

APPEAL NO. 030715
FILED MAY 8, 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 was held on February 10, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fifth and sixth compensable quarters, and that the appellant (carrier) is not relieved of liability for SIBs because the claimant timely filed a statement of employment status Application for [SIBs] (TWCC-52) for the fifth quarter. The fifth quarter of SIBs began September 7 and ended December 6, 2002. The sixth quarter of SIBs began December 7, 2002, and ended March 7, 2003. The carrier appealed, arguing that the hearing officer erred in her determinations that the claimant is entitled to SIBs for the fifth and sixth quarters and that the claimant timely filed a TWCC-52 for the fifth quarter. The claimant responded, urging affirmance.

DECISION

Affirmed.

SIBs ENTITLEMENT

The parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant did not seek employment during the qualifying periods for the fifth or sixth quarters. The qualifying period for the fifth quarter began May 26 and ended August 24, 2002; and the qualifying period for the sixth quarter began August 25 and ended November 23, 2002. 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). At issue is the requirement in Section 408.142(a)(4) and Rule 130.102(b)(2), that the claimant make a good faith effort to obtain employment commensurate with her ability to work.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee as 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 found that the claimant established by specific, detailed, or explanative medical evidence that she was unable to perform any work during the qualifying periods at issue and that no other records show that the claimant had an ability to work. The hearing officer explained why she gave little, if any weight to the reports of Dr. T and Dr. TS. The carrier argues that the testimony of Dr. M establishes that the claimant had some ability to work. Although Dr. M acknowledged that the

claimant had some abilities such as being able to walk, sit, and stand, he testified that in his opinion the claimant is not able to work. Additionally, there are narrative reports in evidence from Dr. M that specifically explain why the claimant's compensable injury causes a total inability to work.

Whether the claimant satisfied the good faith requirement for SIBs entitlement as provided for in Rule 130.102(d)(4) was a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. Nothing in our review of the record indicates that the hearing officer's decision 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).

TIMELY FILING OF FIFTH QUARTER SIBs APPLICATION

The evidence reflected that the claimant submitted a TWCC-52 dated September 4, 2002, and that it was received by the carrier on the same date. The application was returned to the claimant and, in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), the carrier disputed entitlement on the basis that the request was too early for the sixth quarter. The carrier further disputed entitlement to the fifth quarter, stating in part "In the event the [claimant] was under the impression she was applying for the 5th quarter supplemental income benefits carrier disputes entitlement for the 5th quarter." The quarter number on the application dated September 4, 2002, was identified as the "6th" and the qualifying period listed was the corresponding period for the sixth quarter. The claimant testified that she thought the application was for the fifth quarter and submitted it to the carrier. The hearing officer specifically found that the claimant filed her application for fifth quarter SIBs on September 4, 2002, and that the carrier received such application on the same date. The carrier argues on appeal that "the hearing officer has inappropriately construed the rules against the carrier and has given the carrier the burden of proof along with burden of divining the intent of the claimant when she filed benefits." We disagree.

We have found in the past that there are situations where the TWCC-52 is so incomplete, absent, misleading, or inaccurate on the date it was filed that it equaled a nonfiling. Texas Workers' Compensation Commission Appeal No. 941629, decided January 20, 1995. However, in other instances, we specifically found that comparing an incomplete TWCC-52 to nonfiling should be saved for those cases of "clear and intentional" nondisclosure. Texas Workers' Compensation Commission Appeal No. 970435, decided April 24, 1997; see also Texas Workers' Compensation Commission Appeal No. 980153, decided March 11, 1998.

In the instant case, both applications for the fifth and sixth quarters alleged entitlement to SIBs on the basis of no ability to work. The parties stipulated that the claimant did not seek employment during the qualifying periods for the fifth or sixth

quarters. Further, the hearing officer noted and the evidence reflects that the carrier disputed the claimant's eligibility for the fifth quarter based on the receipt of the application on September 4, 2002. We do not perceive error in the hearing officer's determination that the carrier is not relieved of liability for SIBs because the claimant timely filed a TWCC-52 for the fifth quarter. The hearing officer did not inappropriately construe the rules or place the burden of proof on the carrier as alleged.

We affirm the decision and order of the hearing officer.

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

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge