

APPEAL NO. 040083
FILED MARCH 3, 2004

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 December 9, 2003. The hearing officer determined that attorney's fees "in the amount of \$5,175.11¹ are reasonable and necessary in sequence 88" and that the attorney's fees in sequence 88 are not covered by Section 408.147(c). The hearing officer ordered that attorney's fees in the amount of \$5,175.00 are to be deducted from "any future income benefits payable to Claimant, at a rate not to exceed 25% of any such income benefits." The claimant's absence, presumably at his request, was "excused."

The appellant (claimant's attorney) appeals, contending that the subject \$5,175.00 attorney's fees should be paid directly by the respondent (carrier) pursuant to Section 408.147(c). The carrier responds that the claimant's attorney is not entitled to the fees because they "do not fall within the stated parameters of Section 408.147(c) of the Act."

DECISION

Reversed and a new decision is rendered.

This is a supplemental income benefits (SIBs) attorney's fee case of first impression with a somewhat unusual twist. The claimant's attorney represented the claimant during certain periods of time including January 4 through December 19, 2001. The claimant filed a Request for Benefit Review Conference [BRC] (TWCC-45) for SIBs for the 17th quarter and entitlement was disputed by the carrier on or about January 4, 2001. A BRC was unable to resolve the matter and a CCH was conducted on June 4, 2001. Another hearing officer found that the claimant was not entitled to SIBs for the 17th quarter and the claimant appealed that decision to the Appeals Panel which, in Texas Workers' Compensation Commission Appeal No. 011765, decided September 7, 2001, affirmed the hearing officer's decision. In that the claimant lived in a county outside of (city), the claimant subsequently retained another attorney (attorney 2) to represent him in the District Court for that county. Attorney 2 was successful in obtaining an agreed settlement and the District Court entered a judgment in the amount of \$2,152.37 for the 17th quarter SIBs to the claimant and \$1,500.00 in attorney's fees to attorney 2. After receiving notice of the agreed judgment, the claimant's attorney filed an application for attorney's fees for services rendered from January 4 through December 19, 2001. In a Texas Workers' Compensation Commission (Commission) Order for Attorney's Fees (Order) dated October 2, 2003, the Commission ordered \$5,175.00 of attorney's fees paid pursuant to Section 408.147(c) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.1(f) (Rule 152.1(f)).

¹ The amount of \$5,175.11 appears to contain a typographical error and should read \$5,175.00.

Section 408.147(c) and Rule 152.1(f) provide that an attorney for an employee who prevails when a carrier contests a Commission determination of eligibility for SIBs shall be eligible to receive a reasonable and necessary attorney's fee, including expenses. This fee is payable by the carrier, not out of the employee's benefits, and the fee shall not be limited to a maximum of 25% of the employee's recovery. The hearing officer, in his Statement of the Evidence, did a step-by-step analysis of Section 408.147(c), and concluded, in the absence of specific authority, that the Commission had abused its discretion in ordering the carrier to pay the fees in the Commission Order "without deducting those fees from any future income benefits payable to Claimant." The claimant's attorney, in her appeal, asserts that the hearing officer "erred as a matter of law in ordering the attorney fees payable out of the claimant's benefits rather than payable by the Carrier." We agree with the claimant's attorney that with respect to the payment of the claimant's attorney's fees in a SIBs case, Section 408.147(c) and Rule 152.1(f) contemplate that reasonable and necessary attorney's fees are paid by the carrier and not out of the employee's benefits. There is no basis for ordering that the claimant's attorney's fees (which the hearing officer found were reasonable and necessary in sequence 88) are to be "deducted from any future income benefits payable to Claimant." We are cognizant that there may be no future income benefits payable to the claimant and that the claimant has not appealed that finding. Nonetheless, the claimant's attorney appealed that Order and we hold that the hearing officer erred in ordering SIBs attorney's fees in the amount of \$5,175.00 deducted from future income benefits payable to the claimant. We reverse that order and render a new decision that the \$5,175.00 attorney's fees found reasonable and necessary in sequence 88 are not to be deducted or paid out of any future benefits payable to the claimant.

With regard to the attorney's fees for the 17th quarter of SIBs, the claimant's attorney, for one reason or the other, declined to pursue the claimant's case in the District Court. Attorney 2 then took the case, filed suit and went to trial in the District Court. During the trial an agreement was reached and an agreed judgment was entered whereby the claimant would receive \$2,152.37 for the 17th quarter of SIBs and attorney 2 would receive \$1,500.00 in attorney's fees. The District Court had assumed jurisdiction of the matter and ordered the payment of attorney's fees. The claimant's attorney had failed to give notice to the carrier, the District Court, or apparently even attorney 2 that she had any further interest in the case. It was only after the claimant's agreed judgment, during a trial in District Court on July 31, 2003, due to the efforts of attorney 2, that the claimant's attorney filed her request for attorney's fees with the Commission for work performed in 2001. The District Court assumed jurisdiction of the 17th quarter SIBs case and by the agreed judgment disposed of the case, including the award of attorney's fees. With the rendition of a final judgment for the 17th quarter SIBs, including the award of attorney's fees, the District Court has pre-empted the jurisdiction of this case and we have no authority to take any further action regarding SIBs and attorney's fees for the 17th quarter.

Accordingly, the hearing officer's decision and order are reversed and we render a new decision that the claimant's attorney is not entitled to any attorney's fees for the

17th quarter of SIBs as the District Court has assumed jurisdiction of the matter and disposed of the case by a final judgment.

The true corporate name of the insurance carrier is **BRITISH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CHARLES HARDY
3535 TRAVIS, SUITE 300
DALLAS, TEXAS 75204.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge