

APPEAL NO. 033338
FILED FEBRUARY 12, 2004

This appeal on remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 9, 2003. The hearing officer determined that respondent 2 (claimant) was entitled to lifetime income benefits (LIBs) based on the loss of sight in both eyes; that respondent 1 (Subsequent Injury Fund (SIF)) was liable for LIBs pursuant to Section 408.162, and that those benefits began to accrue on August 10, 1997; and that appellant (carrier) was entitled to reimbursement from the SIF for overpayment of supplemental income benefits (SIBs). The SIF appealed the hearing officer's decision, contending that by not giving it an opportunity to show cause for its failure to appear at the hearing, it was not "afforded due process." In Texas Workers' Compensation Commission Appeal No. 031938, decided September 10, 2003, the Appeals Panel remanded the case to give the SIF an opportunity to show cause why it had failed to appear and for the hearing officer to take evidence on the merits of the case. On November 12, 2003, a hearing on remand was held. The hearing officer determined that the SIF had good cause for its failure to appear at the initial hearing; that the claimant is entitled to LIBs based on the total loss of sight in both eyes; that the SIF is liable for LIBs, which began to accrue on August 10, 1997; and that the carrier is not entitled to reimbursement from the SIF for the overpayment of SIBs¹. The carrier appeals the determinations that the SIF had good cause for failing to appear at the initial hearing and that the carrier is not entitled to reimbursement from the SIF for the overpayment of SIBs. The carrier additionally argues on appeal that the SIF is liable for reimbursing the carrier for the amount it paid in impairment income benefits (IIBs). The SIF responds, urging affirmance of the hearing officer's decision. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered in part; affirmed as reformed in part.

The hearing officer notes in her decision on remand that despite the fact that the SIF was not listed as a party to the initial litigation, the Appeals Panel remanded the case to give the SIF an opportunity to show good cause for its failure to attend the initial hearing. The hearing officer implies that if a party is erroneously omitted from the style of a case, that person/entity should not be considered to be a party and should not be entitled to the rights that are afforded to parties. The disputed issues made it clear that the SIF was indeed a party to the case. The fact that it was erroneously omitted from the style of the case does not negate its party status or otherwise abrogate its rights. For this reason, it was necessary for the hearing officer to afford the SIF an opportunity

¹ At both the initial hearing and the hearing on remand this issue was, generally, whether the SIF is liable for reimbursement to the carrier for the amount of **income benefits** it overpaid the claimant. The issue was not limited to the overpayment of only SIBs.

to show cause for its failure to attend the initial hearing. See Texas Workers' Compensation Commission Appeal No. 960464, decided April 22, 1996.

At the hearing on remand, the SIF explained that it did not appear on June 9, 2003, because "the expenditure of resources was not found necessary to dispute the carrier's request for determination of the amount of reimbursement if [sic] it could seek from the SIF." The SIF went on to explain that it believed the hearing officer's original decision was incorrect; "hence the need for us to request a remand and present evidence supporting our point of view." The hearing officer noted that "[i]n light of the Appeals Panel's clear intention that good cause be found for the SIF's failure to attend the original hearing (in that they also remanded the hearing to 'take evidence on the merits of the case' and 'further development of evidence and for consideration' of the issues involving the SIF, good cause was found for the SIF's failure to attend the original hearing. . . ." We fail to see how our attempt to ensure the preservation of the SIF's rights equates to a clear intention that the hearing officer find good cause for the SIF's failure to appear. Clearly, had the SIF not responded to the opportunity to show cause, there would have been no need to take additional evidence on the merits of the case. However, once the SIF appeared at the hearing on remand, it was entitled to present evidence on the merits of its case irrespective of the determination made by the hearing officer on the good cause issue. Given the explanation provided by the SIF for its failure to appear and the hearing officer's explanation for the basis of her good cause determination, we cannot agree that the SIF established good cause. Finding of Fact No. 4 is reversed and a new decision rendered that the SIF did not establish good cause for its failure to appear at the initial hearing on June 9, 2003.

On the merits of the case, the carrier argues that the hearing officer erred in determining that it is not entitled to reimbursement from the SIF for the carrier's overpayment of SIBs and IIBs. The evidence reflects that the claimant sustained a compensable injury in 1995, which included loss of vision in her right eye. The claimant had previously lost the vision in her left eye, due to a viral infection. The claimant's date of maximum medical improvement for the compensable injury was August 10, 1997, at which time she was assigned a 37% impairment rating (IR), which reflected impairment attributed to the compensable injury and did not include a rating for the loss of left eye vision. It is undisputed by the parties on appeal that the claimant is entitled to LIBs based on the total and permanent loss of sight in both eyes and that LIBs began to accrue on August 10, 1997. Based on the 37% IR, the carrier paid 111 weeks of IIBs. Upon the expiration of the IIBs period, the carrier initiated payment of SIBs. The carrier paid SIBs beginning November 2, 1999, and continuing through March 19, 2003, for a total in excess of \$59,000. The carrier now seeks reimbursement for the amounts of IIBs and SIBs paid to the claimant, which it characterizes as "overpayment."

We first address the carrier's argument with respect to the IIBs paid. Section 408.162(a) provides that "the insurance carrier is liable for the payment of benefits for the subsequent injury **only to the extent that the subsequent injury would have entitled the employee to benefits had the previous injury not existed**" (emphasis added). The evidence reflects that the carrier paid 111 weeks of IIBs, based on the

37% IR. As the hearing officer correctly points out, the 37% IR was assigned to the claimant for the compensable injury only; it does not include a rating for the left eye vision loss. For this reason, the hearing officer concluded that even though the SIF is liable for LIBs as of August 10, 1997, as the IIBs in question were paid based on a rating assigned for the "subsequent" injury and the claimant would have been entitled to these IIBs even in the absence of the left eye vision loss, the carrier is not entitled to reimbursement from the SIF for these payments. We perceive no error in the hearing officer's resolution of the issue of IIBs payments. However, although the hearing officer explained her rationale and decision with regard to the IIBs in the Statement of the Evidence, there are no findings of facts or conclusions of law made with respect to IIBs. The hearing officer's decision is reformed to reflect that the carrier is not entitled to reimbursement from the SIF for the payment of IIBs made to the claimant.

We next turn to the issue of the carrier's right to reimbursement from the SIF for the amount of SIBs paid to the claimant. The carrier asserts on appeal that had the previous injury not existed, the claimant would not have been entitled to SIBs and, therefore, the carrier is entitled to reimbursement from the SIF for the SIBs previously paid. The hearing officer explained that there was insufficient evidence to establish that the claimant would have been entitled to SIBs based solely on the compensable injury; however, she noted that the carrier did not dispute the claimant's entitlement to SIBs and paid approximately \$59,000 in benefits between November 1999 and March 2003. The hearing officer pointed out that there is no statutory provision allowing the carrier to obtain reimbursement from the SIF for SIBs payments that were not required to be made, and concluded that the carrier is not entitled to reimbursement from the SIF for the SIBs payments. We agree. If, as in the present case, the SIF is liable for LIBs, the carrier is not automatically liable for SIBs for the remainder of the 401-week period provided for in Section 408.083. *Texas Workers' Compensation Commission Appeal No. 030330-s*, decided April 2, 2003. However, after the carrier determined that the claimant was entitled to SIBs and paid the benefits, it could no longer contest the entitlement for the SIBs quarters paid. See *Texas Workers' Compensation Commission Appeal No. 032868-s*, decided December 11, 2003. There being insufficient evidence to establish that the claimant would not have been entitled to SIBs had the prior left eye injury not existed, the carrier is not entitled to reimbursement for the SIBs paid to the claimant.

The hearing officer's good cause determination is reversed and a new decision rendered that the SIF did not have good cause for its failure to appear at the initial hearing on June 9, 2003. The remainder of the hearing officer's decision and order are affirmed as reformed.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Chris Cowan
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge