APPEAL NO. 010815-S
FILED JUNE 6, 2001

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 March 27, 2001. The hearing officer resolved the two disputed issues by deciding that the qualifying period for the first quarter of supplemental income benefits (SIBs) began on July 28, 2000, and ended on October 26, 2000, and that the appellant/cross-respondent (claimant) is not entitled to SIBs for the first quarter. The claimant appealed the hearing officer's determinations on the issues of the correct qualifying period and his entitlement to SIBs. The respondent/cross-appellant (carrier) appealed the hearing officer's finding that the claimant's unemployment during the qualifying period was a direct result of the claimant's impairment from his compensable injury.

DECISION

Affirmed in part, and reversed and remanded in part.

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). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted any impairment income benefits (IIBs), is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

The claimant testified that on _____, he was performing his truck driver/mover duties for the employer when he injured his neck and left shoulder moving furniture. He said that his job duties included driving an 18-wheeler and loading and unloading furniture. The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement (MMI) on June 2, 1999, with a 25% IR; and that the claimant did not commute IIBs.

A radiologist reported that the MRI of the claimant's left shoulder done in December 1997 was normal. Dr. G examined the claimant at the carrier's request in February 1998 and reported that she did not see any reason why the claimant could not return to full-duty work at that time. Dr. B examined the claimant at the carrier's request in November 1998 and reported that the claimant is capable of working in a light-duty position. A radiologist reported that the MRI of the claimant's cervical spine done in August 1999 showed no evidence of a disc bulge or disc herniation. Dr. K examined the claimant at the carrier's request in February 2000 and reported that there are no objective findings to explain the claimant's continued pain and problems and that the claimant may return to regular work activity.

The claimant said that Dr. F, a chiropractor, has treated him for his work-related injury since June 1997 and that Dr. F did not release him to return to work prior to August 8, 2000. In a Work Status Report (TWCC-73) dated August 8, 2000, Dr. F noted that the claimant had improved sufficiently to allow the claimant to return to work with restrictions on August 8, 2000; stated the restrictions; and noted that it was unknown how long the restrictions were expected to last. The restrictions included, among other things, working only four to five hours a day, no driving/operating heavy equipment, driving only an automatic transmission, no working at heights, and restrictions on the number of hours per day the claimant can stand, sit, push, pull, and reach. The claimant testified that the work-related injury to his neck and left shoulder prevent him from performing the type of work he was doing when he was injured.

The carrier contends that the hearing officer erred in finding that the claimant's unemployment during the qualifying period for the first quarter was a direct result of his impairment from his compensable injury. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. The Appeals Panel has held that a finding of "direct result" is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. In the instant case, the claimant has a 25% IR and his treating doctor has released him to return to work with restrictions. Although there is conflicting evidence, those conflicts were for the hearing officer to resolve as the finder of fact. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's finding on the direct result criterion for SIBs for the first quarter is supported by sufficient evidence and is not 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 (Tex. 1986).

With regard to the issue of what is the correct qualifying period for the first quarter of SIBs, based on the stipulated date of MMI and IR, the hearing officer did not err in determining that the qualifying period began on July 28, 2000, and ended on October 26, 2000. Rule 130.101(2), (3), and (4). The hearing officer also did not err in determining that the first quarter began on November 9, 2000, and ended on February 7, 2001.

Rule 130.102(e) provides, in part, that except as provided in subsection (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. Rule 130.103(b) provides that if the Texas Workers' Compensation Commission (Commission) determines that the injured employee is entitled to SIBs for the first quarter, the notice of determination shall include, among other things, the beginning and end dates of the first quarter, an Application for SIBs (TWCC-52), and a filing schedule.

In evidence is the claimant's TWCC-52 for the first quarter. The claimant did not testify as to who provided the TWCC-52 to him. The claimant's attorney asserted at the CCH that either the Commission or the carrier had provided claimant with the TWCC-52. The carrier did not challenge the claimant's attorney's assertion at the CCH, nor does it state in its response that the claimant's attorney is incorrect in stating in the appeal that the Commission notified the claimant that the qualifying period was from August 10 through November 8, 2000.

On the TWCC-52, in what appears to be computer-generated printing, the first quarter is stated to begin on November 22, 2000, and end on February 20, 2001, and the qualifying period for the first quarter is stated to begin on August 10, 2000, and end on November 8, 2000 (the dates of the qualifying period are stated in Step Two, Block 4 of page 1). The first quarter and the qualifying period were apparently calculated based on a June 15, 1999, date of MMI and a 25% IR, which are also stated on the TWCC-52. The parties stipulated to a June 2, 1999, date of MMI and a 25% IR, but did not stipulate to the dates of the qualifying period or the dates of the first quarter, although the issue regarding entitlement to SIBs as reported in the benefit review conference report stated that the first quarter was from November 9, 2000, through February 7, 2001. Thus it appears that the qualifying period and first quarter period stated on the TWCC-52 were determined based on an incorrect date of MMI.

The instructions at the top of the TWCC-52 state, in part, that:

> For the qualifying period (see dates in Step Two, Block 4 below), you must provide documentation that you earned less than 80% of your [AWW] as a direct result of your impairment from the compensable injury. You must attach copies of supporting payroll documentation (paycheck stubs, employment statement(s) or other valid documentation) of your wages for the qualifying period. If you are not working, you must in good faith look for a job that matches your ability to work in **every week** of the qualifying period.

The first sentence of Step Four of the TWCC-52 states "If you have not returned to work and your are able to work in any capacity, you must look for a job to match your ability to work during every week of the qualifying period (see dates in Step Two, Block 4 on page 1)."

The claimant's attorney urged at the CCH that, although improper dates for the qualifying period were stated on the TWCC-52, the claimant looked for work each week of the qualifying period that was stated on the TWCC-52, and that the claimant was not released to return to work by his treating doctor until August 8, 2000. The carrier urged that the claimant's "misunderstanding" of the qualifying period is irrelevant, that the claimant did not look for work during the first two weeks of the correct qualifying period, that the quality of the claimant's job search was not adequate to meet the good faith criterion, and that the claimant did not meet the direct result criterion.

If the correct qualifying period of July 28 to October 26, 2000, is used, the claimant did not document a job search during the first two weeks of the qualifying period. If the qualifying period stated on the TWCC-52 is used (August 10 through November 8, 2000), the claimant documented at least one job search effort each week. The carrier states in its response that under Rule 130.101(4), the qualifying period was from July 28, 2000, through October 26, 2000, and that the Commission never issued an order modifying those dates, nor was such an order requested. Some of the documented job search activities are for evaluations done by the Texas Rehabilitation Commission (TRC). The claimant said that in January 2001 he began "classes" provided by the TRC.

On appeal, the claimant does not challenge the hearing officer's finding that he had some ability to work during the entire qualifying period for the first quarter of SIBs. The claimant does challenge the hearing officer's findings that the first quarter of SIBs began on November 9, 2000, and ended on February 7, 2001, and that the qualifying period for the first quarter began on July 28, 2000, and ended on October 26, 2000. We have determined that the hearing officer did not err in determining the dates of the first quarter and the qualifying period for the first quarter.

The claimant also challenges the hearing officer's findings that the claimant did not look for work during each week of the qualifying period, and that the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the first quarter. The hearing officer states in the discussion section of her decision that the claimant did not look for work during the first two weeks of the qualifying period, that Rule 130.102(e) requires the claimant to look for work every week of the qualifying period, and that the claimant did not do so and thus failed to meet the requirements of Rule 130.102. The hearing officer then states that the claimant's evidence is insufficient to prove that he made a good faith effort to obtain employment commensurate with his ability to work.

In Texas Workers' Compensation Commission Appeal No. 010617-S, decided May 15, 2001, a hearing officer found that a claimant was entitled to SIBs for the second quarter, although the claimant did not document a job search in the ninth week of the stipulated qualifying period, but did document a job search in that week if the incorrect qualifying period provided by the carrier on the TWCC-52 was used. The Appeals Panel affirmed, with Judge O'Neill dissenting. The majority opinion noted that Rule 130.104(b) (regarding subsequent quarters) requires the carrier to complete the blanks on the TWCC-52, including among other things, the qualifying period, and stated:

> It is axiomatic that accuracy on the part of the carrier in providing information is required. Where, as here, the carrier provides inaccurate dates, we hold that the carrier is precluded from benefitting from having done so. A carrier will not be permitted to attempt to defeat a claimant's good faith showing by arguing that the claimant did not document a job search in each week of the qualifying period when the claimant can demonstrate that he or she documented a weekly job search using the dates of the qualifying period the

> carrier provided on the TWCC-52. That is, as a prerequisite for advancing the argument that the clamant failed to document a weekly job search in accordance with Rule 130.102(e), the carrier is first required to comply with its obligation to accurately provide the information required in Rule 130.104(b) on the TWCC-52. This outcome is consistent with our decision in Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992, where we determined that we would not impose the five-day, deemed date of receipt provision because the [Commission] failed to mail a copy of the hearing officer's decision and order to the claimant at the last known address. Appeal No. 92199 reasoned that the Commission should not impose the requirements of a rule against a party unless the Commission has complied with its own duties relative to that rule. By analogy, the same reasoning applies to the carrier in this instance.

In the instant case, the carrier does not dispute the claimant's assertion that the Commission notified him that the qualifying period for the first quarter was from August 10 through November 8, 2000, and those are the dates of the qualifying period stated on the TWCC-52 for the first quarter. The TWCC-52 itself instructs the claimant to look for a job to match his ability to work during every week of the qualifying period that is stated on the TWCC-52. Applying our decision in Appeal No. 010617-S to the facts of the instant case, we hold that, since the claimant documented at least one job search effort in every week of the qualifying period that was provided to him on the TWCC-52, the TWCC-52 having apparently been provided to him by the Commission, the claimant should not be denied SIBs based on a failure to document a job search every week of the correct qualifying period. However, we are unable to render a decision for the claimant because we are unable to discern from the hearing officer's decision whether her finding that the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the first quarter was based solely on his failure to look for work during the first two weeks of the correct qualifying period.

The hearing officer's finding in favor of the claimant on the direct result criterion for SIBs is affirmed. The hearing officer's determination that the qualifying period for the first quarter of SIBs began on July 28, 2000, and ended on October 26, 2000, is affirmed. We reverse the hearing officer's decision that the claimant is not entitled to SIBs for the first quarter and we remand the case to the hearing officer to make further findings of fact with regard to whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period stated in the TWCC-52.

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 new request for review not later than 15 days after the date on which the new decision is

received by the 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:

Michael B. McShane
Appeals Judge

CONCURRING OPINION:

I concur in the principal opinion. I write separately only to state that my dissent in Texas Workers' Compensation Commission Appeal No. 010617-S, decided May 15, 2001, is grounded on the fact that not only was there no disputed issue regarding the dates of the quarter or qualifying period but the parties stipulated to the correct dates at the hearing and the claimant then proceeded to adduce evidence at variance with the stipulated dates. In my opinion, the hearing officer was bound by the stipulated dates.

Philip F. O'Neill
Appeals Judge