

APPEAL NO. 990321

A contested case hearing (CCH) was held on January 7, 1999, with the record closing on January 11, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), (hearing officer) presiding as hearing officer, to consider the following disputed issues:

- (1) Is the appellant Subsequent Injury Fund (SIF) liable for lifetime income benefits (LIBS) under Section 408.162 of the 1989 Act and, if so, on what date should payment of those benefits have begun; and
- (2) If the SIF is liable for LIBS to respondent (claimant), is the SIF liable to reimburse (carrier) for the amount of income benefits the carrier overpaid the claimant for which the SIF was liable.

After making certain findings of fact, three of which are appealed, the hearing officer concluded that beginning (day after date of subsequent injury), the SIF was liable to the claimant for the remainder of LIBS after subtracting the amount of temporary income benefits (TIBS) and impairment income benefits (IIBS) paid to the claimant by the carrier, and that since the SIF was liable to the claimant for LIBS, the SIF is liable to reimburse the carrier for the amount of income benefits the carrier overpaid the claimant for which the SIF was liable.

The SIF requests our review, challenging the hearing officer's conclusions and several factual findings. The SIF asserts, in essence, that the hearing officer's resolution of the two disputed issues are erroneous because, based on the applicable statutory provisions of the 1989 Act concerning LIBS and the implementing Texas Workers' Compensation Commission (Commission) rule, the carrier should first pay weekly income benefits to the claimant, be they temporary income benefits (TIBS), impairment income benefits (IIBS), supplemental income benefits (SIBS), or LIBS, for 401 weeks before the SIF becomes obligated to commence payment of "the remainder" of LIBS. The SIF also contends that since it was not obligated to pay any LIBS prior to the expiration of the payment of weekly income benefits by the carrier for 401 weeks, it is thus not liable to the carrier for the reimbursement of overpayments of weekly benefits by the carrier. The carrier's response first asserted that the SIF's appeal was untimely and then urged the correctness of the hearing officer's determinations. The SIF filed a response asserting the timeliness of its appeal and reasserting the errors raised in its appeal.

DECISION

Affirmed.

The Commission's records indicate that the hearing officer's decision was distributed to the parties on January 27, 1999, under a cover letter of that date. The SIF's response acknowledges that the SIF received the hearing officer's decision and order on January 29, 1999. Pursuant to Section 410.202(a), the SIF had 15 days from that date to file its appeal or until February 13, 1999. However, since February 13th was a Saturday and Monday, February 15th was a federal holiday (President's Day), the SIF had until Tuesday, February 16, 1999, to file its appeal. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.3(a)(3) (Rule 102.3(a)(3)). The SIF's appeal was filed on February 16, 1999, was, thus, timely.

We note at the outset that there did not appear to be any factual dispute involved in this case at the CCH or on appeal and that it involves the interpretation of certain provisions of the 1989 Act and Commission rules concerning LIBS.

Section 408.161(a)(1) provides that LIBS are paid until the death of the employee for total and permanent loss of sight in both eyes. Section 408.161(c) provides that, subject to Section 408.061, the amount of LIBS is equal to 75% of the employee's average weekly wage (AWW) and that benefits being paid shall be increased at a rate of three percent a year, notwithstanding Section 408.061.

Section 408.162, entitled "[SIF] Benefits," provides as follows:

- (A) If a subsequent compensable injury, with the effect of a previous injury, results in a condition for which the injured employee is entitled to [LIBS], the insurance carrier is liable for the payment of benefits for the subsequent injury only to the extent that the subsequent injury would have entitled the employee to benefits had the previous injury not existed.
- (B) The [SIF] shall compensate the employee for the remainder of the [LIBS] to which the employee is entitled. [Emphasis supplied.]

Rule 131.1(a) provides that LIBS begin to accrue as provided by the 1989 Act, §4.22 (now Section 408.082), and are payable retroactively from the date of disability (1) for losses described in the 1989 Act, §4.31(a)(2) through (4) (now Sections 408.161(a)(2) through (4)), or (2) for changing from TIBS to LIBS, when maximum medical improvement (MMI) is certified for losses described in the 1989 Act, § 4.31(1), (5), or (6), or §4.31(b). Claimant's loss is described in §4.31(1) (now Section 408.161(a)(1)), namely, total and permanent loss of sight in both eyes.

Rule 131.2(a) provides that LIBS shall be calculated by multiplying the employee's AWW by .75 and that the LIBS payable each week under this formula shall not exceed the weekly minimum benefit under the 1989 Act, § 4.11 (now Sections 408.047, 408.061) for the first year of benefits. Rule 131.2(b) provides for the annual three percent increase.

