

APPEAL NO. 070653
FILED MAY 29, 2007

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 February 23, 2007. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to eighth quarter supplemental income benefits (SIBs) and that the respondent (carrier) did not waive the right to contest entitlement to the eighth quarter SIBs. The claimant appeals, disputing the determination regarding entitlement to SIBs for the eighth quarter as well as the determination that the carrier did not waive the right to contest entitlement to the eighth quarter SIBs. The carrier responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable low back and bilateral ankle injury on _____; (2) the claimant reached maximum medical improvement on January 16, 2004, with a 16% impairment rating; (3) the claimant has not commuted any impairment income benefits; (4) the qualifying period for the eighth SIBs quarter was from June 4 through September 2, 2006; and (5) the eighth SIBs quarter was from September 16 through December 15, 2006. At issue was whether the claimant was entitled to SIBs for the eighth quarter and whether or not the carrier waived its right to contest entitlement to SIBs for the eighth quarter.

The hearing officer found that the claimant had some ability to work during the eighth quarter qualifying period and did not make a good faith effort to obtain employment during the eighth quarter qualifying period commensurate with his ability to work. These findings are supported by the evidence.

The record reflects that the carrier received the claimant's Application for [SIBs] (DWC-52) for the eighth quarter on September 11, 2006. A CCH was held to decide the issue of entitlement to SIBs for the sixth and seventh quarter's on August 28, 2006. In that case, the hearing officer determined that the claimant was entitled to the sixth quarter but was not entitled to the seventh quarter. The hearing officer's decision and order was distributed to the parties on September 6, 2006. Both the carrier and the claimant timely filed appeals of that decision on September 25 and September 28, 2006, respectively. The carrier contends it was not required to request a benefit review conference (BRC) regarding the eighth quarter of SIBs because at the time it received the claimant's application the decision regarding entitlement to SIBs for the seventh quarter had not yet been appealed. The claimant contends that the carrier had an obligation to timely request a BRC because there was an ongoing dispute of the seventh quarter at the time the SIBs application for the eighth quarter was received by the carrier. The claimant argues the dispute is ongoing until a final determination has

been made by the Texas Department of Insurance, Division of Workers' Compensation (Division).

Section 408.147(b) provides as follows:

- b. 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 statement, the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

28 TEX. ADMIN. CODE §130.108 (d) and (e) (Rule 130.108 (d) and (e)) provide as follows:

- (d) Insurance Carrier Dispute; Subsequent Quarter With Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the insurance carrier has paid [SIBs] during the quarter immediately preceding the quarter for which the Application for [SIBs] is filed, the carrier shall dispute entitlement to the subsequent quarter by requesting a [BRC] as provided by §141.1 of this title (relating to Requesting and Setting a [BRC]) within 10 days after receiving the Application for [SIBs]. A carrier waives the right to contest the entitlement to [SIBs] for the subsequent quarter if the request is not received by the [Division] within 10 days after the date the insurance carrier received the Application for [SIBs]. The insurance carrier does not waive the right to contest entitlement to [SIBs] if the carrier has returned the injured employee's Application for [SIBs] pursuant to §130.104(c) of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters).
- (e) Insurance Carrier Disputes; Subsequent Quarter Without Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the carrier did not pay [SIBs] during the quarter immediately preceding the quarter for which the Application for [SIBs] is filed, the carrier shall send the determination to the injured employee within 10 days of the date the form was filed with the insurance carrier and include the reasons for the carrier's finding of non-entitlement and instructions about the procedures for contesting the carrier's determination as provided by subsection (b) of this section.

In Appeals Panel Decision (APD) 032868-s, decided December 11, 2003, the Appeals Panel stated that "[t]he 1989 Act and rules contain no specific provisions relating to the factual situation where the immediately preceding quarter is actively

under dispute at the time the carrier receives the [DWC-52] for the subsequent quarter” and that “the proper approach, when the rule does not fit the factual situation is to return to the statutory provision in the 1989 Act – Section 408.147(b).” In that decision, the Appeals Panel held that “when the issue of entitlement to the prior quarter of SIBs is ongoing and the claimant submits a [DWC-52] for the subsequent quarter, the carrier must timely request a BRC if it wishes to dispute the subsequent quarter, and failure to do so results in waiver as provided in Section 408.147(b).”

Subsequent Appeals Panel decisions have cited APD 032868-s, *supra*, for the proposition that where the immediately preceding quarter is “actively under dispute” at the time the carrier receives the DWC-52, the carrier must comply with the provisions of Section 408.147(b). APD 041362, decided July 27, 2004; and APD 041726, decided September 2, 2004.

As previously stated, the carrier received the DWC-52 on September 11, 2006. The carrier filed a Request for [BRC] (DWC-45) regarding the eighth quarter of SIBs. The DWC-45 was dated September 15, 2006. However, the DWC-45 was unsigned and in correspondence dated September 19, 2006, the Division acknowledged receipt of the request but refused to schedule a BRC because there was no “certification signature” on the DWC-45. See APD 972512, decided January 20, 1998. The carrier resubmitted a DWC-45 regarding the eighth quarter of SIBs on September 27, 2006. The claimant appealed the seventh quarter determination of non-entitlement made by the hearing officer. Since the time for filing an appeal of the immediately preceding quarter had not yet expired when the carrier received the DWC-52 for the eighth quarter, and the seventh quarter was in fact appealed, the issue of entitlement to the prior quarter of SIBs (the seventh quarter) was ongoing. The carrier failed to timely file a signed DWC-45 within 10 days after it received the DWC-52 for the eighth quarter. The hearing officer’s determination that the carrier did not waive the right to contest entitlement to eighth quarter SIBs is in error. We reverse the hearing officer’s determination that the carrier did not waive the right to contest entitlement to the eighth quarter SIBs and render a new determination that the carrier did waive the right to contest entitlement to the eighth quarter SIBs. Therefore, the determination that the claimant is not entitled to SIBs for the eighth quarter is also reversed and a new determination is rendered that the claimant is entitled to SIBs for the eighth quarter.

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

**LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge