

APPEAL NO. 020356
FILED MARCH 19, 2002

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 December 20, 2001. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter; that the claimant has permanently lost entitlement to SIBs pursuant to Section 408.146(c); and that the respondent (carrier) did not waive its right to contest SIBs for the fourth quarter by failing to timely request a benefit review conference (BRC). The claimant appeals, arguing that the hearing officer is interpreting the controlling statute (Section 408.147(c)) contrary to its clear, unambiguous meaning; that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(e) (Rule 130.108(e)) is contrary to Section 408.147(c); that the plain meaning of Rule 130.108(c) does not relieve a carrier from its requirement to file a request for a BRC within 10 days; that the claimant has not permanently lost entitlement to SIBs; and that the medical evidence shows that the claimant had no ability to work during the fourth quarter qualifying period. The carrier responds, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to the hip, neck, and low back; that his impairment rating is 28%; that he did not commute his impairment income benefits; that the fourth SIBs quarter began June 9, 2001, and ended September 7, 2001; that the qualifying period for the fourth quarter began February 25, 2001, and ended May 26, 2001; and that the claimant was not entitled to SIBs for the first, second, and third quarters. Although the Application for [SIBs] (TWCC-52) submitted by the claimant for the fourth SIBs quarter contains a list of job searches, the claimant was asserting entitlement to SIBs based upon no ability to work during the qualifying period. The criteria for entitlement to SIBs are set forth in Sections 408.142(a) and 408.143. The law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the qualifying period is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. Rule 130.102(d)(4) provides that an employee has acted in good faith if the employee

has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

The hearing officer determined that the claimant provided a narrative report from a doctor specifically explaining how the injury caused a total inability to work, but that there are numerous records in evidence which show that the claimant could work. She concluded that the claimant was therefore not entitled to SIBs for the fourth quarter. There is

sufficient evidence in the record to support this determination by the hearing officer. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We will reverse a factual determination of a hearing officer 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). Applying this standard of review to the record of this case, we decline to substitute our opinion of the evidence for that of the hearing officer.

This determination as to the fourth quarter, coupled with the stipulation of nonentitlement to SIBs during the first, second, and third quarters, as well as the evidence presented by the carrier, provides a sufficient basis for the hearing officer to determine that the claimant has permanently lost entitlement to SIBs pursuant to Section 408.146(c).

As to the claimant's assertions that the carrier waived its right to contest SIBs for the fourth quarter by failing to timely request a BRC, we quote from Texas Workers' Compensation Commission Appeal No. 991354, decided August 9, 1999:

A new [SIBs] rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.108 (Rule 130.108), codifies previous Appeals Panel decisions which found a distinction in the rules (in effect prior to January 31, 1999), between those situations involving continuing entitlement to [SIBs], and those quarters where there had been no previous payment of [SIBs] for the preceding quarter. In summary, waiver does not apply against a carrier where there has been no [SIBs] payment in the preceding quarter. Rule 130.108(e); Texas Workers' Compensation Commission Appeal No. 960801, decided June 11, 1996. The obligation to request a BRC where there is no continuing entitlement is on the claimant.

In Texas Workers' Compensation Commission Appeal No. 980143, decided March 11, 1998, we said:

In subsequent cases, having slightly different facts, we have continued to follow the precedent of Appeal No. 960801, *supra*. In Texas Workers' Compensation Commission Appeal No. 970612, decided May 21, 1997, we noted that the 1989 Act could be read to provide that the carrier waives its right to dispute [SIBs] when it fails, in any quarter, to request a BRC within 10 days of receiving a claimant's TWCC-52. In Appeal No. 970612 we followed our decision in Appeal No. 960801, *supra*, that this requirement did not apply to a quarter when the claimant sought a reinstatement of [SIBs].

See *also* Texas Workers' Compensation Commission Appeal No. 971201, decided August 11, 1997. Accordingly, applying the precedent established in our prior cases, and in the absence of judicial review to the contrary, we affirm the hearing officer's determinations that, because claimant was determined by the Commission not to have been entitled to [SIBs] for the first quarter, carrier was not under an obligation to contest continuing entitlement (because there was none) and therefore was not subject to the waiver provisions of Section 408.147.

We have consistently held that Rule 130.108(e) does not require the carrier to request a BRC when SIBs were not paid during the preceding quarter. Despite the claimant's assertions that this is an incorrect interpretation of the 1989 Act and the rules, we will continue to apply the precedent established in our prior cases, and in the absence of a judicial review decision to the contrary, we affirm the hearing officer's determination that the carrier did not waive its right to contest SIBs for the fourth quarter.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **FIREMAN'S FUND INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**DOROTHY C. LEADERER
1999 BRYAN STREET
DALLAS, TEXAS 75201.**

Michael B. McShane
Appeals Judge

CONCUR:

Terri Kay Oliver
Appeals Judge

Philip F. O'Neill
Appeals Judge