

APPEAL NO. 100384  
FILED MAY 26, 2010

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 March 2, 2010. The hearing officer resolved the sole issue by deciding that the respondent (claimant) is entitled to lifetime income benefits (LIBs) based on the loss of use of both hands and both feet as of January 8, 2003. The appellant (self-insured) appealed, arguing that the conditions of which the claimant allegedly suffers are not supportive of a determination of entitlement to LIBs. Additionally, the self-insured argues that the evidence is insufficient to support a determination of entitlement to LIBs as of January 8, 2003. The claimant responded, urging affirmance of the hearing officer's determination of LIBs entitlement as of January 8, 2003.

DECISION

Reversed and remanded.

The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury. The medical records indicate that the claimant had cervical spinal surgery on October 13, 2001, and on January 6, 2005, and that the claimant had lumbar spinal surgery on February 2, 2006.

The claimant claims entitlement to LIBs based on one or more of the provisions in Section 408.161(a) to include subsections: (2) loss of both feet at or above the ankle; (3) loss of both hands at or above the wrist. Section 408.161(b) provides that for purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part. In Appeals Panel Decision (APD) 022129, decided October 3, 2002, the Appeals Panel compared Sections 408.161(a) and (b) with the predecessor statutes; took note of the pertinent commentary in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM § 4b.31 at 4-135 footnote 468; and held that "total loss of use" of a member of the body means that such member no longer possesses any substantial utility as a member of the body, or the condition of the injured worker is such that the worker cannot get and keep employment requiring the use of such member, which is the test set forth in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex. 1962). See APD 941065 decided September 21, 1994. We have also noted that the Seabolt test is disjunctive and that a claimant needed only satisfy one prong of the test in order to establish entitlement to LIBs. See APD 022129.

The hearing officer found that the evidence was sufficient to establish that the claimant no longer possesses any substantial utility of and/or total and permanent loss of use of both hands and both feet as a member of the body. There is sufficient evidence to support that finding.

Additionally, the hearing officer found that the evidence was sufficient to establish that the claimant's condition is such that he cannot get and keep employment requiring the use of both hands and both feet as of January 8, 2003. In Mid-Century Ins. Co. v. Tex. Workers' Comp. Comm'n, 187 S.W.3d 754, 758 (Tex. App.-Austin 2006, no pet.), the court held that an employee is eligible to receive LIBs on the date that the employee suffers from one of the conditions specified in Section 408.161 and further that Section 408.161 does not permit payment of LIBs prior to that date. The Court additionally held that once an employee is adjudicated eligible to receive LIBs, LIBs should be paid retroactively to the date the employee first became eligible. In its appeal, the self-insured correctly notes that the only information regarding the specific date of January 8, 2003, is a progress note of that date which states: "MRI reviewed C3-4 stenosis, 4-5 in lesser degree. Still very weak in general, needs a walker to ambulate. [Received] a functional capacity, [referred] rehab-P.T." This progress note is insufficient to establish a date when the claimant became eligible to receive LIBs under the standard set out in Mid-Century. In evidence were various other medical records of differing dates which discussed the reasons the claimant would be unable to get and keep employment requiring the use of his hands and feet.

The hearing officer was persuaded that the evidence presented was sufficient that the claimant has a loss of both hands and both feet, that the claimant no longer possesses any substantial utility of both hands and both feet, and that the claimant's condition is such that he cannot get and keep employment requiring the use of both hands and both feet as a result of the compensable injury he sustained on \_\_\_\_\_. Although that finding is supported by the evidence, the hearing officer's determination of the date of January 8, 2003, as the date of the claimant's eligibility for LIBs is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Therefore, we reverse the hearing officer's determination that the claimant is entitled to LIBs based on the loss of use of both hands and both feet as of January 8, 2003, and remand this case to the hearing officer to find a date of eligibility to receive LIBs supported by the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**RG, SUPERINTENDENT  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

---

Margaret L. Turner  
Appeals Judge

CONCUR:

---

Thomas A. Knapp  
Appeals Judge

---

Veronica L. Ruberto  
Appeals Judge