

APPEAL NO. 030522
FILED APRIL 17, 2003

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 February 5, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter; that the respondent (carrier) is not relieved from liability for the third quarter of SIBs because the claimant did not fail to file an Application for [SIBs] (TWCC-52); and that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the third quarter because its failure to give the claimant notice of its determination to entitlement or nonentitlement within 10 days does not constitute a waiver. The claimant appealed, arguing that the hearing officer's SIBs and waiver determinations are against the great weight and preponderance of the evidence. The carrier responded, urging affirmance.

DECISION

Affirmed.

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). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the third quarter. The claimant asserted that he had no ability to work due to his compensable injury. The hearing officer found that the claimant did not meet the requirements of Rule 130.102(d)(4), i.e., that the claimant had some ability to work, and determined that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work pursuant to Rule 130.102(d)(5). Whether a claimant satisfied the good faith requirement for SIBs entitlement is a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). We conclude that the hearing officer's decision is supported by sufficient evidence and that it 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).

The claimant asserts on appeal that the carrier waived the right to contest the claimant's entitlement to SIBs for the third quarter because the carrier failed to issue a notice of determination within 10 days as required by Rule 130.108. We note that at the CCH the claimant argued that Rule 130.104, rather than Rule 130.108, applies to the facts of this case.

At a prior CCH, another hearing officer determined that the claimant was not entitled to SIBs for the second quarter. In the instant case, the carrier disputed

entitlement to SIBs for the third quarter. The claimant contends that she did not receive written notice that the carrier disputed entitlement to SIBs for the third quarter, thus it waived its right to contest her SIBs entitlement. We disagree.

Rule 130.104(a) provides that a carrier shall issue a determination of entitlement or nonentitlement within 10 days after receipt of the TWCC-52 for a subsequent quarter. Rule 130.104(e) provides that upon making subsequent quarter determinations, the carrier shall issue a notice of determination to the injured employee. The notice shall be mailed and shall contain all of the information required in the Notice of Entitlement or Non-entitlement portion of the TWCC-52. The hearing officer commented in his Statement of Evidence paragraph that “there is no provision in the [1989] Act or the [Texas Workers’ Compensation Commission’s (Commission)] Rules that a Carrier waives its right to dispute SIBs entitlement if it fails to give this notice as required [by Rule 130.104(e)].” In Texas Workers’ Compensation Commission Appeal No. 021729, decided August 19, 2002, the claimant asserted that the carrier waived any dispute regarding entitlement to the eighth quarter of SIBs because the carrier failed to timely file a sufficient dispute. The Appeals Panel held that “unlike Section 409.021 of the 1989 Act, Rule 130.104(e) is silent on the matter of waiver by noncompliance, but also that the Commission, in its response to a comment on the proposed Rule 130.104(e), directly discussed the matter of adding a waiver provision and stated that it was not necessary.” See 24 Texas Register 409, January 22, 1999.

Rule 130.108(d) requires a carrier to request a benefit review conference within 10 days after the date it receives the TWCC-52 if it had paid SIBs for the previous quarter. A carrier's failure to do so results in the waiver of its right to contest the claimant's entitlement to SIBs for that quarter. Rule 130.108(e) contains an exception to the waiver provision contained in subsection (d). Rule 130.108(e) provides, in relevant part, that if a carrier disputes entitlement to a subsequent quarter and did not pay SIBs during the quarter immediately preceding the disputed quarter, the carrier shall send the determination to the injured employee within 10 days of the date the form was filed with the carrier, and it becomes the injured employee's obligation to dispute the carrier's determination.

Under the facts of this case, Rule 130.108(e) is applicable. However, Rule 130.108(e) does not in its terms provide that failure to comply with the rule will result in the carrier's waiver of its right to dispute SIBs entitlement. See Texas Workers' Compensation Commission Appeal No. 960801, decided June 11, 1996; Texas Workers' Compensation Commission Appeal No. 001715, decided September 7, 2000.

The hearing officer concluded that the carrier did not waive its right to dispute the claimant's entitlement to SIBs. Nothing in our review of the record reveals that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Accordingly, no sound basis exists for us to disturb that determination on appeal.

The decision and order of the hearing officer are affirmed.

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

GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Terri Kay Oliver
Appeals Judge