APPEAL NO. 001443

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 May 23, 2000. The hearing officer determined that although the respondent (claimant) was not otherwise entitled to supplemental income benefits (SIBs) for the 18th quarter (December 2, 1999, to March 1, 2000), the appellant (carrier) waived its right to contest the claimant's entitlement by failing to timely request a benefit review conference (BRC), thus making it liable for SIBs for the 18th quarter. The carrier appealed, contending that this determination is against the great weight and preponderance of the evidence and otherwise erroneous as a matter of law. The appeals file does not contain a response from the claimant. The finding that the claimant did not make the required good faith effort to obtain employment commensurate with his ability to work has not been appealed and has become final. Section 410.169.

DECISION

Reversed and a new decision rendered.

Section 408.143 provides generally that after the Texas Workers' Compensation Commission (Commission) makes the determination of entitlement to first quarter SIBs, the employee must file an Application for [SIBs] (TWCC-52) for later quarters with the carrier. Section 408.147 provides that if a carrier fails to request a BRC within 10 days after receipt of the application, the carrier waives the right to contest entitlement to SIBs for that quarter. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108 (Rule 130.108) limits the requirement to timely request a BRC to those instances where SIBs were paid in the prior quarter. *See also* Texas Workers' Compensation Commission Appeal No. 000581, decided May 1, 2000, and Texas Workers' Compensation Commission Appeal No. 991354, decided August 9, 1999. In the case we now consider, there was no evidence presented by either party about whether or not 17th quarter SIBs were paid. From this, we assume that 17th quarter SIBs were paid and that the carrier was required to timely request a BRC to contest 18th quarter SIBs.

The claimant signed a TWCC-52 for 18th quarter SIBs on November 20, 1999. He testified that on November 23, 1999, he took the TWCC-52 to the Commission field office where an employee made a copy of it and, under his observance, faxed it to the carrier. He said he also mailed the copy to the carrier return receipt requested and entered into evidence a copy of the "green card" used for this mailing. The date of delivery written on the green card is undecipherable as to the month of receipt. Also in evidence was a Dispute Resolution Information System (DRIS) data entry which stated for November 23, 1999: "CLMT in today to leave copy of his TWCC-52 for 18th quarter. Also faxed over to [PJ] at [carrier]." The note was entered by an "S. C." The claimant was unable to confirm that this was the person he observed faxing the TWCC-52.

The current adjuster on this claim testified by telephone at the CCH that, according to carrier records, the number of the article listed on the "green card" matched the number of an item received in August 1999, clearly implying that this "green card" did not go with the TWCC-52. The adjuster also testified that the carrier had no record of receiving the TWCC-52 by fax on November 23, 1999. The carrier introduced into evidence what is apparently the original of the TWCC-52. It bears a receipt date of November 29, 1999. The carrier filed its request for a BRC on December 8, 1999, which was within 10 days of November 29, 1999, but not within 10 days of November 23, 1999. The only other TWCC-52 in evidence and introduced by the claimant was an obvious copy of the TWCC-52 stamped as received by the carrier on November 29, 1999.

Also in evidence was a Commission "FAX COVER SHEET" indicating six pages (including the cover sheet) were faxed from the field office fax machine to PJ at a given telephone number, with the claimant, not the Commission, listed as sender. No Commission employee's name appears on the cover sheet (other than the executive director in his role as such). The item described was "SIBs for 18th quarter." This cover sheet bears no other indication that it was processed through a fax machine, i.e., it lacked a fax machine impressed date and telephone number of the recipient. In closing argument, the claimant asserted, without objection from the carrier, that "S. C" mentioned in the DRIS note was the person the claimant gave the TWCC-52 to and that this person was the one the claimant observed faxing it to the carrier. The ombudsman also asserted that the field office fax machine did not produce a "receipt" for faxes that were successfully transmitted, but only when there was a "negative transmittal." No log of fax transmittals for November 23, 1999, was in evidence.

