

APPEAL NO. 000726

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). At a benefit review conference (BRC) the claimant and the respondent (self-insured, carrier) agreed that the claimant is entitled to supplemental income benefits (SIBs) for the second quarter but not entitled to SIBs for the first, third, fourth, and fifth quarters. The appellant (attorney), who represented the claimant at the BRC, requested \$2,235.00 in attorney's fees for services related to the BRC. A contested case hearing (CCH) was held on March 6, 2000, in San Antonio, Texas, with Norma Herrera presiding as hearing officer to determine whether the fees requested by the attorney were consistent with the 1989 Act and the Texas Workers' Compensation Commission (Commission) rules. The hearing officer determined that the attorney is entitled to \$387.00 in attorney's fees. The attorney appeals, contending that the hearing officer's requirement that the attorney apportion the hours requested between the SIBs quarters at issue is contrary to the plain meaning of the 1989 Act and contending that the hearing officer erred as a matter of law in ordering that the attorney's fees be paid from the claimant's income benefits. The carrier responds that the hearing officer correctly apportioned the fees among the SIBs quarters and that there was insufficient evidence to prove the Commission's initial determination and the agreed-upon determination as to the first quarter of SIBs was one of non-entitlement, resulting in the carrier's not being liable for the attorney's fees. The carrier asks that the hearing officer's decision be affirmed. The appeal file contains no response from the claimant.

DECISION

We affirm the decision and order of the hearing officer.

The attorney urges that we reverse our line of decisions which hold that, where the claimant has prevailed as to one or more quarters of SIBs and has not prevailed as to one or more other quarters of SIBs, the hearing officer must allocate the attorney's fees among the quarters. For that line of cases, see Texas Workers' Compensation Commission Appeal No. 983013, decided February 8, 1999 (Unpublished), and cases cited in that decision. The 1989 Act provides for the filing of statements quarterly by the claimant and for the opportunity for the carrier to quarterly contest payment of SIBs. We review SIBs cases considering each quarter separately. Thus, we do not interpret Section 408.147(c) as providing that if the attorney prevails as to any issue as to any quarter he is entitled to fees for all quarters. Instead, we interpret that provision to mean that if he prevails on any issue dealing with a quarter, he is to be paid his attorney's fees by the carrier for that quarter, thus carrying out the overall scheme of the 1989 Act to consider each quarter separately.

As to the attorney's contention that the hearing officer erred as a matter of law in making his fees payable from the claimant's benefits and the carrier's contention that it is not liable for any attorney's fees if the claimant did not prevail as to the first quarter of SIBs, that issue was not discussed by the parties at the CCH. However, the carrier's contention is

correct. There is no evidence in the record that the Commission's initial determination as to the first quarter of SIBs was that the claimant was entitled to SIBs. In Texas Workers' Compensation Commission Appeal No. 970999, decided July 11, 1997, the Appeals Panel stated:

In Texas Workers' Compensation Commission Appeal No. 950534, decided May 19, 1995, the Appeals Panel determined that the phrase "commission determination" in Section 408.147(c) is the Commission's initial determination with respect to the first quarter.

* * * *

In this instance, as the carrier points out, the Commission's initial determination was that the claimant was not entitled to the first quarter of SIBS. Because we have determined that the phrase "commission determination" is synonymous with the Commission's initial determination, we agree with the carrier that it was not contesting a Commission determination in this instance in proceeding to a hearing on the issue of the claimant's entitlement to SIBS for the first seven quarters. Admittedly, the carrier was contesting the claimant's entitlement to those benefits; however, the prerequisite of its disputing a Commission determination of entitlement was not satisfied. Thus, its liability for the claimant's attorney's fees under Section 408.147(c) was not triggered.

* * * *

In her response, the claimant's attorney notes that she is being "punished for agreeing to have all seven quarters disputed at one [CCH]." While we do not disagree that had the first quarter been tried separately, the carrier may well have been liable for attorney's fees incurred with respect to the litigation of the subsequent quarters, that does not change the fact that that is not what happened in this instance. The requirement that the carrier is disputing a Commission determination of entitlement simply was not satisfied herein and, as such, it is not liable for the fees incurred prior to the issuance of the hearing officer's decision and order. Rather, the fees are to be paid out of the claimant's benefits.

Since, in the case at hand, there is no evidence that the Commission's initial determination, for the first quarter of SIBs, was one of entitlement, Section 408.147(c) does not apply and the attorney's fees for the second quarter of SIBs are payable from the claimant's benefits.

Finally, the attorney, citing Section 410.208(c), contends that the hearing officer erred in setting a 15-day deadline for him to repay any fees in excess of the amount approved by the decision. The 15-day, rather than a 20-day, deadline is set by Rule 152.3(h). Under Section

410.208(c), a person commits an administrative violation if he or she fails to obey a Commission order or decision within 20 days of receipt of the order or decision.

We review attorney's fees cases under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 951196, decided August 28, 1995. Finding no abuse of discretion, we affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge