

## APPEAL NO. 001976

On June 1, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* The hearing officer resolved the disputed issue by deciding that the claimant, is entitled to supplemental income benefits (SIBs) for the 10th quarter. The appellant (carrier) appealed the hearing officer's decision on 10th quarter SIBs and the Appeals Panel affirmed the hearing officer's decision in Texas Workers' Compensation Commission Appeal No. 001448, decided August 3, 2000.

On August 7, 2000, the hearing officer issued an order for attorney's fees, approving \$1,660.00 in attorney's fees for the claimant's attorney, under Section 408.147(c) for legal services performed in connection with the carrier's dispute of 10th quarter SIBs. The carrier filed a request for review of attorney's fee order stating that the subject of the request for review is its exhibit 1 attached to the request, which is the attorney's fee order of August 7, 2000; however, the carrier states that it does not dispute that the order was properly generated in light of the fact that the carrier disputed the claimant's entitlement to 10th quarter SIBs, to which the Texas Workers' Compensation Commission (Commission) found the claimant to be entitled. The carrier states that it files the request for review to seek relief from an overpayment of attorney's fees paid to the claimant's attorney on this case in the amount of \$2,325.00. The carrier contends that the overpayment was made when it paid the claimant's attorney attorney's fees ordered by the hearing officer in a prior attorney's fees order for legal services performed by the claimant's attorney in connection with the carrier's dispute of ninth quarter SIBs.

### DECISION

Affirmed.

On March 2, 2000, a CCH was held to resolve the disputed issues of whether the claimant is entitled to SIBs for the eighth and ninth quarters and the hearing officer issued a decision that the claimant was not entitled to SIBs for the eighth quarter but was entitled to SIBs for the ninth quarter. The hearing officer's decision was distributed to the parties with a cover letter dated March 8, 2000.

On March 16, 2000, the hearing officer issued an order for attorney's fees, approving \$2,325.00 in attorney's fees for the claimant's attorney under Section 408.147(c) for legal services performed in connection with the carrier's dispute of ninth quarter SIBs. The carrier did not contest the March 16, 2000, attorney's fee order.

On March 20, 2000, the carrier filed a request for review of the hearing officer's decision awarding the claimant ninth quarter SIBs. The claimant did not appeal the hearing officer's decision denying him eighth quarter SIBs.

In Texas Workers' Compensation Commission Appeal No. 000570, decided May 4, 2000, the Appeals Panel reversed the hearing officer's decision awarding the claimant ninth quarter SIBs and rendered a decision that claimant is not entitled to ninth quarter SIBs.

On June 1, 2000, a CCH was held to resolve the disputed issue of whether the claimant is entitled to SIBs for the 10th quarter and the hearing officer issued a decision that the claimant is entitled to SIBs for the 10th quarter. The carrier appealed the hearing officer's decision on 10th quarter SIBs and in Appeal No. 001448, *supra*, the Appeals Panel affirmed the hearing officer's decision on 10th quarter SIBs.

On June 13, 2000, the claimant filed a petition in district court seeking judicial review of the Appeals Panel decision that determined that the claimant is not entitled to ninth quarter SIBs.

On August 7, 2000, the hearing officer issued an order for attorney's fees, approving \$1,660.00 in attorney's fees for the claimant's attorney under Section 408.147(c) for legal services performed in connection with the carrier's dispute of 10th quarter SIBs. The carrier's request for review of the August 7, 2000, attorney's fees order, which is a timely appeal of that order, does not actually dispute that order. The carrier states that it filed the request for review of the attorney's fee order of August 7, 2000, to seek relief from an overpayment of attorney's fees paid to the claimant's attorney in the amount of \$2,325.00, which is the amount of attorney's fees approved by the hearing officer in the order dated March 16, 2000.

The carrier states in its request for review that, at the time the carrier received the March 16 order for attorney's fees, there was no basis upon which to request review of the March 16 order with the Appeals Panel; that Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 152.3(d) (Rule 152.3(d)) did not provide the carrier sufficient time (15 days) to appeal the March 16 order in light of the fact that the case (on entitlement to ninth quarter SIBs) had not yet been reviewed by the Appeals Panel and the carrier had no indication whether or not the case would be affirmed or reversed at the time the payment of fees was required; that an appeal of the March 16 order pursuant to Rule 152.3(d) would not have prevented the overpayment in this case in light of the fact that a carrier is required to pay attorney's fees during the pendency of a contest or appeal pursuant to Rule 152.3(f); that it does not appear to be the intent of the rules addressing payment of attorney's fees to have the carrier to dispute every single order of attorney's fees in order to be protected just in case the order is subsequently reversible based upon a reversal of a SIBs determination; that the carrier timely filed an appeal of the ninth quarter SIBs determination; that the Appeals Panel subsequently reversed the hearing officer and rendered a decision that the claimant was not entitled to SIBs for the ninth quarter; that the Appeals Panel decision was not mailed to the carrier until May 5, 2000; and that it was impossible for the carrier to know that the attorney's fees ordered on March 16, 2000, were ordered in error because the SIBs determination had not yet been reversed.

The carrier further states in its request for review that the Commission's rules do not seem to address how or if a carrier can seek reimbursement for attorney's fees overpaid on this case as it previously described; that the subsequent injury fund does not provide any type of relief for overpaid attorney's fees; that the carrier has informally requested that the overpaid attorney's fees be reimbursed (by the claimant's attorney); and that the carrier has requested a CCH to determine the issues of: (1) whether the carrier is entitled to an order of reimbursement of attorney's fees in the amount of \$2,325.00 from the claimant's attorney pursuant to Rule 152.3(g); (2) whether the carrier is entitled to recoup its overpayment of attorney's fees in the amount of \$2,325.00 from future SIBs benefits owed to the claimant, if any; (3) and whether the carrier is entitled to recoup the overpayment of \$2,325.00 from future attorney's fees ordered and, if so, whether the carrier is limited to attorney's fees ordered on this particular claim.

The carrier states that it has not received confirmation of whether a CCH will be scheduled as requested (the claimant's response reflects that a CCH was scheduled for September 18, 2000, on the amount of or entitlement to attorney's fees under Rule 152.3(d)) and that it has not received reimbursement from the claimant's attorney. The carrier states that it feels that it would be appropriate to utilize "its credit of \$2,325 to offset the current order for attorney's fees in the amount of \$1,660.00" and request that the Appeals Panel let it know if that is the correct procedure. The carrier requests an order from the Appeals Panel ordering the claimant's attorney to reimburse the carrier for overpayments made as described in its request for review.

Rule 152.3(g) provides: "If an attorney has been paid more than authorized by the final order of the commission, the commission shall order that the excessive amount be reimbursed." The carrier did not timely contest the March 16, 2000, order on attorney's fees (see Rule 152.3(d) and (e)). In Texas Workers' Compensation Commission Appeal No. 971769, decided October 14, 1997, the Appeals Panel determined that where a carrier did not timely dispute two Commission orders for attorney's fees and it was subsequently determined that the claimant in that case was not entitled to SIBs for one of the quarters in issue, the two Commission orders for attorney's fees had become final and, therefore, Rule 152.3(g) was inapplicable, since the attorney's fees were authorized by orders that became final. In Appeal No. 971769, the Appeals Panel affirmed the hearing officer's decision that the carrier did not timely contest the Commission orders for attorney's fees and affirmed the hearing officer's order for the carrier to pay the attorney's fees in the amounts approved in the Commission orders for attorney's fees, with deduction for any amount already paid. See *also* Texas Workers' Compensation Commission Appeal No. 990533, decided April 16, 1999.

In the instant case, the carrier did not timely contest the March 16, 2000, Commission order for attorney's fees and thus that order became final. As noted in Appeal No. 971769, if the carrier in that case had wished to argue that the attorney's fees orders were premature since SIBs entitlement for one of the quarters was still in dispute, the proper way to do so was by timely contesting the Commission orders for attorney's fees. In the present case, since the attorney's fees in the March 16, 2000, Commission order for

attorney's fees were ordered by a hearing officer after a CCH (the CCH on entitlement to eighth and ninth quarter SIBs), the carrier could have requested review of that order by the Appeals Panel under Rule 152.3(e). The carrier knew by March 20, 2000, that it was requesting review of the hearing officer's decision awarding ninth quarter SIBs.

The Commission order for attorney's fees of August 7, 2000 (for the 10th quarter) is affirmed. The relief requested with regard to the Commission order for attorney's fees of March 16, 2000 (for the ninth quarter) is not granted.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

CONCUR IN THE RESULT:

I concur in the result only. The carrier would not have had grounds to contest ninth quarter attorney fees, so why would the Appeals Panel say that they waived any yet-to-be-established error in failing to appeal? The bottom line is that the Texas Workers' Compensation Commission has not provided for offset of attorney's fees in such situations as this. I do not concur in chastising the carrier for failing to "preserve error" by appealing because there was no error to preserve when the time to appeal ninth quarter attorney fees ran out.

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Judy L. Stephens  
Appeals Judge