

APPEAL NO. 040632  
FILED MAY 10, 2004

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 18, 2004. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 12th quarter and that the respondent (carrier) did not waive its right to dispute entitlement to SIBs for the 12th quarter by failing to file a Request for Benefit Review Conference [BRC] (TWCC-45) requesting a BRC. The claimant appealed, disputing both the SIBs and waiver determinations. 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 claimant appeals, contending that she had a total inability to work in any capacity thus meeting the good faith requirement of Section 408.142(a)(4) and Rule 130.102(b)(2). The hearing officer's determination on the direct result requirement of Section 408.142(a)(2) and Rule 130.102(b)(1) has not been appealed. The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury to her lower back, which resulted in a 15% impairment rating and that the qualifying period for the 12th quarter of SIBs was from May 14 through August 12, 2003.

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 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. Although the hearing officer found that the claimant provided a narrative report which specifically explained how her compensable injury caused her to have a total inability to work during the qualifying period for the 12th quarter, he found that the carrier provided medical records from Dr. C and a June 2003 functional capacity evaluation (FCE) that showed that the claimant was able to return to some type of work during the qualifying period at issue. The hearing officer noted in his Statement of the Evidence that Dr. C based his conclusion of the claimant's work capability on the FCE, the pathology, the diagnostic tests, and his own examination of the claimant.

Whether or not there were other records that showed that the claimant was able to return to work presented a question of fact for the hearing officer to resolve. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo

1974, no writ). In view of the evidence presented and the applicable law, we cannot conclude that the hearing officer's determination 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).

The hearing officer did not err making the complained-of determinations. Section 408.147(b) provides, in pertinent part, "if an insurance carrier fails to make a request for a [BRC]...within 10 days after receipt of the employee's [Application for [SIBs] (TWCC-52)], the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period...." See *also* Rule 130.108(d), regarding subsequent quarters with prior payment. The hearing officer found that the carrier received the claimant's TWCC-52 on August 13, 2003. Although the claimant testified that she mailed the TWCC-52 by two day priority mail on August 8, 2003, the hearing officer was persuaded by the TWCC-52 in evidence date stamped as received by the carrier on August 13, 2003. The hearing officer additionally found that the Texas Workers' Compensation Commission (Commission) received the TWCC-45 prior to the close of business on August 22, 2003, based on the fax in evidence which noted that it was received by the Commission at 4:49 p.m. on August 23, 2003. There is sufficient evidence to support the hearing officer's determinations.

We affirm the decision and order of the hearing officer.

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

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge