

## APPEAL NO. 950334

Following a contested case hearing held in (city), Texas, on February 8, 1995, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, (hearing officer), made certain factual findings and concluded that the respondent (carrier) did not waive its right to contest the appellant's (claimant) entitlement to supplemental income benefits (SIBS) for the fourth compensable quarter by failing to request a benefit review conference (BRC) and that claimant was not entitled to SIBS for that quarter. Claimant appeals asserting, in essence, that the hearing officer misapplied the requirements of the 1989 Act insofar as the statement required to be filed by claimant is concerned. The carrier's response urges the correctness of the hearing officer's findings and conclusions and seeks our affirmance.

### DECISION

Reversed and a new decision rendered.

Claimant's first position at the hearing was that he was entitled to SIBS for the fourth quarter because the carrier waived its right to contest his entitlement by its failure to request a BRC within 10 days of having received claimant's Statement of Employee Status (TWCC-52). Sections 408.147(a) and (b) provide that an insurance carrier may request a BRC to contest an employee's entitlement to SIBS or the amount and that if a carrier fails to make a request for a BRC within 10 days after the date of the expiration of the impairment income benefits (IIBS) period or within 10 days after receipt of the employee's statement, the carrier waives the right to contest the entitlement and the amount. *And see* Rule 130.108(c). The hearing officer's findings that the carrier received claimant's TWCC-52 for the fourth quarter on October 20, 1994, and did not request a BRC within 10 days thereafter have not been appealed. In the alternative, claimant contended that the evidence established that he met the entitlement criteria for SIBS for the fourth quarter. Although the hearing officer made findings on both of claimant's theories it is clear from the hearing officer's discussion that his decision was based on his view that because the statement claimant filed with the carrier was insufficient, the carrier did not waive its right to contest the entitlement by not timely requesting a BRC.

The carrier did not contend it had timely requested a BRC but rather that claimant's TWCC-52 was insufficient as the "statement" required to be filed by Section 408.143 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101 (Rule 130.101) and thus the requirement to timely request a BRC did not become operative. Responding to claimant's alternative theory, the carrier maintained that claimant failed to prove two of the statutory criteria for entitlement to SIBS for the fourth quarter, namely, that during the filing period his unemployment or underemployment was a direct result of his impairment and that he made a good faith attempt to obtain employment commensurate with his ability to work.

We turn first to the waiver issue which, under the circumstances of this case with no dispute of the relevant facts and no appeal of the pertinent findings, amounts to a question

of law. The TWCC-52 form asks for a statement of wages earned during the preceding 13 weeks but instructs "if no wages were earned, enter none." Above the employee's signature line are the following four statements with boxes in front of them for checking. There are no instructions on the form respecting the checking of the statements.

I returned to work on \_\_\_\_\_.

I have not returned to work.

I have earned less than 80% of my preinjury average weekly wage [AWW] as a direct result of the impairment from my compensable injury.

I have in good faith attempted to obtain employment in line with my ability to work.

Claimant checked the second and fourth statements. The carrier contended that because claimant failed to check the third statement his TWCC-52 was insufficient as the "statement" required by Section 408.143 and Rule 130.101. Claimant maintained that it was unnecessary for him to check that box because he had checked the statement that he had not returned to work and that to require both statements to be made would be mutually inconsistent and redundant. Pertinent to this issue the hearing officer found that claimant did not check the third statement, that his TWCC-52 did not elsewhere contain that statement or a similar one, and that claimant did not file a statement with the carrier for the fourth quarter stating that he earned less than 80% of his AWW as a direct result of his impairment. Based on these findings the hearing officer concluded that the carrier did not waive its right to contest claimant's entitlement to SIBS for the fourth quarter by failing to request a BRC and that claimant is not entitled to SIBS for the fourth compensable quarter. We determine these findings and conclusions to be erroneous as a matter of law.

There were representations in the record of previous determinations that claimant was not entitled to SIBS for the first and third quarters. The parties stipulated that claimant was not entitled to SIBS for the second quarter. Though not developed, the record suggests that claimant's nonentitlement for the first three quarters was not based on his having earned more than 80% of his preinjury AWW during any of those quarters.

Section 408.142(a) provides that an employee is entitled to SIBS if on the expiration of the IBS the employee has an impairment rating [IR] of 15% or more, "has not returned to work or has returned to work earning less than 80% of the employee's [AWW] as a direct result of the employee's impairment [emphasis supplied]," has not elected to commute a portion of the IBS, and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Section 408.142(b) provides that if an employee is not entitled to SIBS when the final IBS payment is made because the employee is earning at least 80% of the employee's AWW, the employee may become entitled to SIBS at any time within one year after the expiration of the IBS period if the employee earns less than 80% of the employee's AWW for at least 90 days, meets the other criteria in Section 408.142(a),

and the decrease in earnings is a direct result of the impairment from the compensable injury. Section 408.143 provides that after the initial determination of SIBS "the employee must file a statement with the insurance carrier stating: (1) that the employee has earned less than 80% of the employee's [AWW] as a direct result of the employee's impairment; (2) the amount of wages the employee earned in the filing period provided by Subsection (b); and (3) that the employee has in good faith sought employment commensurate with the employee's ability to work." Section 408.143(b) provides, in part, that the statement must be filed quarterly on a form and in the manner proved by the Texas Workers' Compensation Commission (Commission).

Rule 130.105(b) relating to delayed entitlement to SIBS provides that an injured employee initially determined by the Commission not to be entitled to SIBS "will become entitled if the employee, for one filing period: (1) is unemployed, or underemployed as defined in § 130.101 of this title (relating to Definitions), as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. [Emphasis supplied.]" Rule 130.105(c) provides, in part, that an injured employee seeking delayed entitlement to SIBS must send the carrier a Statement of Employment Status. Rule 130.101 defines "Statement of Employment Status" as a Commission-prescribed form filed with the carrier containing, in part, a statement with supporting documentation that the employee earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury and the amount of the employee's earned and offered wages during the filing period. "Underemployment" is defined as occurring when the injured employee's average weekly earnings during a filing period are less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury.

Reading the provisions of Section 408.142 and 408.143 together it is apparent that the requirement for the statement that the employee earned less than 80% of the AWW as a direct result of the impairment contemplated that the employee had in fact been working. Similarly reading the pertinent Commission rules together, we view them as contemplating applications for SIBS from injured employees who during the filing period have been either unemployed or underemployed and we view the Commission's form TWCC-52 as reflecting such in the four statements presented to the employee for checking. Accordingly, we agree with claimant that after showing that he had no wages during the filing period and checking the statement that he had not returned to work he would not be further required to make the statement that during the same period he earned less than 80% of his AWW in order to have a sufficient statement.

The carrier cites us to Texas Workers' Compensation Commission Appeal No. 941629, decided January 20, 1995, and asks that we apply it, analogously, arguing that claimant's omission of the statement rendered his TWCC-52 insufficient as a statement to the carrier and thus did not trigger the carrier's 10-day period to request a BRC. In that case the hearing officer determined that the employee was entitled to SIBS for the third quarter because the carrier had waived its right to contest the entitlement by not timely

requesting a BRC. The hearing officer also found that the employee had falsified her TWCC-52 in failing to state that she had returned to work and received wages during the filing period. The employee conceded she had worked during the filing period. She indicated she failed to reflect her wages on the TWCC-52 and checked the statement that she had not returned to work because she knew if she disclosed the information her SIBS would be reduced or stopped and she needed the money to pay bills. She also conceded to having lied about the matter at the BRC. In reversing and rendering a decision that the employee was not entitled to SIBS for the third quarter the Appeals Panel stated that "claimant's failure to state the wages she earned during the filing period in question resulted in her having failed to file with the carrier the statement required by Section 408.143, thereby relieving the carrier of liability for SIBS for that period. Thus, we need not reach the contention that the carrier waived its right to contest her entitlement to SIBS for that quarter. *Compare* Texas Workers' Compensation Commission Appeal No. 94335, decided May 6, 1994, where a claimant's erroneous TWCC-52 was revised. . . ." The facts in that case are readily distinguishable from those in the case we here consider and we do not view it as dispositive.

Finding that the hearing officer erred as a matter of law in determining that the carrier did not waive its right to contest claimant's entitlement to SIBS for the fourth quarter, we reverse the decision and order of the hearing officer and render a new decision that the carrier waived its right to contest claimant's entitlement to SIBS for the fourth quarter and that claimant is entitled to SIBS for the fourth quarter.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Thomas A. Knapp  
Appeals Judge