

## APPEAL NO. 010190

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 9, 2001, the hearing officer resolved the disputed issues by determining that during the filing periods for the third through sixth quarters the appellant (claimant) did not make a good faith attempt to obtain employment commensurate with his ability to work and is not entitled to supplemental income benefits (SIBs); that the claimant has permanently lost entitlement to SIBs because he was not entitled to them for twelve consecutive months; and that the respondent (carrier) is relieved of liability for SIBs for the fourth through sixth quarters because the claimant failed to timely file a Statement of Employment Status (TWCC-52) for those quarters. The claimant has appealed these determinations, contending that his doctors had not released him to work and that he had no ability to work during the filing periods in issue; that he has not permanently lost entitlement to SIBs because the hearing officer erred in determining his nonentitlement for the third through sixth quarters; and that the carrier is not relieved of liability due to his late filing of the TWCC-52 forms for the fourth through sixth quarters because the carrier failed to provide him with the forms and he had to ultimately obtain them from the Texas Workers' Compensation Commission (Commission). The carrier urges in response that the evidence is sufficient to support the challenged SIBs determinations and that it had no obligation to mail TWCC-52 forms to the claimant for the fourth through sixth quarters because the claimant was not paid SIBs for the third quarter.

### DECISION

Affirmed in part; reversed and rendered in part.

The parties agreed that the SIBs quarters at issue were governed by the "old" SIBs rules. The claimant testified that he has been drawing Social Security disability benefits since sometime following his \_\_\_\_\_, low back injury sustained in a fall at work; that his impairment rating (IR) is 15%; that during the pertinent filing periods (November 13, 1997, through November 11, 1998) he had two lumbar spine operations, an L4-5 level procedure in July 1996 and the removal of plates in July 1997; that he is depressed; and that he did not look for employment because he has not yet been released by his back surgeon, Dr. MM, to return to work. He conceded that his other doctor, Dr. GM, advised him during a March 1998 follow-up visit that a November 1997 functional capacity evaluation (FCE) determined that he could work at the sedentary level. He said that when he voiced his disagreement and spoke of his continuing back pain, Dr. GM stated that the FCE was just a four-hour test. Dr. GM's November 17, 1997, report states that with a one-level fusion, it was his feeling that the claimant can return to work; that he advised the claimant, at the time, to go to the Texas Rehabilitation Commission and get retrained for light-to-medium work with a 15 to 20 pound lifting restriction; that the claimant will not be able to return to his former very heavy level of work; that the claimant is released for sedentary-to-light work and should be able to progress to the medium level of work; and that it is his feeling that until the claimant decides that he wants to become productive

again, a work hardening program will be deferred. Dr. GM wrote on June 5, 2000, that the claimant was 11 days status post an L5-S1 decompression and fusion (the claimant's third spinal operation) and that he remains disabled.

The claimant also testified, without refutation, that the carrier paid the first two quarters of SIBs but denied liability for the third quarter and did not send him the "papers" for the subsequent quarters. He said that when his income benefits stopped (apparently referring to the period after receiving his last payment for the second quarter) he called the carrier and was told that his doctor said he could return to work, so he went to the Commission, where he was given an explanation and the forms to file. Not disputed is a finding that the claimant filed for the fourth quarter on or about October 25, 2000, and for the fifth and sixth quarters on or about August 23, 2000.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work.

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant" (Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994), and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. See also Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to light duty does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. We are satisfied that the determinations that the claimant is not entitled to SIBs for the third through sixth quarters and that he has permanently lost entitlement to SIBs are 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The facts in Texas Workers' Compensation Commission Appeal No. 970134, decided March 10, 1997 (Unpublished), are substantially similar to those in the case we here consider concerning the late filing issue. In Appeal No. 970134, the uncontroverted testimony of the claimant was that the carrier, which disputed the ninth through the fifteenth

quarters, did not send her a TWCC-52 form after sending her the final monthly payment for the eighth quarter and we held that the hearing officer did not err in concluding that the carrier was not relieved from liability for the ninth through the fifteenth quarters as a result of the claimant's failure to timely file her TWCC-52 forms for those quarters. Our decision cited not only the governing statute and Commission rules but also a number of Appeals Panel decisions holding that late filed TWCC-52 forms did not relieve the carriers of liability for SIBs where the carriers did not timely send the TWCC-52 forms to the employees. We regard our decision in Appeal No. 970134 as dispositive of the case we here consider. See *also* Texas Workers' Compensation Commission Appeal No. 972017, decided November 24, 1997 (Unpublished).

So much of the hearing officer's decision as determines that the claimant is not entitled to SIBs for the third through sixth quarters and that he has permanently lost entitlement to SIBs is affirmed. So much of the decision as determines that the carrier is relieved of liability for SIBs because of the claimant's failure to timely file TWCC-52 forms for the fourth through sixth quarters is reversed and a new decision is rendered that the carrier is not relieved of liability on that basis.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge