

APPEAL NO. 041427
FILED AUGUST 13, 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 was held on May 12, 2004. The hearing officer determined that the respondent (claimant herein) is not entitled to supplemental income benefits (SIBs) for the 1st quarter; that the claimant is entitled to SIBs for the 2nd, 6th, and 10th quarters; that the claimant is not entitled to SIBs for the 3rd, 4th, 5th, 7th, 8th, 9th, 11th, 12th, and 13th quarters; that the appellant (self-insured herein) waived its right to contest SIBs for the 2nd through the 13th quarters by failing to timely request a benefit review conference (BRC); and that because of waiver, the self-insured is liable for SIBs for the 2nd through 13th quarters. The self-insured appeals, contending that it did timely request a BRC for all 13 quarters of SIBs. The claimant responds that the evidence shows that the self-insured only timely requested a BRC for the 1st quarter and therefore waived its right to contest SIBs for quarters 2 through 13. Neither party appeals the hearing officer's determination as to which quarters the claimant was entitled to SIBs and to which quarters the claimant was not entitled to SIBs and these determinations have become final pursuant to Section 410.169. However, pursuant to Section 408.147(b), the claimant is entitled to SIBs for quarters 2 through 13 by waiver.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The sole issue before us on appeal is whether or not the hearing officer erred in concluding that the self-insured waived its right to contest the claimant's entitlement to SIBs for the 2nd through the 13th quarters by failing to timely request a BRC. The self-insured argues strongly that under the unique facts of this case it did not waive its right to contest entitlement for these quarters. The claimant argues that the evidence showed that the self-insured only timely requested a BRC for the 1st quarter of SIBs.

Most of the facts of this case are not in dispute. It was undisputed that the claimant sustained a compensable injury on _____, while working for the self-insured. The claimant testified that he was a 25-year employee of the self-insured and that he was injured when a ladder upon which he was standing fell from under him. The claimant testified that his left foot was caught in the ladder and broken off. The claimant underwent surgery to reattach his left foot. The claimant testified that he underwent a series of six surgeries, culminating in the amputation of his left leg below the knee on June 9, 2003.

The parties also stipulated that the claimant reached maximum medical improvement on March 15, 1999, with a 32% impairment rating (IR), and the claimant did not elect to commute any portion of the impairment income benefits. The parties

further stipulated that the self-insured received the Texas Workers' Compensation Commission's (Commission) determination regarding SIBs for the 1st quarter on January 12, 2004.

The claimant testified that he received an Application for [SIBs] (TWCC-52) for each of the first 13 quarters from the Commission in January 2004.¹ The claimant testified that he completed the TWCC-52 for the 1st quarter and sent it to the Commission and completed the TWCC-52's for the 2nd through 13th quarters and sent those to the self-insured. The Commission determined that the claimant was entitled to the 1st quarter of SIBs and the self-insured received notice of this determination on the morning of January 12, 2004. The self-insured received the claimant's TWCC-52's for the 2nd through the 13th quarters during the afternoon of January 12, 2004. It was undisputed that the self-insured filed a Request for a Benefit Review Conference (TWCC-45) in which it checked the box for "Contesting the determination of entitlement to or amount of [SIBs] or whether the injured employee's underemployment is a direct result of the impairment." This TWCC-45, dated January 21, 2004, was file-stamped as received by the Commission on January 21, 2004.

The claimant testified that he received the TWCC-52's for the 2nd through the 13th quarters back from the self-insured indicating that the self-insured had denied SIBs for each of these quarters. The TWCC-52's for quarters 2 through 13 in evidence indicate that the self-insured denied SIBs for all of these quarters on January 21, 2004. Also in evidence is a printout of a Commission computer record which states that a Commission employee spoke to the self-insured's adjuster on February 4, 2004. The computer note of this conversation indicates that the Commission employee was told that on the same day the adjuster had disputed the Commission's approval of the 1st quarter and requested a BRC, she had returned the other quarters to the claimant with a denial of them.

Section 408.147(b) states as follows:

If an insurance carrier fails to make a request for a [BRC] within 10 days after the date of the expiration of the impairment income benefit period or within 10 days after receipt of the employee's [TWCC-52], the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

The self-insured contends on appeal that it complied with this statutory provision, as well as the interpretation of this provision found in Texas Workers' Compensation Commission Appeal No. 032868-s, decided December 11, 2003, because the TWCC-45 it filed constituted a dispute of entitlement to all 13 quarters of SIBs in dispute and not just to the 1st quarter of SIBs. As the self-insured points out, the TWCC-45 is ambiguous on its face in that the form does not indicate for which quarter a BRC is

¹ Apparently, there had been a delay in determining the claimant's eligibility for SIBs because the extent of his injury and his IR had been disputed and were not finally determined until somewhere around the time the Commission sent him the TWCC-52's.

being requested.

Based upon the evidence before her, the hearing officer resolved this ambiguity by making the following factual finding:

Carrier did not request a [BRC] to contest SIBs for the second through thirteenth quarters within 10 days of receiving applications from Claimant for [SIBs] for the second through thirteenth quarters.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find sufficient evidence to support the hearing officer's factual finding cited above. In light of this factual finding, we find no legal basis to reverse the decision of the hearing officer.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Edward Vilano
Appeals Judge