

APPEAL NO. 991293

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 26, 1999. The issues were:

1. What is the accrual date of the Lifetime Income Benefits [LIBS]?
2. What amount of [LIBS] does the Subsequent Injury Fund [SIF] [appellant] owe, and for what time period?
3. What is the average weekly wage [AWW]?

The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. Claimant [Respondent 1] sustained a compensable injury to his right foot on (date of injury for 1995).
3. Claimant had a prior compensable injury to his left foot.
4. Claimant has been found to be entitled to [LIBS] because of the loss of use of both feet.
5. Two separate compensable injuries resulted in Claimant's entitlement to [LIBS].
6. The second injury occurred on (date of injury for 1995), and the first date of disability was July 29, 1995.
7. TIBs [temporary income benefits, TIBS] were paid from July 29, 1995 through January 27, 1997, at the rate of 70% of the [AWW] as computed by Carrier [Respondent 2].
8. The maximum medical improvement [MMI] date for the second accident was January 27, 1997.

9. The second injury was rated at a 1% impairment, and Claimant was paid for three weeks of impairment income benefits [IIBS], through February 17, 1997, at the rate of 70% of the [AWW] as computed by the Carrier.
10. During the 13 weeks immediately preceding the injury of (date of injury for 1995), Claimant was unable to work for two weeks due to illness or other reason beyond his control, and was not paid for those two weeks.
11. No evidence was presented as to the wages for a similar employee or for the same or similar services.
12. A fair, just and reasonable method of computing the [AWW] would be to divide the total wages for the 13 week period (\$4,959.02) by the number of weeks actually worked (11), giving a quotient of \$450.82.

CONCLUSIONS OF LAW

3. The accrual date of [LIBS] is the eighth day after the date of injury.
4. The [AWW] is \$450.82.
5. The [SIF] owes [LIBS] in the following amounts: 5% of the [AWW] each week beginning July 29, 1995 and continuing through February 17, 1997, and thereafter 75% of [AWW] each week for the remainder of Claimant's life; provided, that the benefits shall increase by 3% every year on the (eighth day after date of injury) of each year beginning the eighth day after the date of injury. Through the date of the hearing, the table of benefits payable by the [SIF] is as follows (not including interest on past-due months):

| <u>Date Range</u> | <u>Weekly benefits</u> |
|--------------------------------|------------------------|
| 7/29/95 through 8/4/96 | \$22.54 |
| 8/5/96 through 2/17/97 | 23.22 |
| 2/18/98 through 8/4/97 | 348.26 |
| 8/5/97 through 8/4/98 | 358.71 |
| 8/5/98 through date of hearing | 369.47 |

The SIF appealed. First, it contended that LIBS began to accrue on January 27, 1997, the date that the claimant reached MMI, rather than the eighth day after the second injury. Next, the SIF contended that the claimant is estopped from challenging the AWW for the second injury because of his acceptance of TIBS and IIBS and the agreed judgment concerning those benefits. Finally, the SIF contended that Conclusion of Law No. 5 is wrong because it is based upon an erroneous accrual date and erroneous AWW. The claimant responded. Concerning AWW, he urged that the SIF's estoppel argument failed on jurisdictional grounds because the SIF did not raise waiver as a separate issue at the hearing and that an issue of waiver must be raised as such or it is waived. In addition, he argued that the evidence is sufficient to support the determination that his AWW is \$450.82. The claimant also urged that the hearing officer properly applied the law in determining that the accrual date of LIBS is the eighth day after the date of injury. The carrier that provided workers' compensation insurance coverage for the first injury also responded. It contended that it is a proper party to the dispute; briefly summarized the evidence; referred to parts of the 1989 Act, Texas Workers' Compensation Commission (Commission) rules, and Appeals Panel decisions; urged that the SIF is liable for the remainder of all benefits which were not paid by the other carrier; and requested that the Appeals Panel issue a proper decision. A response from the carrier that provided workers' compensation insurance coverage for the second injury has not been received.

DECISION

We affirm.

The claimant, a diabetic, sustained a compensable injury to his left foot on (prior date of injury). The claimant had several surgeries and amputations on his left foot. He testified that he returned to work in February or March 1995 and that in July 1995 he was off work for two weeks because of the injury to his left foot. The claimant sustained a compensable injury to his right foot on (date of injury for 1995); he began missing work the next day, and later had the small toe on his right foot amputated. In an agreed judgment dated July 24, 1997, a district court judge stated that the claimant sustained an injury in the course and scope of his employment on (date of injury for 1995); that the carrier for the 1995 injury was to pay an additional 12 weeks of TIBS and three weeks of IIBS; that the carrier was not liable or responsible for further workers' compensation benefits to or on behalf of the claimant in connection with the (date of injury for 1995), injury; that any current disability of the claimant was caused by diabetes, a prior injury to his left foot, or an ordinary disease of life and not his (date of injury for 1995), injury; and that all current need for medical treatment is due to diabetes, a prior injury, or an ordinary disease of life. In October 1998 a hearing officer determined that the claimant's 1994 and 1995 compensable injuries were producing causes of the claimant's inability to obtain or retain employment requiring the use of his feet and that the claimant is entitled to LIBS. The Appeals Panel affirmed that decision on January 27, 1999.

We first address the determination that the claimant's AWW is \$450.82. The claimant contended that when he worked for the employer, the employer provided health

insurance for him and his family and did not provide such insurance when he did not work because of his injury. His testimony was not clear as to how much was withheld from his pay for health care insurance and how much was paid by the employer. The claimant stated that efforts to obtain that information from the employer and carrier had not been successful and asked that the record be held open to obtain that information from the employer. The hearing officer denied that request and did not include any amount for health insurance in determining the claimant's AWW. Neither of those actions were appealed. The hearing officer used the fair, just, and reasonable method of determining the claimant's AWW. Since the claimant did not work two of the 13 weeks immediately preceding the date of the injury, he added the wages for the 13-week period and divided by 11 rather than 13. The Appeals Panel approved that method in Texas Workers' Compensation Commission Appeal No. 941292, decided November 9, 1994. Concerning waiver or estoppel, the benefit review officer (BRO) reported that one of the issues not resolved at the benefit review conference (BRC) was the claimant's AWW. The BRC report states that the SIF's position was that the claimant's AWW is \$381.47 and does not mention waiver or estoppel. The record does not contain any responses to the BRC report. The provisions of the agreed judgment are summarized earlier in this decision. Neither the agreed judgment nor the Appeals Panel decision cited in it mention the claimant's AWW. The agreed judgment contains:

It is further ORDERED, ADJUDGED AND DECREED that [claimant] recover an additional 12 weeks of [TIBS] and 3 weeks of [IIBS] based upon a finding of a 1% impairment in addition to those sums previously paid of and from The (carrier 1) in connection with his injuries in the course and scope of his employment on or about (date of injury for 1995). The (carrier 1) is not liable or responsible for further payment of workers' compensation benefits to or on behalf of [claimant] in connection with alleged injuries on or about (date of injury for 1995) while in the course and scope of his employment for (employer).

In his opening statement, the attorney representing the carrier that provided coverage for the 1995 injury stated:

It is also my opinion that \$381.46 is the [AWW] for all amounts that the Carrier has paid, and [Claimant] is waived from challenging that [AWW] for those payments since those payments were made in 1996 and 1997 and since an agreed judgment was entered that the Carrier would only have to pay an additional number of weeks without-without any challenge to the amounts paid previously. I believe [Claimant] has waived his right to challenge that [AWW] for purposes of the benefits paid by the Carrier. Thank you.

The attorney representing the claimant stated "[w]e need to make an objection to that argument because waiver was not raised as an issue, and as you know waiver should be a separate issue." The hearing officer did not rule on the objection and said "Ms. B [attorney

representing the SIF]?" The last sentence of her opening statement is "[a]nd our position with regard to the [AWW] is that the [AWW] is 100—excuse me, \$381.47 as established on the wage statement and as paid to [Claimant] by Carrier, the [AWW] that he was receiving as of the 1995 injury, second injury." She did not use waived, waiver, or estoppel in her opening statement. In his closing statement, the attorney representing the carrier providing coverage for the 1995 injury concluded with:

I also believe that based upon the length and time that's passed since those [TIBS] and [IIBS] were paid and based on the agreed judgment that [Claimant] has waived his right to dispute [AWW] with regard to (carrier 1). Thank you.

The attorney representing the SIF did not use waived, waiver, or estoppel in her closing statement, but after commenting on health insurance did say:

The best evidence is the [AWW] statement that's been provided that indicates an [AWW] of \$381.46.

That is also consistent with the payments that were paid to him for the second injury all along during the time of the [TIBS] and [IIBS] for that period.

* * * *

It would be the position of the [SIF] that it is not liable for any [LIBS] except the difference between the calculated amount of [LIBS] and [IIBS], [TIBS] or supplemental income benefits which are due and owing to [claimant] for either injury.

Hearing Officer's Exhibit No. 1 includes the report of the BRO that states that one issue is "[w]hat is the [AWW]?" The record does not contain any responses to the BRC report. The Decision and Order of the hearing officer states that one of the issues is "[w]hat is the [AWW]?" The record does not contain an objection to that being an issue. In his opening statement, the attorney representing the carrier stated that it was the carrier's position that the claimant had waived the right to challenge AWW for benefits paid by it. The attorney representing the claimant objected, but the objection was not ruled upon. There was no request to add the issue of waiver by the claimant and such an issue was not added. In Texas Workers' Compensation Commission Appeal No. 962311, decided December 27, 1996, one of the issues was what is the claimant's AWW. The Appeals Panel wrote:

We note at the outset that waiver of a timely dispute by the claimant over AWW was not raised by the carrier notwithstanding that claimant had, according to the carrier, already been paid [TIBS] and [IIBS] based upon an AWW of \$355.18.

The better practice would have been to raise the issue of waiver at the BRC or in a response to the BRC report so that waiver could have been fully litigated at the hearing. Had the issue of waiver been before the hearing officer, the record does not indicate that the parties stipulated or agreed to the claimant's AWW and accepting income benefits alone does not result in waiving the right to dispute the AWW. Texas Workers' Compensation Commission Appeal No. 971351, decided September 2, 1997. The hearing officer did not improperly apply the law to the facts. The determination that the claimant's AWW is \$450.82 is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We now address the determination concerning the accrual date of LIBS. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §131.1 (Rule 131.1) provides in part:

Rule 131.1: Initiation of [LIBS]

- (a) [LIBS] begin to accrue as provided by the Texas Workers' Compensation Act (the Act), §4.22, and are payable retroactively from the date of disability:
 - (1) for losses described in the Act, § 4.31 (a)(2) through (4); or
 - (2) for changing from [TIBS] to [LIBS], when [MMI] is certified for losses described in the Act, §4.31 (a)(1), (5), or (6), or §4.31 (b).

The 1989 Act has been codified in the labor code. Since Rule 131.1 includes citations to the 1989 Act before the codification, provisions of the 1989 Act as enacted in 1989 will be set forth in this decision. Section 4.22 provides:

SECTION 4.22. ACCRUAL OF RIGHT TO INCOME BENEFITS.

- (a) Weekly income benefits may not be paid under this Act for an injury that does not result in disability for a period of at least one week. If disability extends beyond one week, weekly income benefits begin to accrue on the eighth day after injury. This section does not preclude recovery of medical benefits as provided by Chapter D of this article.
- (b) If disability does not follow at once after the injury occurs or within eight days of the occurrence but does result subsequently, weekly income benefits begin to accrue on the eighth day after the date the disability began.
- (c) If the disability continues for four weeks or longer after the beginning date of the disability, the compensation shall be computed from the beginning date of the disability.

Section 4.31 of the 1989 Act provides in part:

SECTION 4.31. LIFETIME INCOME BENEFITS.

