

APPEAL NO. 021078
FILED JUNE 13, 2002

Following a contested case hearing held on April 11, 2002, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 8th, 9th, and 10th quarters and that the appellant (carrier) waived the right to contest the claimant's entitlement to SIBs for the 8th quarter (by not requesting a benefit review conference (BRC) within 10 days of receiving the Application for [SIBs] (TWCC-52)), but did not waive such right for the 9th and 10th quarters. The carrier appeals the SIBs entitlement determinations on evidentiary sufficiency grounds. The carrier also appeals the 8th quarter waiver determination, contending that the hearing officer erred in applying Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(d)(Rule 130.108(d)) because the carrier had not paid SIBs for the 7th quarter at the time of the filing of the TWCC-52 for the 8th quarter and that it is Rule 130.108(e) that governs. The claimant's response urges the sufficiency of the evidence to support the challenged SIBs determinations and contends that Texas Workers' Compensation Commission Appeal No. 990180, decided March 17, 1999, supports the correctness of the hearing officer's applying Rule 130.108(d) in the circumstances present in this case. The hearing officer's determinations that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the 9th and 10th quarters have not been appealed and have become final. Section 410.169.

DECISION

Affirmed in part; reversed and rendered in part.

The claimant testified that he has been a truck driver all his working life; that his compensable injury of _____, consisted of bilateral carpal tunnel syndrome, for which he underwent surgery on each wrist; that his treating doctor has told him he cannot return to truck driving and should not drive at all; and that he walks with a cane due to a previous knee injury sustained 15 years earlier. The claimant further testified that, as reflected on his applications for SIBs, he made more than 300 job search contacts during the 8th quarter qualifying period, more than 90 during the 9th quarter qualifying period, and more than 100 during the 10th quarter qualifying period. He said he faxed resumes to job contacts willing to accept them but has had no responses to his job seeking efforts; that he was registered with the Texas Workforce Commission but had received no job leads, and that he contacted the Texas Rehabilitation Commission but has received no retraining. The claimant further stated that he has a 10th grade education; that he has worked at truck driving all of his life; that his wife is currently unemployed; that his only income is Social Security disability; that he needs a job; and that he would attempt to perform any job he applied for, even if the duties should exceed his doctor's restrictions, because of his need for employment.

The requirements for entitlement to SIBs are set out in Section 408.142 and in Rule 130.102. With regard to the required “good faith effort,” the hearing officer was satisfied that the claimant proved, pursuant to Rule 130.102(d)(5) and Rule 130.102(e), that he looked for work commensurate with his ability to work during every week of the qualifying periods at issue and that he documented these job search efforts. The carrier contends that the claimant was only going through the motions of seeking employment in order to qualify for SIBs and made contacts for many jobs he could not perform physically or because he had no prior experience. However, the hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that this 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

With regard to the 8th quarter waiver issue, the hearing officer states that the “[c]arrier made payment for the 7th quarter and needs to file a Request for [BRC] (TWCC-45) requesting a BRC within 10 days of receipt of the TWCC-52,” and that “Rule 130.108(d) applies to the 8th quarter.” Rule 130.108(d) provides, in part, that “if an insurance carrier disputes entitlement to a subsequent quarter and the insurance carrier **has paid** [SIBs] during the quarter immediately preceding the quarter for which the [TWCC-52] is filed, the carrier shall dispute entitlement to the subsequent quarter by requesting a [BRC] within 10 days after as provided by § 141.1 of this title (relating to Requesting and Setting a [BRC]) within 10 days after receiving the [TWCC-52.] [Emphasis supplied.]” The carrier contends that at the time it received the claimant’s TWCC-52 for the 8th quarter, it had not paid SIBs during the 7th quarter and, in fact, was actively disputing entitlement for that quarter. We note that no documents relating to the claimant’s 7th quarter application and adjudication of his entitlement for that quarter are in evidence. The carrier contends that in these circumstances, Rule 130.108(e) applies. That rule provides, in part, that “if an insurance carrier disputes entitlement to a subsequent quarter and the carrier **did not pay** [SIBs] during the quarter immediately preceding the quarter for which the [TWCC-52] is filed, the carrier shall send the determination to the injured employee within 10 days of the date the form was filed with the insurance carrier . . . [Emphasis supplied.]” The essence of Rules 130.102(d) and 130.102(e) are stated on the “Notice of Entitlement or Nonentitlement” page of the TWCC-52. The claimant, who had the burden of proof on the waiver issue, presented no evidence that the carrier had paid SIBs for the 7th quarter at the time he filed his TWCC-52 for the 8th quarter with the carrier. The TWCC-52 for the 8th quarter, which the claimant introduced into evidence, was signed by the claimant on “5-10-01.” It bears a stamp stating “Received” and a partially illegible date in May 2001 which appears to be May 23, 2001. The claimant did not adduce direct evidence as to whether this information was stamped by the carrier although the carrier’s Claim Number has been written on the first page of the TWCC-52 near the stamped information. The page of the TWCC-52 stating the carrier’s Notice of Non-Entitlement and the reasons therefore is dated “05/23/01.” The claimant’s TWCC-45 requesting a

BRC on the 8th quarter application is dated "5-30-01." There is no evidence that the carrier also requested a BRC on 8th quarter entitlement.

In defending the hearing officer's waiver determination, the claimant relies on a statement in the concluding paragraph in Appeal No. 990180 as follows. "In our view, whether a determination of entitlement to a quarter of SIBs is ultimately modified or reversed at a much later date in the appellate or judicial review of that quarter, or if the application for the next quarter of SIBs is considered a continuing entitlement, is determined by the status of the prior quarter at the time of the application for the next quarter." We find this reliance misplaced because our decision in Appeal No. 990180 was construing the version of Rule 130.108, effective April 17, 1992. This rule, and related SIBs rules concerning continuing entitlement and reinstated or delayed entitlement, were amended effective January 31, 1999. As was stated in Texas Workers' Compensation Commission Appeal No. 992528, decided December 29, 1999, the decision in Appeal No. 990180 "applied and discussed Rule 130.108 as it existed before the January 31, 1999, amendment." The Appeals Panel has held that "under Rule 130.108(e), waiver does not apply against a carrier where there has been no SIBs payment in the preceding quarter." Texas Workers' Compensation Commission Appeal No. 000581, decided May 1, 2000.

We determine that the hearing officer's Conclusion of Law No. 4, which states that the carrier waived the right to contest the claimant's entitlement to SIBs for the 8th quarter by failing to timely request a BRC, and so much of the Decision portion of the Decision and Order as contains a similar statement, to be against the great weight of the evidence. Cain, supra; King, supra.

The hearing officer's determination that the claimant is entitled to SIBs for the 8th, 9th, and 10th quarters is affirmed. The hearing officer's determination that the carrier waived its right to contest the claimant's entitlement to SIBs for the 8th quarter is reversed and a new decision is rendered that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the 8th quarter.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**C T CORPORATION
350 N. ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge