APPEAL NO. 001788

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 July 5, 2000, with the record closing on July 17, 2000. With regard to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) was not entitled to lifetime income benefits (LIBs).

The claimant appealed, contending that "she has total inability to gain and retain employment without use of both upper extremities." The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent/cross-appellant (carrier) appealed the hearing officer's comment, which found that whether Section 408.146(c) barred the claimant from even applying for LIBs, was moot and requests a ruling that as a matter of law the claimant was ineligible to even applying for LIBs.

DECISION

Affirmed as clarified.

Initially, we note that the claimant has had CCHs on prior quarters of supplemental income benefits (SIBs) which have resulted in Texas Workers' Compensation Commission Appeal No. 970055, decided February 20, 1997 (Unpublished) (for the 6th and 7th SIBs quarters); Texas Workers' Compensation Commission Appeal No. 971355, decided August 21, 1997 (Unpublished) (8th quarter SIBs); Texas Workers' Compensation Commission Appeal No. 980116, decided March 5, 1998 (Unpublished) (10th quarter SIBs); Texas Workers' Compensation Commission Appeal No. 981295, decided July 22, 1998 (Unpublished) (12th quarter SIBs); Texas Workers' Compensation Commission Appeal No. 982067, decided October 8, 1998 (Unpublished) (13th quarter SIBs); and Texas Workers' Compensation Commission Appeal No. 990276, decided March 24, 1999 (Unpublished) (14th quarter SIBs). In each of those cases (except for the 6th quarter in Appeal No. 970055, *supra*), we affirmed the hearing officer's decision that the claimant was not entitled to SIBs for that quarter. The claimant testified that she has filed for the 18th compensable quarter, but that her claim has been denied because she has not been entitled to SIBs for four consecutive quarters. The parties appear to agree that the claimant has not been entitled to SIBs for 12 consecutive months.

Many of the background facts are recited in the Appeals Panel decisions cited above and will not be repeated here. The claimant sustained a compensable upper extremity injury on _____. That injury includes ulnar nerve entrapment and apparently bilateral carpal tunnel syndrome (CTS). Appeal No. 982067, *supra*, recites that in addition to the injuries listed in the previous sentence, the claimant was also diagnosed with reflex sympathetic dystrophy (RSD) and depression. Appeal No. 990276, *supra*, affirmed a finding that the compensable injury of the ulnar and median nerves of both upper extremities was also a producing cause of the claimant's left CTS and left ulnar nerve

entrapment but was not a producing cause of a number of other conditions, including RSD and allergies. Consequently, we clarify that while the claimant may have been diagnosed with RSD, Appeal No. 990276 affirmed a finding that the compensable injury was not a producing cause of the RSD. The claimant now contends that she is entitled to LIBs.

Section 408.161(a) provides that LIBs are paid until the death of the employee for: (3) loss of both hands at or above the wrist . . . ." In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, we stated that the standard for determining whether a claimant is entitled to LIBs under the 1989 Act is the same as it was under the old law. Citing Travelers Ins. Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962), we noted that the test for total loss of use is whether the member (here, the claimant's upper extremities) possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the claimant from getting and keeping employment requiring the use of the member. *See also* Section 408.161(b). In Texas Workers' Compensation Commission Appeal No. 952100, decided January 23, 1996, we noted that the Seabolt test is disjunctive and that a claimant need only satisfy one prong of the test in order to establish entitlement to LIBs. *See also* Texas Workers' Compensation Commission Appeal No. 941065, decided September 21, 1994. That is, evidence supporting either of the definitions of total loss of use will support recovery. *See also* Texas Workers' Compensation Commission Appeal No. 000412, decided April 10, 2000, where we went on to quote the Texas Supreme Court in Seabolt which stated at 361 S.W.2d 206:

> Although a member may possess some utility as a part of the body, if its condition be such as to prevent the workman from procuring and retaining employment requiring the use of the injured member, it may be said that a total loss of use has taken place.

The hearing officer correctly recites the standard for determining total loss of use and summarizes the claimant's testimony as follows:

> Claimant testified that she has very limited use of her upper extremities and that she has substantial loss of strength, endurance and dexterity in both of her arms. Claimant testified that she can conduct most activities but only briefly and slowly and that it takes her some recovery time after she performs any activity requiring the use of her hands/arms. Claimant also testified that she cannot perform daily activities such as personal hygiene. Claimant testified that she is able to drive and that she does take long trips to visit her children twice per year. Claimant testified that she makes sure that her car is aligned and she wears gloves to protect her hands on these trips. Claimant testified that she sees her treating doctor two or three times a year and that she is unable to take pain medication, other than Tylenol, due to an allergic reaction to pain medications.

The claimant's treating doctor is Dr. A, who in a report of a January 19, 2000, visit, commented that the claimant "has total loss of the use of her wrists bilaterally due to the development of chronic, persistent [CTS]," that the claimant "has lost substantial utility of each of her wrists because of the [CTS] she has had since _____," and that Dr. A is of the opinion "that, as a result of the total loss of the use of each wrist, she cannot get and keep a position requiring the use of her hands." A Specific and Subsequent Medical Report (TWCC-64) of a June 20, 2000, visit notes "unchanged persistent symptomatology" and that the claimant "continues to be debilitated as a result of her chronic [CTS] affecting her ability to do normal tasks in her life." The hearing officer also references an October 7, 1996, functional capacity evaluation (FCE) and an Appeals Panel decision and concludes:

> Although [Dr. A] used the "magic words" in his letter dated January 28, 2000 regarding Claimant's condition and ability to work, the claimant failed to meet her burden of proving, by a preponderance of the evidence, that she meets the requirements for LIBS pursuant to Texas Labor Code Ann. §408.161.

The hearing officer found that the claimant has some use of both of her upper extremities and has the ability to perform sedentary physical demand level work with limited use of her upper extremities. The hearing officer found that the claimant had failed to meet the requirements of Section 408.161. The carrier points out that the Appeals Panel has consistently affirmed hearing officer's decisions that the claimant was not entitled to SIBs and that the claimant had some ability to work, although we point out, as does the claimant, that the standards for SIBs are different than those for LIBs. In any event, the hearing officer obviously carefully considered all the evidence and concluded that the claimant has not lost the substantial use of her hands at or above the wrist which would preclude her from either getting or keeping employment requiring the use of her hands. We conclude that the hearing officer's determinations on that point are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

At the CCH, the carrier also asserted that because the claimant had been found not entitled to SIBs for four consecutive quarters of SIBs, she would not be eligible to LIBs pursuant to Section 408.146(c), which states:

> Sec. 408.146. TERMINATION OF [SIBs]; REINITIATION.
>
> (c) Notwithstanding any other provision of this section, an employee who is not entitled to [SIBs] for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. (V.A.C.S. Arts. 8308-4.28(d), (e), (f).)

The carrier argues that "income benefit" is defined in Section 401.011(25) to mean "a payment made to an employee for a compensable injury" which term "does not include a medical benefit, death benefit or burial benefit." The carrier cites Texas Workers'

Compensation Commission Appeal No. 992191, decided November 4, 1999 (Unpublished), where in a parenthetical note, this author judge commented that Section 408.146(c) states that where an employee has permanently lost entitlement to SIBs the employee "ceases to be entitled to any additional income benefits [emphasizing the word any] not just SIBS." The carrier had also quoted that parenthetical comment in a similar factual case in Texas Workers' Compensation Commission Appeal No. 000754, decided May 24, 2000, where the Appeals Panel affirmed the hearing officer's decision regarding LIBs on the merits and declined to address the issue of whether loss of entitlement to SIBs for four quarters precluded an application for LIBs stating the "matter to be moot." The hearing officer, obviously having read those decisions, took the tack used in Appeal No. 000754, commenting that the question of whether or not the claimant could apply for LIBs after being found not entitled to SIBs for 12 consecutive months was "moot." Although prevailing on the merits in this case, the carrier nonetheless appeals requesting a ruling from the Appeals Panel regarding this specific question.

First, in reviewing Subchapter I of Chapter 408, we find no provision for the termination of LIBs based on non-entitlement to SIBs for 12 consecutive months; rather Section 408.161(c) provides that benefits will "be increased at a rate of three percent a year." (We speculate that the legislature never contemplated that an injured employee would progress through SIBs to LIBs but rather expected an injury so catastrophic as to warrant LIBs to be evident shortly after the injury.) Subchapter H of Chapter 408.141 deals with SIBs. Several sections later, in Section 408.146, a section entitled "Termination of [SIBs]; Reinitiation" Subsection (c)begins with "Notwithstanding any other provision of this section" and speaks of "additional income benefits." We believe that various sections of the 1989 Act must be read to harmonize with other sections. Further, the Texas Workers' Compensation Commission (Commission) has addressed the subject in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.106 (Rule 130.106) effective January 31, 1999. That rule states:

> Rule 130.106 Permanent Loss of Entitlement to [SIBs].
>
> (a) 12-Month Provision. Except as provided in §130.109 of this title (relating to Reinstatement of Entitlement if Discharged with Intent to Deprive of [SIBs]), an injured employee who is not entitled to [SIBs] for a period of four consecutive quarters permanently loses entitlement to such benefits. [Emphasis added.]

The history and public comment on this rule was limited to interpreting the wording of "12 consecutive months" in Section 408.146(c) to mean "four consecutive quarters." That aside, it appears fairly clear to us that the Commission interprets the phrase "any additional income benefits" in Section 408.146(c) to be limited to SIBs ("to such benefits" while talking about SIBs). We consider the Commission interpretation of Section 408.146(c) in Rule

130.106(a) to be dispositive and rule that the provision of Section 408.146(c) applies only to SIBs.

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur in the result. I write separately only to state my opinion that the Appeals Panel should not reach the issue of the applicability of Section 408.146(c) to LIBs in this case. According to the benefit review conference (BRC) report, the sole disputed issue was whether the claimant is not entitled to LIBs as she does not meet the provisions of Section 408.161. The record does not indicate that the carrier filed a response to the BRC report. The hearing officer decided the disputed issue of entitlement to LIBs on the merits of the evidence. Yet, the carrier in its appeal criticizes the hearing officer for deciding the disputed issue on the merits of the evidence and contends, as argued at the hearing, that the hearing officer should have decided that, based on the provisions of Section 408.126(c), the claimant was not entitled to LIBs. There was no specific disputed issue as to whether or not the provisions of Section 408.146(c) precluded the claimant from entitlement to LIBs. Since the sole disputed issue was decided by the hearing officer on the merits of the evidence and the Appeals Panel affirms that determination under the great weight of the evidence standard of review, we need not and should not go on to issue an advisory opinion on the reach of Section 408.146(c).

Philip F. O'Neill
Appeals Judge

CONCUR IN THE RESULT:

I concur in the result; however, I write separately on the interpretation of Section 408. 146 that provides:

TERMINATION OF [SIBs]; REINITIATION

(a) If an employee earns wages that are at least 80 percent of the employee's average weekly wage for at least 90 days during a time that the employee receives supplemental income benefits [SIBs], the employee ceases to be entitled to [SIBs] for the filing period.

(b) [SIBs] terminated under this section shall be reinstated when the employee:

(1) satisfies the conditions of Section 408.142(b); and
(2) files the statement required under section 408.143

(c) Notwithstanding any other provision of this section, an employee who is not entitled to [SIBs] for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury.

Review of Section 4.28, Act of the 71st Leg., 2d C.S., Ch.1, 1989 Tex. Gen. Laws 1 at 40, codified in the Act of the 73d Leg., Ch. 279, 1993 Tex. Gen. Laws, reveals that it is entitled SUPPLEMENTAL INCOME BENEFITS and that subsections (a), (b), and (c) pertain to the requirements to be eligible for SIBs and are contained in Sections 408.141and 408.142 of the 1989 Act as codified in the Labor Code. In Section 428 of the Act of the 71st Legislature, subsections (a), (b), and (c) are followed by:

(d) If an employee earns wages that are at least 80 percent of the employee's average weekly wage for a period of at least 90 days during which the employee is receiving [SIBs], the employee ceases to be entitled to [SIBs] for the filing period.

(e) [SIBs] that have been terminated under Subsection (d) of this section shall be reinstated when the employee satisfies the conditions enumerated in Subsection (c) of this section and files the statement required under Subsection (k) of this section.

(f) Notwithstanding any other provision of this section, if an employee is not entitled to [SIBs] for 12 consecutive months, the employee ceases to be entitled to any additional income benefits for the compensable injury.

(g) If the employee is discharged within 12 months of losing entitlement under Subsection (f) of this section, the commission may reinstate benefits if the commission finds that the employee was discharged at that time with the intent to deprive the employee of [SIBs].

Subsection (e) refers to subsection (d). Subsection (f) states notwithstanding any other provision of this section, which refers to Section 4.28, SUPPLEMENTAL INCOME BENEFITS. Subchapter H of the 1989 Act as codified in the Labor Code is entitled SUPPLEMENTAL INCOME BENEFITS. It appears that in a more literal codification, subchapter, rather than section, would have been used in Section 408.146(c).

Benefit is defined as "a medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury." Section 401.011(5). Income benefit is defined as "a payment made to an employee for a compensable injury. The term does not include a medical benefit, death benefit, or burial benefit." Section 401.011(25).

Section 408.101 provides that an employee is entitled to temporary income benefits if the employee has disability and has not attained maximum medical improvement (MMI). Generally, MMI is the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated or the expiration of 104 weeks from the date on which income benefits began to accrue. Section 401.011(30). An employee is entitled to three weeks of impairment income benefits (IIBs) for each percentage point of impairment. Section 408.121. One of the requirements for entitlement to SIBs is an impairment rating (IR) of 15% or more.

It appears that most employees seeking lifetime income benefits (LIBs) would have an injury that would result in the employee's reaching MMI after the expiration of 104 weeks. The minimum 15% IR for entitlement to SIBs would result in 45 weeks of IIBs. If an employee had never been entitled to SIBs, the 12 consecutive months in Section 408.146(c) would result in 52 weeks of nonentitlement to SIBs. The determination of nonentitlement would be made after the qualifying period and would not always be made at the end of the quarter for SIBs. However, it appears that in most cases, the determination of nonentitlement to SIBs for 12 consecutive months would normally be made more than 200 weeks, or about four years, after income benefits began to accrue. In my view in most factual situations, the medical information would indicate whether or nor an employee met the requirements for entitlement to LIBs in Section 408.161 well before that injured employee is not entitled to SIBs for 12 consecutive months.

In Continental Casualty Insurance Company v. Functional Restoration Associates, 19 S.W.3d 393, 398 (Tex. 2000) the Texas Supreme Court wrote:

> Our objective in construing a statute is to determine and give effect to the Legislature's intent. *See* Liberty Mut. Ins. Co. v. Garrison Contractors. Inc., 966 S.W.2d 482,484 (Tex. 1998). In so doing, we look first to the plain and common meaning of the statute's words. *See id.; see also* Fitzgerald v Advanced Spine Fixation Sys., Inc., 996 S.W.2d 864, 865 (Tex. 1999). We consider the entire statute, not simply the disputed portions. *See* State v. Terrell, 588 S.W.2d 784, 786 (Tex. 1979). Each provision must be construed in the context of the entire statute of which it is a part. *See*

> Bridgestone/firestone, Inc. v. Glyn-Jones, 878 S.w.2d 132, 133 (Tex. 1994) ("Only in the context of the remainder of the statute can the true meaning of a single provision be made clear.").

In Albertson's v. Sinclair, 984 S.W.2d 958, 961 (Tex. 1999) the Texas Supreme Court cited Ward v. Charter Oaks fire Ins. Co., 579 S.W.2d 909 (Tex. 1979) and wrote " we liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents." In Ward the workers' compensation law required that a party file a notice of intent with the Industrial Accident Board (Board) not later than 20-days after receiving a copy of an award from the Board. The claimant mailed a notice of intent to appeal on the 14th day, the United States Postal Service mistakenly returned the envelope with a notation that additional postage was due, the notice of intent to appeal was remailed, and it was received by the Board two days after the 20 day deadline. The lower court held that the notice of intent to appeal had not been timely filed. The Texas Supreme Court at page 910 wrote:

> A full reading of the Workers' Compensation Law reveals that the Legislature did not intend this result. The Workers' Compensation Law is to be liberally construed to effectuate the remedies which it grants.

Review of Section 408.146 reveals that in subsection (a) "ceases to be entitled to [SIBs]" is used and in subsection (b) "[SIBs] terminated" is used. However, in subsection (c) "ceases to be entitled to any additional income benefits for the compensable injury" is used. Reviewing Section 408.146 and other applicable Sections of the 1989 Act and considering the principle of liberal construction of the 1989 Act, I do not agree that the Legislature intended for 12 consecutive months of nonentitlement to SIBs to end only entitlement to SIBs, but to end entitlement to all income benefits including LIBs.

In the case before us, the claimant was injured on _____. Section 408.083 provides that an employee's eligibility for TIBs, IIBs, and SIBs terminates on the expiration of 401 weeks after the date of injury. In the case before us, it appears that 401 weeks expired on or about September 1, 2000.

Tommy W. Lueders
Appeals Judge