mail, personal delivery or facsimile. Except as otherwise provided in this section, the [TWCC-52] shall be filed no later than seven days before, and no earlier than 20 days before, the beginning of the quarter for which the injured employee is applying for SIBs

Rule 130.105(a) states, in pertinent part, that, except in situations that do not apply in this case:

[a]n 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

In this case, the hearing officer judged the credibility of claimant's testimony in this regard and determined that it was not persuasive. Claimant contends that there was a presumption that the TWCC-52 he said he mailed in June 1999 was received by carrier. However, whether claimant mailed the TWCC-52 was a fact issue for the hearing officer. She heard the evidence and determined what facts were established. We will not reverse her determinations in this regard because they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We note that, in her decision, the hearing officer concluded that claimant is "not entitled" to SIBs for the 8th quarter. However, the hearing officer determined that claimant met his burden of proof regarding good faith and direct result. The proper determination would have been that carrier is *relieved of liability* for SIBs because claimant did not file his TWCC-52 for the 8th quarter on time. The end result is the same: claimant does not receive SIBs. However, we reform the decision to state that claimant is entitled to 8th quarter SIBs but that carrier is relieved of liability for 8th quarter SIBs.

We reform the hearing officer's decision to state that: (1) claimant is entitled to SIBs for the 8th and 9th quarters; and (2) carrier is relieved of liability for SIBs for the 8th quarter. As reformed, we affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge