

APPEAL NO. 990990

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 April 12, 1999. The issue at the CCH was:

Is the Carrier liable for Supplemental Income Benefit Attorney fees for the whole quarter or only to [sic] those fees incurred by Claimant after the actual date of the dispute by the Carrier of a quarter or quarters?

The hearing officer determined that the carrier is not liable for attorney's fees in the amount of \$990.00 under the first three orders and is liable for attorney's fees of \$240.00 under the fourth order (because he determined that the carrier did not timely request a CCH on that order). The appellant (attorney) appeals, contending that the law does not distinguish attorney's fees which are part of a disputed quarter by whether they were before or after the time of dispute by the carrier. The attorney also urges that the decision of the hearing officer has the effect of encouraging carriers to delay as long as possible in disputing supplemental income benefits (SIBS) and would further discourage legal representation of claimants. The attorney urges that the position of the carrier, if accepted, would create a divided attorney's fee application and a more complicated approach to filing for and receiving fees. The attorney asks that the Appeals Panel reverse the decision of the hearing officer and order that the attorney's fees be paid under Section 408.147(c) and that the Appeals Panel also determine whether the attorney's fees incurred in handling this dispute of attorney's fees would be payable as SIBS attorney's fees or as regular attorney's fees. The carrier responds that the carrier should pay for attorney's fees generated by the claimant's attorney on behalf of the claimant after the date of its dispute of the quarters at issue. The carrier does not appeal the hearing officer's determination that its request for a CCH was untimely as to one order. The file contains no separate response from the claimant.

DECISION

We affirm.

We review attorney's fees cases under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 951196, decided August 28, 1995. The Appeals Panel has in some cases considered attorney's fees disputes regarding SIBS on a quarter by quarter basis. See, e.g., Texas Workers' Compensation Commission Appeal No. 961981, decided November 18, 1996, in which we stated:

We believe that Section 408.147(c) is applicable whenever a carrier disputes entitlement to SIBS and the Commission [Texas Workers' Compensation Commission] (the hearing officer) determines that the employee should prevail on the entitlement to SIBS; the carrier will be liable for reasonable and

necessary attorney fees for any quarter where carrier had disputed that entitlement and claimant has prevailed [emphasis added].

We have also required allocation of fees in some cases involving several quarters. For example, in Texas Workers' Compensation Commission Order No. 97020, issued June 16, 1997, we stated:

A carrier is liable for payment of the attorney's fees under Section 408.147(c) and Rule 152.1(f) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.1(f)] only for the portion of those fees attributable to the SIBS quarters to which it disputed the claimant's entitlement and on which he later prevailed. We encourage the adjudication of multiple disputed quarters of SIBS by consolidating issues into one CCH, where appropriate However, when the adjudication of the disputed SIBS quarters . . . results in entitlement to one or more quarters previously disputed by the carrier and nonentitlement to one or more quarters, the hearing officer entering the order for attorney's fees must allocate the fees amongst the different quarters [emphasis added].

But, c.f., Texas Workers' Compensation Commission Appeal No. 970010, decided January 14, 1997, in which we remanded "for the hearing officer to determine the amount of the attorney's fees that were incurred by the claimant as the result of the carrier's dispute of the claimant's entitlement to SIBS." The attorney's argument that, by agreeing with the argument of the carrier, we would be making a confusing system even more complicated is well taken and in view of allocations both between and within quarters, may even be understated.

Two treatises on Texas workers' compensation law discuss this provision in general terms. The first discussion is in 1 JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4.28(l) (1991) where the author states:

Under an important new provision, if the carrier disputes a Commission determination of the employee's entitlement to or amount of [SIBS] and the employee prevails on the disputed issue, the carrier is liable for reasonable and necessary attorney's fees incurred by the employee in resolving the dispute. The attorney's fees are an additional award [emphasis added].

The provision is also discussed in 1 JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 33.11[4] (1998), where that author states:

A carrier may dispute an employee's entitlement to [SIBS] or their amount. [Citation omitted.] If the carrier disputes a commission determination in favor of the employee on either of these issues and the employee prevails on either issue, the employee's attorney is entitled to recover attorney's fees from the carrier for representation in the dispute. [Citing Section 408.147(c) and Rule 152.1(f).] These fees are paid wholly by the carrier and are not

deducted from the claimant's recovery. [Citing the same section and rule.]
[Emphasis added.]

However, we are nevertheless confronted with the plain language of the 1989 Act which provides in Section 408.147(c) that the carrier is liable for attorney's fees "incurred by the employee as a result of the insurance carrier's dispute." Almost identical language is found in Rule 130.108(d)(2). Rule 152.1(f) provides that:

An attorney for an employee who prevails when a carrier contests a commission determination of eligibility for [SIBS] shall be eligible to receive a reasonable and necessary attorney's fee, including expenses. This fee is payable by the carrier, not out of the employee's benefits

We have found only one case where this issue has been squarely presented to the Appeals Panel. In Texas Workers' Compensation Commission Appeal No. 972431, decided January 5, 1998 (Unpublished), we stated:

After the attorney made a statement that the self-insured is liable for all attorney's fees, the hearing officer asked him how the self-insured could be liable for attorney's fees before it disputed the entitlement to SIBS. The attorney responded that since the self-insured permitted entitlement to the first three quarters of SIBS to be litigated in one CCH and the claimant prevailed on SIBS for the second and third quarter, the self-insured is liable for all attorney's fees. The self-insured said that it paid the attorney's fees for the BRC [benefit review conference] at which SIBS for the first and second quarter were considered and the CCH at which entitlement to SIBS for the first three quarters was litigated. Clearly the self-insured is not liable for services provided before it first disputed entitlement to SIBS on August 12, 1996. [Emphasis added.]

The services of the attorney prior to the carrier's dispute of SIBS entitlement would have been performed even if the carrier had not then disputed the claimant's entitlement to SIBS. While the arguments of the attorney are cogent and persuasive as to the resulting problems, we cannot ignore the clear language of Section 408.147(c) and Rule 130.108(d)(2), which clearly designate the carrier's dispute as the action at which point the carrier then becomes liable for any resulting (and necessarily subsequent) attorney's services and fees. Nonetheless, it is important to note that an untimely contest of SIBS entitlement results in the waiver of the right to contest.

Since the carrier does not appeal the hearing officer's determination that its appeal of one of the orders was untimely, we will not address that issue. We also note that the attorney attempted unsuccessfully to add an issue at the CCH as to the recovery of fees for time spent on this CCH on attorney's fees. We find no abuse of discretion by the hearing officer in declining to add this issue, and we refer the attorney to Texas Workers' Compensation Commission Appeal No. 93389, decided July 1, 1993.

Finding no abuse of discretion by the hearing officer and finding his decision correct as to the interpretation of Section 408.147(c), we affirm.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge