

APPEAL NO. 091061  
FILED SEPTEMBER 10, 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 June 16, 2009. The hearing officer determined that: (1) the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter; (2) the claimant is not entitled to SIBs for the second quarter; and (3) the respondent (carrier) has not waived its right to contest the claimant's entitlement to SIBs for the second quarter because it was not required to request a benefit review conference (BRC). The claimant appeals the hearing officer's determinations. The carrier responds, urging affirmance.

**DECISION**

Affirmed in part, reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, with an impairment rating of 15% or greater. The parties stipulated that the claimant's: (1) qualifying period for the first quarter was from September 20 through December 19, 2008; (2) qualifying period for the second quarter was from December 20, 2008, through March 20, 2009; (3) first quarter of SIBs was from January 2 through April 2, 2009; and (4) second quarter of SIBs was from April 3 through July 2, 2009.

**FIRST QUARTER SIBS**

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

**WAIVER OF RIGHT TO CONTEST ENTITLEMENT  
TO SECOND QUARTER SIBS**

In the background information of the decision, the hearing officer states that "the claimant's entitlement to first quarter [SIBs] was not actively being disputed at the time the [Application for [SIBs] (DWC-52)] for the second quarter [of SIBs] was received by the carrier." Further, the hearing officer stated in his decision that the claimant testified it delivered the DWC-52 for the second quarter on March 6, 2009, but the claimant did not request a BRC to dispute the denial of the first quarter until March 17, 2009. The hearing officer's finding that the carrier received the claimant's DWC-52 for the second quarter of SIBs on March 6, 2009, is factually incorrect. The evidence reflects that the carrier received the claimant's DWC-52 for the second quarter on March 26, 2009, rather than March 6, 2009, as determined by the hearing officer. In evidence is a copy of the claimant's DWC-52 for the second quarter dated March 26, 2009; a letter dated March 26, 2009, from the claimant's attorney to the carrier regarding the claimant's

DWC-52 for the second quarter of SIBs; and a fax cover and confirmation sheet both dated March 26, 2009, from the claimant's attorney to the carrier.

The hearing officer's finding that the claimant did not contest the denial of SIBs for the first quarter until March 17, 2009, when he filed a Request for a BRC (DWC-45) is supported by the evidence. However, the hearing officer's conclusion that the carrier has not waived its right to contest the claimant's entitlement to SIBs for the second quarter because it was not required to request a BRC is in error.

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 [Texas Department of Insurance, Division of Workers' Compensation (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) 051130-s, decided July 12, 2005, the Appeals Panel cited to APD 032868-s, decided December 11, 2003, which 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)."

In the instant case, the Division issued a notice of non-entitlement for the first quarter of SIBs on December 5, 2008. In an unappealed finding of fact, the hearing officer found that the claimant did not contest the denial of SIBs for the first quarter until March 17, 2009, when it filed a DWC-45. Thereafter, the carrier received the claimant's DWC-52 for the second quarter of SIBs on March 26, 2009. The evidence establishes that the first quarter of SIBs was actively in dispute when the carrier received the claimant's DWC-52 for the second quarter of SIBs on March 26, 2009, and that the carrier did not request a BRC within 10 days after receiving the claimant's DWC-52 to contest entitlement to SIBs for the second quarter of SIBs. Consequently, the carrier waived the right to contest entitlement to SIBs for the second quarter. The hearing officer's decision that the carrier did not waive the right to contest entitlement to SIBs for the second quarter because it was not required to request a BRC is reversed and a new decision is rendered that the carrier waived the right to contest entitlement to SIBs for the second quarter.

### **SECOND QUARTER SIBS**

Because we have reversed and rendered a new decision that the carrier waived the right to contest entitlement to SIBs for the second quarter, we likewise reverse the hearing officer's decision that the claimant is not entitled to SIBs for the second quarter and render a new decision that the claimant is entitled to SIBs for the second quarter.

### **SUMMARY**

We affirm the hearing officer's decision that the claimant is not entitled to SIBs for the first quarter.

We reverse the hearing officer's decision that the carrier did not waive its right to dispute entitlement to SIBs for the second quarter because it was not required to request a BRC and render a new decision that the carrier waived its right to dispute entitlement to SIBs for the second quarter. We reverse the hearing officer's decision that the claimant is not entitled to SIBs for the second quarter and render a new decision that the claimant is entitled to SIBs for the second quarter.

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

**CORPORATION SERVICE COMPANY  
701 BRAZOS, SUITE 1050  
AUSTIN, TEXAS 78701.**

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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