

APPEAL NO. 050280  
FILED APRIL 6, 2005

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 January 4, 2005. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first through fourth quarters for the inclusive dates, beginning October 11, 2003, and ending October 8, 2004, and that the appellant (carrier) is not relieved of liability for the payment of SIBs for the second, third, and fourth quarters because of the claimant's failure to timely file an Application for [SIBs] (TWCC-52) for those quarters. The carrier appealed the hearing officer's determinations asserting that there were other records that showed the claimant had an ability to work and that there was no obligation by the carrier to send TWCC-52 forms to the claimant pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(b) (Rule 130.104(b)). The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered in part, affirmed in part.

It is undisputed that the claimant sustained a compensable injury on                     . The parties stipulated that the carrier accepted, as compensable, injuries to the claimant's neck and left shoulder; that income benefits accrued on February 4, 1999; that maximum medical improvement (MMI) by operation of law was reached on February 2, 2001; that the claimant attained [clinical] MMI on January 5, 2001, with a 48% impairment rating (IR), as determined by (Dr. M), D.C., designated doctor; and that the claimant did not return to work or otherwise earn wages during the qualifying periods for the quarters at issue.

TIMELY FILING

At issue was whether the carrier was relieved of liability for SIBs for the second, third, and fourth quarters because of the claimant's failure to timely file a TWCC-52 for those quarters, and if so, for what periods. The parties stipulated that the Texas Workers' Compensation Commission (Commission) did not approve SIBs for the first quarter. In evidence is a notice of nonentitlement letter dated November 13, 2003, from the Commission, giving the claimant notice of nonentitlement to SIBs for the first quarter. The letter states that if the claimant is not in agreement with the nonentitlement determination, he may request a benefit review conference. Additionally, the letter states that if the claimant meets "the qualifications in a particular qualifying period, [the claimant] may become entitled to SIBs for a future quarter. To claim a delayed entitlement to SIBs, [the claimant] must complete the enclosed [TWCC-52] for a future quarter, and send it to the insurance carrier by first class mail, personal delivery or facsimile (fax)." The claimant testified, and the parties stipulated, that he filed a TWCC-52 for the second, third, and fourth quarters on September 9, 2004. The claimant

testified that his attorney provided him with the TWCC-52 forms to send to the carrier, because he never received copies of TWCC-52 forms from the carrier for him to apply for future SIBs quarters.

Rule 130.104(b), provides in part, that an injured employee claiming entitlement to SIBs for a subsequent quarter must send the carrier a TWCC-52 and the carrier is required to send a TWCC-52 for a subsequent quarter with either the first payment for a quarter of SIBs to which the claimant is determined to be entitled or with the carrier's determination of nonentitlement for that quarter. Rule 130.105(a)(1), (2), and (3), provide in part, that the injured employee who does not timely file an application for SIBs with the insurance carrier shall not receive SIBs for the period of time between the beginning date of the quarter and the date on which the form was received by the carrier, unless the following apply: the carrier failed to timely mail the form to the injured employee as provided by Rule 130.104; the Commission failed to issue a determination of entitlement or nonentitlement for the first quarter and the quarter applied for immediately follows the first quarter; or, a finding of an IR of 15% or greater in an administrative or judicial proceeding when the previous IR was less than 15%.

The carrier argues that the hearing officer erred, as a matter of law, because the carrier's obligation to send TWCC-52 forms for the second, third, and fourth quarters was never triggered under Rule 130.104(b), since the carrier never sent a monthly payment for a SIBs quarter nor made a determination of nonentitlement after the Commission's initial nonentitlement determination for the first quarter. We agree. At the CCH the carrier's position was that it provided the claimant a TWCC-52 for the second, third, and fourth quarters of SIBs, however the claimant did not timely file TWCC-52 forms for these quarters. The claimant's position was that the carrier did not provide him with TWCC-52 forms, rather that his attorney provided him with TWCC-52 forms for the second, third, and fourth quarters which he filed on September 9, 2004. The hearing officer reviewed the evidence and found that the carrier did not mail any TWCC-52 forms to the claimant at any time before September 9, 2004. The hearing officer concluded that the carrier is not relieved of liability for SIBs for the second, third, and fourth quarters because of the claimant's failure to timely file a TWCC-52 for those quarters; the carrier failed to provide copies of the TWCC-52 "in accordance with Commission Rules." The hearing officer failed to cite the Commission Rules that required the carrier to send TWCC-52 forms to the claimant. However, we note that Rule 130.105(a)(1) provides exceptions for when the carrier fails to timely mail TWCC-52 forms to the claimant, as provided by Rule 130.104.

Under Rule 130.104(b), the carrier is required to send a TWCC-52 for a subsequent quarter with either the first payment for a quarter of SIBs to which the claimant is determined to be entitled or with the carrier's determination of nonentitlement for that quarter. See Texas Workers Compensation Commission Appeal No. 021776, decided August 28, 2002. The duty of a carrier to send the application arises only with either the first payment of SIBs or a determination of nonentitlement for any quarter. See Texas Workers' Compensation Commission Appeal No. 020047, decided February 21, 2002. Under the facts of this case, the Commission determined

that the claimant was not entitled to SIBs for the first quarter, thus the claimant had to apply for a subsequent quarter of SIBs in order for the carrier to be required to send a TWCC-52 to the claimant under Rule 130.4(b). The exceptions under Rule 130.105(a) do not apply to the facts of this case.

It is undisputed that the fourth quarter of SIBs began on July 10 and ended on October 8, 2004. The parties stipulated that the claimant filed a TWCC-52 for the fourth quarter on September 9, 2004. Rule 130.105(a) provides in part, that a claimant who does not timely file TWCC-52 shall not receive SIBs for the period of time between the beginning date of the quarter and the date on which the form was received by the carrier. Therefore, the claimant shall not receive SIBs for the fourth quarter, regardless of entitlement, between July 10, 2004, and September 9, 2004.

Accordingly, we reverse the hearing officer's decision that the carrier is not relieved of liability for the payment of SIBs for the second, third, and fourth quarters because of the claimant's failure to timely file a TWCC-52 for those quarters, and render a new decision that the carrier is relieved of liability for the payment of SIBs for the second and third quarter, and that portion of the fourth quarter between July 10 through September 9, 2004, because of the claimant's failure to timely file a TWCC-52 for those quarters.

### **ENTITLEMENT TO SIBs**

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Rule 130.102. The SIBs criteria in issue was whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the first, second, third, and fourth quarters. 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.

The evidence reflects that during the qualifying period for the first quarter of SIBs the claimant began and completed a chronic pain management program. Upon his completion of the program the claimant was released to sedentary duty. However, the claimant complained of neck and shoulder pain and was treated with epidural steroid injections and medication during the qualifying period for the second quarter of SIBs. The medical records reflect that (Dr. E) contemplated placing a morphine pump catheter in the claimant's neck to relieve his pain. The claimant's neck and left shoulder pain were treated and monitored during the qualifying period for the third quarter of SIBs. The claimant underwent left shoulder surgery on May 24, 2004, during the qualifying period for the fourth quarter of SIBs.

The hearing officer determined that the claimant was entitled to SIBs for the first, second, third, and fourth quarters of SIBs because the claimant had no ability to work

for all the quarters in dispute, and that no other records showed that the claimant was able to return to work. Although, the hearing officer does not specifically state that the claimant provided a narrative report from a doctor that specifically explains how the compensable injury causes a total inability to work, the report from (Dr. B) dated July 14, 2004, satisfies the requirement of Rule 130.102(d)(4). The carrier argues that there are other records from (Dr. Mc) and (Dr. M) that show that the claimant had an ability to work.

With regard to Dr. Mc's report, the hearing officer commented in her decision that the report of Dr. Mc was not credible in that other medical records reflected that the claimant's "doctors were discussing fitting the Claimant with a morphine pump to alleviate the Claimant's pain a few weeks after the date of [Dr. Mc's] examination." Additionally, the hearing officer commented that the medical records reflected that the claimant underwent epidural steroid injections for neck pain, that surgery to his left shoulder was contemplated, and that he was prescribed several medications for his neck and left shoulder pain. However, with regard to Dr. M's report, the hearing officer did not explain why the medical record was not credible. The evidence reflects that Dr. M evaluated the claimant after he completed a chronic pain management program under his care during the qualifying period for the first quarter of SIBs. Dr. M's report dated August 15, 2003, states that the claimant's "work activity and range of motion activity is still very limited, but we know that we will not be able to get him to a full work level. He stabilized at a sedentary-light level." The Appeals Panel has held that in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. In the instant case, the hearing officer acknowledged that there were some other records in evidence that purported to show that the claimant had an ability to work but offered an explanation as to why Dr. Mc's report was not credible, however she did not explain why Dr. M's report was not credible. The evidence does not support the determination that the claimant met the requirement of a good faith effort to obtain employment commensurate with the claimant's ability to work by complying with Rule 130.102(d)(4) for the first quarter of SIBs. We reverse the hearing officer's decision that the claimant is entitled to SIBs for the first quarter and render a new decision that the claimant is not entitled to SIBs for the first quarter.

With regard to the second, third, and fourth quarters of SIBs, the Appeals Panel has held that there is no condition in Rule 130.102(d)(4) that limits "other records," as to the time of inception, to those created during the qualifying period for the quarters at issue. Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. In the instant case, the hearing officer explained that during the second through the fourth quarters of SIBs the claimant had neck and left shoulder pain that required medical treatment and that he had left shoulder surgery. The hearing officer could conclude that the other records from Dr. Mc and Dr. M did not take into consideration that claimant's condition after the qualifying period for the first quarter of SIBs. The credibility to be given to the evidence is the province of the hearing officer as

sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). In view of the applicable law and the evidence presented, we cannot conclude that the hearing officer's determination that the claimant is entitled to SIBs for the second, third, and fourth quarters are 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).

We reverse the hearing officer's decision that the carrier is not relieved of liability for the payment of SIBs for the second, third, and fourth quarters because of the claimant's failure to timely file a TWCC-52 for those quarters, and render a new decision that the carrier is relieved of liability for the payment of SIBs for the second and third quarters, and that portion of the fourth quarter between July 10 through September 9, 2004, because of the claimant's failure to timely file a TWCC-52 for those quarters.

We reverse the hearing officer's decision that the claimant is entitled to SIBs for the first quarter and render a new decision that the claimant is not entitled to SIBs for the first quarter.

We affirm the hearing officer's decision that the claimant is entitled to SIBs for the second, third, and fourth quarters.

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

**CT CORPORATION SYSTEMS  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Margaret L. Turner  
Appeals Judge