The hearing officer found that a "copy of Claimant's application for 18th quarter [SIBs] was faxed to Carrier on November 23, 1999." Finding of Fact No. 6. Based on this finding and undisputed evidence that the request for the BRC was not filed until December 8, 1999, the hearing officer concluded that the carrier waived the right to dispute 18th quarter SIBs entitlement because the request for a BRC was not timely filed.

The carrier appeals Finding of Fact No. 6, arguing that the requirement for filing the TWCC-52 with the carrier requires evidence of receipt of the TWCC-52, not evidence simply that a TWCC-52 was sent. It further argues that "[j]ust because an item is faxed is no proof that it was received" and that the evidence was insufficient to establish receipt. The cases relied on by the carrier are discussed in the main in Texas Workers' Compensation Commission Appeal No. 982731, decided January 6, 1999, and Texas Workers' Compensation Commission Appeal No. 991911, decided October 15, 1999. These cases generally dealt with conflicting evidence about when a document was received and the resolution of the matter by the hearing officer as a question of fact. Other cases confirmed the proposition that, in different situations, evidence of a mailing can support a finding that the mail was received by the person to whom and at the address to which it was sent. However, in Appeal No. 982731, *supra*, we wrote:

> In Texas Workers' Compensation Commission Appeal No. 971474, decided September 10, 1997, the Appeals Panel considered whether mere evidence of the employee's [TWCC-52] having been mailed to the carrier, as distinguished from the date of its receipt by the carrier, constituted a filing by the employee. That decision cited Texas Workers' Compensation Commission Appeal No. 951264, decided September 8, 1995, and Texas Workers' Compensation Commission Appeal No. 960345, decided April 8, 1996, for the proposition that a filing means that the communication in SIBs cases must be received and that evidence that the correct form was placed in the mail within the period of time is not enough. Our decision recognized no basis to make a distinction between a TWCC-45 having to be received by the Commission to be filed and a claimant's request for SIBs having to be received by a carrier, not merely mailed. [Emphasis added.]

Because an essential part of the filing of a TWCC-52 is a receipt of the document, it is unfortunate that the hearing officer made no express finding of fact as to when the TWCC-52 was received by the carrier. The hearing officer apparently implied a finding that the carrier received the TWCC-52 on the date it was purportedly faxed.

The claimant had the burden of proving when the carrier received his TWCC-52 for 18th quarter SIBs. Whether, and, if so, when the TWCC-52 was faxed and received presented a question of fact for the hearing officer to decide. *See* Texas Workers' Compensation Commission Appeal No. 992910, decided February 3, 2000. A reversal on appeal of a factual determination of a hearing officer is appropriate only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). We conclude that the implied finding of receipt of the TWCC-52 by the carrier on November 23, 1999, is against the great weight and preponderance of the evidence for the following reasons. There is no indication on either copy of the TWCC-52 in evidence or on the fax transmittal sheet that the TWCC-52 was actually faxed or faxed to the correct telephone number. Nor was there in evidence a log of fax transmittals on November 23, 1999. The ombudsman's "testimony" at the CCH was argument, not evidence, and it was not based on any evidence of record. The claimant's testimony that he "saw" the Commission employee fax this particular document is not evidence that the correct number was dialed, that there was a satisfactory transmission of the fax, or that the fax was received. Finally, there was evidence that the carrier complied with the requirements of Rule 102.4(j) that the carrier keep a log and date stamp all documents on the date they are received. Under these circumstances, the implied finding of receipt of the purported fax based solely on a DRIS note without other confirmation amounts to no more than speculation on the part of the hearing officer and is against the great weight and preponderance of the evidence.

For the foregoing reasons, we reverse the decision of the hearing officer that the carrier waived the right to contest the claimant's entitlement to 18th quarter SIBs and render a decision that the carrier did not waive this right, but did timely file a request for a BRC. Thus, the claimant was not entitled to 18th quarter SIBs.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I dissent and would affirm the hearing officer's decision. The hearing officer could find from the Dispute Resolution Information System note that the Application for Supplemental Income (TWCC-52) was received by the carrier. This is a fact issue.

Judy L. Stephens
Appeals Judge