- (a) Income benefits shall be paid until the death of the employee for:
 - (1) total and permanent loss of sight in both eyes;
 - (2) loss of both feet at or above the ankle;
 - (3) loss of both hands at or above the wrist;
 - (4) loss of one foot at or above the ankle and the loss of one hand at or above the wrist;
 - (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg; or
 - (6) an injury to the skull [For injuries on or after September 1, 1997, "brain" replaced "skull."] resulting in incurable insanity or imbecility.
- (b) The total and permanent loss of use of a member under Subsection (a) of this section is considered equal to the loss of the member.
- (c) [LIBS] are payable at the rate of 75 percent of the employee's [AWW]. Lifetime benefits may not exceed the maximum weekly benefit, except that benefits being paid shall be increased three percent a year not withstanding the maximum weekly benefit.

The history of Rule 131.1 is helpful in interpreting it. The original proposed Rule 131.1(a) in the September 28, 1990, Texas Register at 15 TexReg 5663 stated "[LIBS] begin to accrue the day after the employee has met one of the conditions listed in the Workers' Compensation Act (Act), §4.31(a) or (b)." The March 29, 1991, Texas Register at 16 TexReg 1886 contains:

Concerning proposed § 131.1, several commenters suggested that the rule should require that for injuries enumerated in the Act, §4.31(a)(1), (5), (6), and (b), eligibility for [LIBS] should not be determined until [MMI]. The injuries described in those portions of the statute tend to be those involving a condition that may not be stabilized, at the outset, into one of the conditions entitling the injured employee to lifetime benefits, although he or she may be

receiving other workers' compensation benefits. The commission agrees and has incorporated this change.

The May 17, 1991, Texas Register at 16 TexReg 2737 contains Rule 131.1 as adopted by the Commission and:

The new section provides that lifetime benefits will accrue as provided in the Act, §4.22 (in other words, on the eighth day of disability following an injury), and will be paid retroactively upon the occurrence of losses of both feet at or above the ankle, of both hands at or above the wrist, or of the loss of one foot at or above the ankle and the loss of one hand at or above the wrist. In addition, for changing from [TIBS] to [LIBS], lifetime benefits will be paid retroactively from date of disability when [MMI] is certified for these losses: total and permanent loss of sight in both eyes; an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg; an injury to the skull resulting in insanity or imbecility; or total and permanent loss of use of both hands, both legs, or one arm and one leg. The losses are described in the proposed section by reference to the applicable section of the Act, §4.31.

The Master Operations Manual of the Commission, at page III-35, states “[u]pon **certification of [MMI] establishing entitlement**, [LIBS] are paid retroactively from the date of disability until the death of the worker.” The provisions of the Master Operations Manual are not binding in dispute resolution; however, they are evidence of the Commission's interpretation of its rules. It is clear that when Rule 131.1 was adopted, the intent was for LIBS to be paid retroactively from the date of disability. In the case before us, disability for the (date of injury for 1995), injury began on July 29, 1995.

Conclusion of Law No. 5 contains a table of benefits from July 29, 1995, through the date of the hearing. In its appeal, the SIF makes statements about what the claimant was paid during certain periods. Evidence of all of those payments is not in the record. The Decision and Order of the hearing officer contains the following decision and order:

DECISION

The [BRO's] interlocutory order is modified and superseded by this decision and order. The accrual date of [LIBS] is the eighth day after the date of injury. The [AWW] is \$450.82. The [SIF] owes [LIBS] in the following amounts: 5% of the [AWW] per week beginning July 29, 1995 and continuing through February 17, 1997 and thereafter 75% of the [AWW] per week for the remainder of Claimant's life, with such benefits increasing by 3% every year on the (eighth day after date of injury), with the first such adjustment to be made on the eighth day after the date of injury. Accrued and past due income benefits shall be paid in a lump sum with interest.

ORDER

Carrier is ordered to pay benefits in accordance with this decision, the [1989 Act] and the Commission's Rules.

The [SIF] of the [Commission] is ordered to pay income benefits in accordance with this decision, the [1989 Act] and the Commission's Rules.

We affirm that decision and that order.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge