

APPEAL NO. 080242
FILED APRIL 7, 2008

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 4, 2008. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the fourth quarter; that the claimant was not entitled to SIBs for the fifth quarter; and that the respondent (carrier) did not waive its right to contest the claimant's entitlement to SIBs for the fourth quarter. The claimant appealed, disputing the determinations of non-entitlement for both the fourth and fifth quarters as well as the determination that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the fourth quarter. The carrier responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____, that resulted in an impairment rating of 15% or greater; that the claimant did not commute any portion of the impairment income benefits; that the qualifying periods for the disputed quarters began June 1, 2007, and continued through November 29, 2007; and that the claimant did not receive SIBs for the third quarter.

FIFTH QUARTER SIBS

The hearing officer's decision that the claimant is not entitled to SIBs for the fifth quarter is supported by sufficient evidence and is affirmed.

FOURTH QUARTER SIBS

The hearing officer found that the claimant did not make a good faith effort to find employment commensurate with his ability to work. That finding is supported by the evidence.

With regard to the issue of whether the carrier waived its right to contest entitlement to SIBs for the fourth quarter, the record reflects and the hearing officer found in an unappealed finding, that the carrier received the claimant's Application for [SIBs] (DWC-52) for the fourth quarter on September 7, 2007. The evidence reflects that a CCH was held to decide the issue of entitlement for the third quarter SIBs on September 13, 2007, that the CCH decision determined that the claimant was not entitled to SIBs for the third quarter, and that the Texas Department of Insurance, Division of Workers' Compensation (Division) notified the parties that the hearing officer's decision, which was appealed to the Appeals Panel, became final on December 17, 2007. The carrier contends that it was not required to request a benefit review

conference (BRC) regarding the fourth quarter because it did not pay SIBs for the third quarter. The carrier additionally argues that it disputed the claimant's entitlement to SIBs for the fourth quarter on the DWC-52 itself on the day it was received. The hearing officer found that the carrier denied the claimant's entitlement to fourth quarter SIBs on September 7, 2007, as is reflected on the DWC-52 for the fourth quarter. The claimant contends that the carrier had an obligation to timely request a BRC to dispute entitlement to fourth quarter SIBs because there was an ongoing dispute of the third quarter at the time the SIBs application for the fourth quarter was received by the carrier. There is no evidence that the carrier requested a BRC on entitlement to fourth quarter SIBs, nor does the carrier assert that it did.

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.” At issue in APD 032868-s, *supra*, was whether the carrier had waived its right to contest entitlement to fourth and sixth quarter SIBs by not filing BRC requests to dispute those quarters, although it had not paid third and fifth quarter SIBs. The Appeals Panel noted 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 APD 032868-s, *supra*, 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; APD 041726, decided September 2, 2004; and APD 070653, decided May 29, 2007.

As previously noted, the carrier received the DWC-52 for the fourth quarter on September 7, 2007, and a CCH to determine entitlement for the third quarter of SIBs was held on September 13, 2007. The CCH decision in evidence for the third quarter SIBs issue states that a BRC had been held on July 20, 2007, to mediate resolution of that disputed issue, but the parties were unable to reach an agreement. Since the September 13, 2007, CCH to determine SIBs entitlement for the third quarter would have been scheduled under Rule 142.6 by September 7, 2007, the date the carrier received the DWC-52 for the fourth quarter, the issue of entitlement to the prior quarter of SIBs (the third quarter) was ongoing. The carrier failed to file a Request for a [BRC] (DWC-45) within 10 days after it received the DWC-52 for the fourth quarter. Therefore, applying APD 032868-s, *supra*, the hearing officer's determination that the carrier did not waive the right to contest entitlement to the fourth quarter of SIBs is in error. We reverse the hearing officer's determination that the carrier did not waive the right to contest entitlement to the fourth quarter of SIBs and render a new determination that the carrier did waive the right to contest entitlement to the fourth quarter of SIBs. Therefore, the determination that the claimant is not entitled to SIBs for the fourth quarter is also reversed and a new determination is rendered that the claimant is entitled to SIBs for the fourth quarter.

SUMMARY

The hearing officer's determination that the claimant is not entitled to SIBs for the fifth quarter is affirmed. The hearing officer's determination that the carrier did not waive the right to contest entitlement to the fourth quarter of SIBs is reversed and a new decision rendered that the carrier did waive the right to contest entitlement to the fourth quarter of SIBs. The determination that the claimant is not entitled to SIBs for the fourth quarter is reversed and a new decision rendered that the claimant is entitled to SIBs for the fourth quarter.

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

**CINDY GHALIBAF
5221 NORTH O'CONNOR BLVD., SUITE 400
IRVING, TEXAS 75039-3711.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge