

APPEAL NO. 091146  
FILED SEPTEMBER 24, 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 July 2, 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 by failing to timely request a benefit review conference (BRC). The claimant appealed, disputing the hearing officer's determinations. The carrier responded, 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 at least 15%. Additionally, the parties stipulated that: (1) the qualifying period for the first quarter was from October 20, 2008, through January 18, 2009; (2) the qualifying period for the second quarter was from January 19 through April 19, 2009; (3) the first quarter of SIBs was from February 1 through May 2, 2009; (4) the second quarter of SIBs was from May 3 through August 1, 2009; (5) on January 30, 2009, the claimant filed her initial Application for [SIBs] (DWC-52) for the first quarter of SIBs; (6) on February 10, 2009, the Texas Department of Insurance, Division of Workers' Compensation (Division) issued a letter of non-entitlement; and (7) on February 20, 2009, the claimant filed a request for a BRC on SIBs entitlement for the first quarter.

**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**

The evidence reflects that the carrier received the claimant's DWC-52 for the second quarter on April 22, 2009. In evidence is a copy of the claimant's DWC-52 for the second quarter dated April 20, 2009; a letter dated April 22, 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 April 22, 2009, from the claimant's attorney to the carrier.

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.

The hearing officer cited Appeals Panel Decision (APD) 023229, decided February 4, 2003, stating Rule 130.108(e) does not in its terms provide that failure to comply with the rule will result in waiver with respect to a subsequent quarter.

In 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)." The Appeals Panel noted in APD 032868-s 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).” Subsequent Appeals Panel decisions have cited APD 032868-s, 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; APD 070653, decided May 29, 2007; and APD 080242, decided April 7, 2008.

In the instant case, the parties stipulated that the Division issued a notice of non-entitlement for the first quarter of SIBs on February 10, 2009, and that the claimant filed a request for a BRC on SIBs entitlement for the first quarter on February 20, 2009. The evidence established that the carrier received the claimant’s DWC-52 for the second quarter of SIBs on April 22, 2009. Therefore, 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 April 22, 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. 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 by failing to timely 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 **NEW HAMPSHIRE 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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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge