

APPEAL NO. 000217

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) on remand pursuant to Texas Workers' Compensation Commission Appeal No. 991144, decided July 12, 1999, was held on September 27 and December 20, 1999. The issues at the CCH were whether the respondent (carrier) is liable for the appellant's (attorney) attorney's fees for the 8th, 9th, 11th, 12th, and 13th compensable quarters. The hearing officer determined that the carrier is not liable for attorney's fees for the compensable quarters in question. The attorney appeals, contending that the Appeals Panel has held in recent cases that, after the first quarter, if the carrier appeals and loses it pays. The carrier contends in its response that the carrier did not contest a Texas Workers' Compensation Commission (Commission) determination of entitlement to supplemental income benefits (SIBS) concerning any of the quarters in question. The attorney, the carrier, and the hearing officer all join in attacking the line of cases which began with Texas Workers' Compensation Commission Appeal No. 950534, decided May 19, 1995, which interprets the phrase "Commission Determination" in Section 408.147(c) as meaning the initial Commission determination for the first quarter of SIBS. The appeal file contains no response from the claimant.

DECISION

We affirm as reformed.

Many of the facts of this case are set out in Appeal No. 991144, *supra*, and we will not repeat them here. This is basically a dispute over whether the carrier or the claimant should pay attorney's fees in disputes over eligibility for SIBS for the 8th, 9th, 11th, 12th and 13th compensable quarters. The Commission's initial determination as to SIBS for the first quarter was that the claimant is not entitled to SIBS for that quarter. A CCH on that issue also determined that the claimant is not entitled to first-quarter SIBS, and that decision has become final. The hearing officer determined in Finding of Fact No. 12 that "[t]he Commission never determined Claimant was entitled to [SIBS] for any of the five quarters for which fees have been requested nor for the quarters proceeding [sic] any of the disputed quarters." The Commission, in CCHs, determined that the claimant is not entitled to SIBS for the five quarters at issue, the Appeals Panel affirmed, and the (County Court at Law), in two separate judgments, filed with the Executive Director of the Commission in compliance with the statute prior to entry, set aside the Commission's decisions as to these five quarters of SIBS and the time has expired for appeal of the court's decisions.

Section 408.147(c) provides that, if a carrier disputes a Commission determination that an employee is entitled to SIBS or the amount of SIBS due and the employee prevails on any disputed issue, the carrier is liable for reasonable and necessary attorney's fees incurred as a result of the dispute. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.1(f)

(Rule 152.1(f)) contains similar provisions dealing with "[an] attorney for an employee who prevails when a carrier contests a commission determination of eligibility for [SIBS]." John T. Montford notes the absence in the 1989 Act of a procedure for determining a claimant's initial eligibility for SIBS and notes the absence of any Commission rule on the subject at the time his treatise went to the publisher. 1 JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4.28(l) (1991). The Commission subsequently adopted rules on the subject and the procedure they set up was discussed in the concurring opinion of Judge Lueders in Texas Workers' Compensation Commission Appeal No. 962504, decided January 27, 1997. While that procedure remains the same, the rules have since been amended, effective January 31, 1999, and then effective November 28, 1999. Under Rule 130.103, the Commission will make the determination of entitlement or non-entitlement for the first quarter of SIBS. Under Rule 130.104, after the Commission has made a determination of entitlement or non-entitlement for SIBS for the first quarter, the carrier shall make determinations for subsequent quarters. While these subsequent amendments do not effect the case at hand, the basic procedure, as discussed by Judge Lueders, remains unchanged. The Commission makes a determination only for the first quarter. A determination for any subsequent quarter is made by the carrier. We have made a study of the history of the rules affecting this case and find nothing to aid us in interpreting them or the 1989 Act. As Judge Kilgore pointed out in Texas Workers' Compensation Commission Appeal No. 950534, *supra*, "The interpretation of Section 408.147(c) for which the carrier argues would defeat a claim for the majority of attorney's fees in most SIBS cases as most of the legal work on a SIBS dispute would take place prior to and during the CCH and not afterward. This would effectively preclude attorney's fees in [a] SIBS situation and this is obviously not what the 1989 [Act] or the Rules of the [Commission] intended." The parties and the hearing officer urge that the Appeals Panel reconsider our decision in Appeal No. 950534, *supra*. The Appeals Panel has declined to do so in a number of cases. See Texas Workers' Compensation Commission Appeal No. 961924, decided November 14, 1996 (Unpublished); Texas Workers' Compensation Commission Appeal No. 970073, decided February 26, 1997, and cases cited therein; Texas Workers' Compensation Commission Appeal No. 970881, decided June 25, 1997 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 970957, decided July 3, 1997 (Unpublished). We again decline to revisit Appeal No. 950534, *supra*, in this case.

The claimant was determined not to be entitled to SIBS for the first quarter. He must have been determined by the carrier to be eligible for some succeeding quarters of SIBS, since he did not permanently lose his entitlement to SIBS. He was paid SIBS by the carrier for the seventh quarter, was determined by CCH decisions affirmed by the Appeals Panel not to be entitled to SIBS for the eighth and ninth quarters, paid SIBS by the carrier for the 10th quarter, and determined by CCH decisions affirmed by the Appeals Panel not to be entitled to SIBS for the 11th, 12th, and 13th quarters. The attorney has not argued that in paying SIBS for the 7th and 10th quarters, the carrier acted as agent for the Commission and determined he was entitled to SIBS. The attorney has also not presented evidence of a Commission determination of entitlement to SIBS for the eighth, ninth, 11th, 12th, or 13th quarter. Thus, even were we to reconsider Appeal No. 950534, *supra*, which we do not in

this case, the carrier would still not be liable for payment of fees to the attorney. Texas Workers' Compensation Commission Appeal No. 982935, decided January 29, 1999.

We reform Finding of Fact No. 12 to change the word "proceeding" to "preceding."  
We affirm the decision and order of the hearing officer as reformed.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge