

APPEAL NO. 090077  
FILED MARCH 19, 2009

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 April 10, 2008, with the record closing on December 29, 2008. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter, and that the appellant (carrier) waived the right to dispute the claimant's entitlement to third quarter SIBs by failing to timely request a benefit review conference (BRC).

The carrier appealed the hearing officer's SIBs entitlement and waiver determinations. The carrier asserted that the hearing officer's waiver determination is factually incorrect. The appeal file does not contain a response from the claimant.

**DECISION**

Reformed and affirmed in part and reversed and rendered in part.

We note that there are two Findings of Fact No. 5. Clearly the second Finding of Fact No. 5 should in fact be Finding of Fact No. 6. We reform the hearing officer's decision to consecutively number the Findings of Fact Nos. 1 through 8.

It is undisputed that the claimant sustained a compensable injury on \_\_\_\_\_. In an unappealed finding, the hearing officer found that the claimant reached maximum medical improvement (MMI) on August 23, 2006. The parties stipulated that: (1) the claimant reached MMI with an impairment rating of 15% or greater; and (2) the claimant has commuted none of his income benefits. In an unappealed finding, the hearing officer found that the third quarter of SIBs was from January 3 through April 2, 2008, and that the qualifying period was from September 21 through December 20, 2007.

**ENTITLEMENT TO SIBS**

The hearing officer's determination that the claimant is entitled to SIBs for the third quarter is supported by sufficient evidence and is affirmed.

**WAIVER OF RIGHT TO CONTEST SIBS ENTITLEMENT**

Section 408.147(b) provides that 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) (Rule 130.108(d)) provides in part that 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] (DWC-52) is filed, the carrier shall dispute entitlement to the subsequent quarter by requesting a BRC as provided by Rule 141.1 of this title (relating to Requesting and Setting a BRC) within 10 days after receiving the DWC-52. A carrier waives the right to contest the entitlement to SIBs for the subsequent quarter if the request is not received by the Texas Department of Insurance, Division of Workers' Compensation (Division) within 10 days after the date the insurance carrier received the DWC-52.

It is undisputed that the carrier paid the second quarter of SIBs. In the Background Information section of the decision, the hearing officer states that "[t]he evidence established that the [DWC-52] was faxed to [c]arrier on December 20, 2007 at 4:55 p.m. Carrier received the [DWC-52] on December 20, 2007 at 5:08 p.m., which is deemed the next business day, December 21, 2007. The deadline for [c]arrier to issue its determination of non-entitlement was December 31, 2007." Accordingly, the hearing officer found that the carrier received the claimant's DWC-52 "for the third quarter on December 20, 2007 at 5:08 p.m., which is deemed the next [working] day, December 21, 2007" and that the carrier filed its contest of claimant's entitlement to third quarter SIBs on January 3, 2008. Therefore, the hearing officer determined that the carrier waived the right to dispute the claimant's entitlement to third quarter SIBs by failing to timely request a BRC.

Review of the record indicates that the hearing officer's findings on waiver are factually incorrect because the hearing officer mistakenly referred to an incorrect date of "December 20, 2007," rather than "December 21, 2007." The record reflects that the DWC-52 for the third quarter of SIBs was faxed to the carrier on December 21, 2007, at 4:55 p.m., and that the carrier received the DWC-52 on December 21, 2007, at 5:08 p.m.

Rule 102.3(d) provides that "[a]ny written or telephonic communications received other than during normal business hours on working days are considered received at the beginning of normal business hours on the next working day." Further, Rule 102.3(c) establishes that "[n]ormal business hours in the Texas workers' compensation system are 8:00 a.m. to 5:00 p.m. Central Standard Time with the exception of the [Division's] El Paso field office whose normal business hours are 8:00 a.m. to 5:00 p.m. Mountain Standard Time." See Appeals Panel Decision 030105, decided February 21, 2003. The carrier received the DWC-52 on December 21, 2007, at 5:08 p.m. after "normal business hours," therefore the DWC-52 is deemed received by the carrier on the next working day, December 27, 2007.

Rule 102.3(b) defines working day as any day, Monday-Friday, other than a national holiday as defined by Texas Government Code, Section 662.003(a) and the Friday after Thanksgiving Day, December 24th and December 26th. In this case, the evidence established that the carrier received the DWC-52 after 5:00 p.m. on Friday, December 21, 2007. We note that the following dates are excluded as working days pursuant to Rule 102.3(b): (1) December 22 and 23, 2007 (Saturday and Sunday respectively both dates fall on a weekend); (2) December 24 and 26, 2007 (both dates

are state holidays pursuant to Section 662.003(b)); and (3) December 25, 2007 (Christmas Day, national holiday pursuant to Section 662.003(a)). Therefore, the next working day after Friday, December 21, 2007, is Thursday, December 27, 2007.

In an unappealed finding of fact, the hearing officer found that the “[c]arrier filed its contest of [c]laimant’s entitlement of third quarter [SIBs] on January 3, 2008.” The evidence establishes that the carrier requested a BRC within 10 days of December 27, 2007. Accordingly, we reverse the hearing officer’s determination that the carrier waived its right to contest the claimant’s entitlement to third quarter SIBs and we render a new decision that the carrier did not waive its right to contest the claimant’s entitlement to third quarter SIBs.

### **SUMMARY**

We affirm the hearing officer’s determination that the claimant is entitled to SIBs for the third quarter. We reverse the hearing officer’s determination that the carrier waived its right to contest the claimant’s entitlement to third quarter SIBs and we render a new decision that the carrier did not waive its right to contest the claimant’s entitlement to third quarter SIBs.

We reform the hearing officer’s decision to consecutively number the Findings of Fact Nos. 1 through 8.

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.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge