APPEAL NO. 022848
FILED DECEMBER 12, 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 October 15, 2002. The hearing officer determined that respondent self-insured (carrier herein) did not waive its right to contest entitlement to supplemental income benefits (SIBs) for the first quarter by failing to timely request a benefit review conference (BRC); that appellant (claimant herein) is not entitled to SIBs for the first quarter; and that claimant is not entitled to SIBs for the second quarter. Claimant appealed the waiver determination regarding first quarter SIBs and the direct result and SIBs entitlement determinations regarding second quarter SIBs. Carrier responded, urging affirmance.

DECISION

We reverse and render.

Claimant contends that the hearing officer erred in determining that she is not entitled to first quarter SIBs. Claimant asserts that carrier is liable for first quarter SIBs because carrier failed to timely request a BRC pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c)). Claimant does not contend that the hearing officer erred in making the entitlement-related determinations regarding good faith and direct result for this quarter.

Regarding carrier waiver, Rule 130.108(c) provides that a carrier waives its right to contest entitlement to first quarter SIBs if it does not request a BRC within 10 days of its receipt of the determination of entitlement of the Texas Workers' Compensation Commission (Commission). The hearing officer determined that carrier first received written notice of claimant's application for SIBs for the first quarter on June 20, 2002, and that it disputed SIBs eligibility on June 21, 2002. The hearing officer did not make an express finding regarding the date carrier received the notice of determination of entitlement.

Claimant asserts that carrier was deemed to have received the form EES-22 (Notice of Entitlement to SIBs) mailed by the Commission on May 28, 2002. A dispute resolution information system (DRIS) computer note in the record does indicate that such a form was "mailed" on that date, but does not specify a recipient and does not state whether a copy was placed in the box of carrier's Austin representative. Neither the EES-22 letter itself nor a DRIS entry showing that carrier was a recipient of this letter, by which receipt might be deemed pursuant to Rule 102.5(d), is in the record. *See generally* Texas Workers' Compensation Commission Appeal No. 982326, decided November 16, 1998. There is no evidence that carrier was a listed recipient of the letter. Therefore, we disagree that the carrier can be deemed to have received the EES-22 pursuant to Rule 102.5(d). Rule 102.5(d) speaks in terms of deeming receipt by a "recipient," but there was no evidence that carrier was a recipient of the EES-22.

Claimant contends that the hearing officer erred in shifting the burden of proof regarding carrier waiver. Claimant asserts that once she showed the EES-22 was mailed, it was "incumbent on the carrier to rebut the presumption." However, there was no presumption raised or deemed date proved for the reasons stated above.

Claimant cites Texas Workers' Compensation Commission Appeal No. 990668, decided May 20, 1999, and Texas Workers' Compensation Commission Appeal No. 970147 decided February 21, 1997, in support of the contention that carrier is deemed to have received the EES-22. Those cases involve the application of Rule 102.5 and deemed receipt. However, in Appeal No. 970147, the DRIS notes affirmatively stated that a Commission employee requested the printing of a *letter to the carrier* and also noted that the letter was mailed on November 22, 1994. In Appeal No. 990668, the letter itself was in evidence showing that carrier was a recipient. Here, there is no indication in the record that the carrier was a recipient of the EES-22 and in the absence of either the EES-22 letter itself or a DRIS entry showing that carrier was a "recipient," we decline to so presume just because "a" notice is supposed to be sent to the carrier pursuant to Rule 130.103(a).

We have rejected claimant's contentions regarding deemed receipt of the EES-22. However, we note that carrier's position at the hearing was that it received notice of the Commission's determination of entitlement on June 20, 2002. Yet there is no Request for [BRC] (TWCC-45) in the record. The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by carrier regarding the first quarter does not contain a request for a BRC and no other evidence in the record indicates when or if carrier requested a BRC. Claimant had the burden of proof on the issue of carrier waiver. Texas Workers' Compensation Commission Appeal No. 021078, decided June 13, 2002. Although claimant did not prove that carrier received notice of the determination of entitlement on June 3, 2002, carrier did admit that it received such notice on June 20, 2002. Therefore, since the issue of waiver was raised, it was incumbent upon carrier to prove that it requested a BRC within 10 days of that date. *See generally* Texas Workers' Compensation Commission Appeal No. 981882, decided September 23, 1998. Because carrier did not show that it requested a BRC within 10 days of June 20, 2002, carrier waived the right to dispute SIBs entitlement regarding the first quarter. We note that carrier did "dispute" SIBs entitlement by filing its TWCC-21. However, Rule 130.108(c) states that carrier must "request a BRC," not file a dispute. *See* Texas Workers' Compensation Commission Appeal No. 970750, decided June 11, 1997. We decline to determine that a TWCC-21 that does not state that a BRC is requested is sufficient to satisfy the specific requirements of Rule 130.108(c). *See* Rule 141.1. We reverse the hearing officer's determination that carrier did not waive the right to dispute claimant's entitlement to first quarter SIBs as it is 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).

Claimant contends that the hearing officer erred in determining that she is not entitled to SIBs for the second quarter. The hearing officer determined that, while claimant made a satisfactory job search during the qualifying period for the second

quarter, she was not entitled to SIBs because she failed to prove that her unemployment is a direct result of her compensable injury.

The exact nature and extent of claimant's injury was not established at the hearing, and no certification of maximum medical improvement (MMI) and impairment rating (IR) was admitted into evidence to determine the nature of claimant's impairment. Claimant said she was injured when she collided with a police officer who was running. The record reflects that claimant complained of or was treated for carpal tunnel syndrome (CTS), cervical disc displacement, an injury to her low back, and a shoulder injury. The functional capacity evaluation (FCE) report dated February 19, 2002, written by Dr. P, states that claimant was diagnosed with multilevel disc derangement from C2 to C6, that the greatest disc bulge "appears to be compressing the right C6 nerve root and adjacent cord," and that cervical surgery had been recommended but claimant decided against surgery. Dr. P examined claimant and noted cervical spasm, joint hypomobility, radicular symptoms, mildly restricted cervical range of motion (ROM), and hyposthesia along the C6 dermatomes. Waddell's signs were all negative. Dr. P stated that claimant's job involves "medium duty." Claimant was diagnosed by Dr. B with myalgia. Dr. BA summarized the medical evidence he reviewed and stated that: (1) the designated doctor had determined that claimant was not at MMI on September 7, 2000; (2) on September 26, 2000, Dr. T diagnosed cervical facet arthropathy and cervical radiculopathy with nerve root irritation; (3) on November 20, 2000, Dr. E examined claimant and found marked give-way weakness in claimant's upper extremities and diagnosed her with double crush syndrome; and (4) on May 1, 2001, the designated doctor, certified that claimant's IR is 26%. Dr. BA then stated that: (1) claimant had tenderness at C6-7; (2) no cervical myospasm was noted; (3) all orthopedic tests of the cervical spine were reported by claimant as positive; (4) claimant does not need any future medical care; (5) there were three positive Waddell's signs, which was "significant"; (6) ROM loss in claimant's shoulder was due to inadequate effort; (7) claimant's subjective responses of pain behavior far outweigh objective findings documented on evaluation; and (8) claimant had no significant findings in the cervical spine. Dr. BA opined that claimant could return to work and that her capabilities would be as shown by the FCE performed that "same day." No such FCE report is in the record. In an August 29, 2002, report, written about one month after the filing period for the second quarter, Dr. BA stated that "based on the compensable injury and the areas of the body involved, [claimant] is quite capable of returning to light duty at the present time." In an August 29, 2002, Work Status Report (TWCC-73) signed by Dr. BA, he indicated that claimant could return to work without restrictions, but then listed several restrictions and stated that she may work at the "light physical demand level."

The hearing officer concluded that the evidence was not persuasive that the compensable injury was keeping claimant from returning to her preinjury line of work. The hearing officer noted that Dr. BA said that the majority of claimant's complaints concerned conditions that are not part of the compensable injury. It appears that carrier disputed whether CTS is part of the compensable injury. The hearing officer stated that there is no objective medical evidence of any observable pathologies that would account for claimant's allegedly debilitating symptoms and that "[o]verall, the evidence

is not persuasive that the compensable injury was keeping the claimant from returning to her pre-injury line of work . . . ." However, the hearing officer did not find that claimant's preinjury work involved only light-duty and even carrier's required medical examination (RME) doctor, Dr BA, stated that, based on the compensable injury alone, claimant could perform only light duty. Even if claimant did not have "observable pathologies," carrier's RME doctor still found that she was capable only of light duty because of deconditioning due to the compensable injury. We find the hearing officer's direct result determination to be so against the great weight and preponderance of the evidence to be clearly wrong and manifestly unjust. Key to our holding is that the hearing officer did not make a determination that claimant's prior work involved less than medium duty and there is no evidence in that regard. Given the state of the evidence, including the report of Dr. BA that the hearing officer appeared to rely on, we are hard pressed to say that claimant did not meet her burden to prove that her unemployment was at least a direct result of her impairment. We reverse the hearing officer's determination that claimant's unemployment was not a direct result of her impairment.

We reverse the hearing officer's decision and order and render a new decision that: (1) carrier waived the right to contest SIBs entitlement for the first quarter; (2) carrier is liable for first quarter SIBs; and (3) claimant is entitled to SIBs for the second quarter.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Judy L. S. Barnes
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Margaret L. Turner
Appeals Judge