Rule 131.3 is entitled "Carrier's Petition for Payment of Benefits by [SIF]." Rule 131.3(a) provides that when an insurance carrier reasonably believes that an injured employee may be eligible for LIBS from the SIF, the insurance carrier shall petition the Commission for payment of LIBS from the SIF. Rule 131.3(b) provides that the Commission shall order the payment of LIBS from the SIF if it finds that the effects of the two injuries combined entitle the employee to LIBS. Rule 131.3(c) provides that the insurance carrier shall pay to the employee weekly benefits as ordered by the Commission. Rule 131.3(d) provides that the SIF shall compensate the employee "for the remaining [LIBS] for which the insurance carrier is not liable."

By way of background, our decision in Texas Workers' Compensation Commission Appeal No. 972705, decided February 12, 1998, which is in evidence, stated the parties' stipulations that on (date of first injury), the claimant was the employee of (employer 1), who had workers' compensation insurance with another carrier; that on (date of first injury), the claimant sustained a compensable injury to his left eye that resulted in total and permanent loss of sight in the left eye; that on (date of subsequent injury), the claimant was the employee of (employer 2) who had workers' compensation insurance with the carrier; that on (date of subsequent injury), the claimant sustained a subsequent compensable injury to his right eye that resulted in total and permanent loss of sight in the right eye; and that the claimant has total and permanent loss of sight in both eyes. Our decision affirmed the decision of the hearing officer in the November 20, 1997, CCH that the claimant is entitled to LIBS based on the permanent loss of both eyes. According to our decision, the carrier agreed with that determination but appealed the hearing officer's decision which ordered it to pay income and medical benefits in accordance with the decision, the 1989 Act, and the Commission's rules, contending that the hearing officer should have ordered the SIF to pay the claimant LIBS. We stated that the SIF responded that the hearing officer should have ordered the carrier and the SIF to pay the claimant LIBS. We noted that the only issue at that CCH was the claimant's entitlement to LIBS and that the hearing officer's decision in the claimant's favor on that issue was not appealed. We also stated that pursuant to Rule 131.3(a), the carrier has the responsibility to file a written petition with the Commission for payment of LIBS from the SIF; that no such written petition was in evidence; and that, after such petition is filed, the Commission may then order the payment of LIBS from the SIF under Rule 131.3(b), make a determination as to what weekly benefits the carrier is to pay to the claimant under Rule 131.3(c), and determine what "remaining" LIBS the SIF is to pay the claimant for which the carrier is not liable under Rule 131.3(d).

In addition to the two legal conclusions mentioned above, the SIF challenges findings that the claimant is entitled to be paid weekly income benefits equal to LIBS, with the three percent annual increase, from both the carrier and the SIF beginning on (day after date of subsequent injury) (we note this date is the day after the claimant's second injury); that since (day after date of subsequent injury), the SIF was obligated to pay the claimant a weekly amount that, when added to the amount of income benefits the carrier was obligated to pay, would total the amount of LIBS to which the claimant was entitled; and

that the SIF owes the carrier for the amounts of income benefits that the carrier paid to the claimant since (day after date of subsequent injury), that were beyond the carrier's financial obligation of \$261.82 per week to the claimant and were actually the financial obligations of the SIF to pay the claimant.

The SIF does not take specific issue with the dates the hearing officer determined concerning when the claimant's entitlement to LIBS commenced (day after date of subsequent injury), when the claimant reached statutory maximum medical improvement (July 21, 1994), and when the TIBS and IIBS were paid by the carrier, nor with the various dollar amounts determined by the hearing officer relating to the amounts of TIBS and IIBS paid by the carrier, nor with the amounts due the carrier from the SIF for reimbursement. Reduced to its essence, it is the SIF's position that it is not obliged to commence the payment of LIBS until after the expiration of 401 weeks and that the carrier is solely responsible for the payment of weekly income benefits, be they TIBS, IIBS, or SIBS, during the 401-week period. The carrier relies on the phrase "for the remainder of the [LIBS]" in Section 408.162 and the corresponding phrase in Rule 131.3(d), asserting that, had the legislature intended for the SIF to pay the entire amount of LIBS, it would not have used the word "remaining." We disagree with the SIF's contention in this matter and find its interpretation strained. Section 408.162(a) provides that "the insurance carrier is liable for the payment of benefits for the subsequent injury only to the extent that the subsequent injury would have entitled the employee to benefits had the previous injury not existed." "Remainder" is defined as the number left after a subtraction. Webster's Ninth New Collegiate Dictionary 996 (9th ed. 1983). It is clear that the carrier's liability is limited to benefits the claimant is entitled to had the previous injury not existed. The SIF is liable for the remainder, the number left after the amount of the benefits due the claimant for the subsequent injury is subtracted from the LIBS amount. We believe that the hearing officer correctly followed the LIBS statute and rule in determining that, from the date that the claimant's LIBS accrued, the SIF was liable for the amounts which exceeded the weekly benefits due from the carrier and remains so liable until no further weekly benefits are due from the carrier after which time the SIF is solely liable for the claimant's LIBS.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge