

APPEAL NO. 111238
FILED SEPTEMBER 28, 2011

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 July 15, 2011. With regard to the two disputed issues before him, the hearing officer determined that: (1) the respondent (carrier) did not waive its right to contest the appellant's (claimant) entitlement to supplemental income benefits (SIBs) for the 9th quarter because it timely filed its Request for a Benefit Review Conference (BRC) (DWC-45) and timely notified the claimant of its denial and the reasons for the denial; and (2) the claimant is not entitled to SIBs for the 9th quarter, April 27, 2011, through July 26, 2011.

The claimant appealed the determinations on both issues but concentrated his appeal on a waiver argument contending a lack of proper documentation on the carrier's DWC-45. The carrier responded, urging affirmance of both issues and contending that the carrier's adjuster had provided the proper documentation with its initial DWC-45.

DECISION

Reversed and rendered.

The claimant was alleging entitlement to SIBs for the 9th quarter on alternative theories of active work search efforts (28 TEX. ADMIN. CODE § 130.102(d)(1)(D) (Rule 130.102(d)(1)(D))), total inability to work (Rule 130.102(d)(1)(E)), reasonable grounds for failing to comply with the work search requirements (Rule 130.102(d)(2)), and the carrier's failure to timely dispute by requesting a BRC (Rule 130.108(c)).

The parties stipulated that the claimant had sustained a compensable injury on (date of injury), with an impairment rating (IR) of 15%, that impairment income benefits (IIBs) had not been commuted, and that the claimant did not earn at least 80% of his average weekly wage during the qualifying period for the 9th quarter of SIBs. The parties further stipulated that the qualifying period for the 9th quarter of SIBs began on January 13, 2011, and ended on April 13, 2011. The parties also stipulated that the carrier received the claimant's Application for [SIBs] (DWC-52) for the 9th quarter on April 20, 2011, and at the time the carrier received the claimant's DWC-52 for the 9th quarter, the 8th quarter (of SIBs) had been paid but was still under dispute.

The claimant contends this is a case of first impression and the resolution of the case hinges on whether the carrier's DWC-45 was sufficient to dispute entitlement to a subsequent quarter of SIBs.

DISPUTE OF SIBS ENTITLEMENT

Section 408.147(b) provides:

- (b) If an insurance carrier fails to make a request for a [BRC] within 10 days after the date of the expiration of the [IIBs] 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].

Rule 130.108(c) provides:

- (c) 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 [DWC-52] is filed, the insurance carrier shall dispute entitlement to the subsequent quarter by requesting a [BRC] as provided by Chapter 141 of this title (relating to Dispute Resolution – [BRC]) within 10 days after receiving the [DWC-52]. An insurance 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].

Rule 141.1, effective October 1, 2010, provides in part:

- (d) Request for [BRC]. A request for a [BRC] shall be made in the form and manner required by the [D]ivision. The request shall:
 - (1) identify and describe the disputed issue or issues;
 - (2) provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues, including but not limited to, copies of the notification provided in accordance with subsection (a) of this section, correspondence, e-mails, facsimiles, records of telephone contacts, or summaries of meetings or telephone conversations . . . ;
 - (3) contain a signature by the requesting party attesting that reasonable efforts have been made to resolve the disputed issue(s) prior to requesting a [BRC], and that any pertinent information in their possession has been provided to the other parties . . . ; and
 - (4) be sent to the [D]ivision and opposing party or parties.

- (e) Complete Request. A request that meets the requirements of subsection (d) of this section is a complete request for a [BRC]. The [D]ivision will schedule a [BRC] if the request is complete and otherwise appropriate for a [BRC].
- (f) Incomplete Request. A request for a [BRC] that does not meet the requirements of subsection (d) of this section is an incomplete request and will be denied.
 - (1) A denied request for a [BRC] does not constitute a dispute proceeding, except as provided by subsection (g) of this section.
 - (2) The [D]ivision will notify the parties if a request is denied and state the reasons for the denial.
 - (3) Upon notice from the [D]ivision, the requesting party may submit a new request for a [BRC] that meets the requirements of this section.
- (g) Incomplete Request Denials. If a party disagrees with the [D]ivision's determination that the request was incomplete, or, if a party has good cause for failing to meet the requirements of subsection (d) of this section, the party may pursue an administrative appeal of the [D]ivision's determination in accordance with Chapter 142 of this title (relating to Dispute Resolution—[CCH]). The party may also request an expedited [CCH] in accordance with [Rule] 140.3 of this title (relating to Expedited Proceedings).

In this case, the parties stipulated that: (1) the carrier received the claimant's DWC-52 for the 9th quarter on April 20, 2011; (2) the carrier filed a DWC-45 requesting a BRC to dispute the 9th quarter of SIBs on April 28, 2011, and attached a Notice of Dispute Issue(s) and Refusal to Pay Benefits (PLN-11) denying the claimant's entitlement to the 9th quarter of SIBs explaining the reasons for the denial; (3) the carrier sent a copy of these documents to the claimant the same day; and (4) the Division rejected the carrier's DWC-45 due to failure to specify the efforts to resolve the dispute prior to filing the DWC-45. The Division's determination rejecting the carrier's DWC-45 was not appealed nor did the carrier request an expedited CCH on an incomplete request denial pursuant to Rule 141.1(g). The parties also stipulated that an amended DWC-45 disputing the claimant's 9th quarter of SIBs was filed on May 10, 2011, a date more than 10 days after the date the carrier received the DWC-52 for the 9th quarter.

Section 410.007, in part, requires the Division to determine the type of information that is most useful to parties to help resolve disputes regarding income benefits. Section 410.023, in part, requests the party requesting the BRC to provide documentation of efforts made to resolve the disputed issues before requesting the BRC.

The hearing officer, in his Background Information, commented:

Carrier filed a DWC-45 form requesting a [BRC] in order to dispute the 9th quarter of [SIBs] on April 28, 2011, and attached a PLN-11 denying [c]laimant's entitlement to 9th quarter [SIBs] and explaining the reasons for the denial, and sent a copy of these documents to [c]laimant the same day. The Division rejected [c]arrier's DWC-45 due to failure to specify the efforts to resolve the dispute prior to filing the DWC-45. Carrier then filed on May 10, 2011, an amended DWC-45 with more detail as to its resolution efforts which was accepted and acted upon by the Division.

Under these facts the filing of the DWC-45 on April 20, 2011, was timely even though it was determined to be incomplete. While Rule 141.1 discusses the penalty for failure to comply with the requirements of that rule relating to documentation of efforts to resolve the dispute prior to requesting a BRC, the prescribed penalty for filing an incomplete DWC-45 is to deny the BRC, not [c]arrier waiver of right to dispute.

We disagree. Rule 141.1(f) discusses the penalty for submitting an incomplete request. The penalty is to not only deny the request for a BRC but also "a denied request for a [BRC] does not constitute a dispute proceeding" The whole purpose of filing a DWC-45 was to dispute the claimant's entitlement to SIBs for the 9th quarter. Rule 141.1(f)(1) is clear that an incomplete DWC-45 "does not constitute a dispute proceeding"

Rule 141.1 and the preamble to Rule 141.1 (35 Tex.Reg. 7430, 2010) make clear that all the requirements of Rule 141.1(d) must be met and if the requirements of subsection (d) are not met, the request is an incomplete request which will be denied. Rule 141.1(f)(1) makes clear that a denied request for a BRC does not constitute a dispute proceeding.

The carrier, having failed to file a timely request for a BRC has also failed to timely dispute entitlement to SIBs pursuant to Rule 130.108(c) for the 9th quarter. We reverse the hearing officer's determination that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the 9th quarter by failing to timely request a BRC. We render a new decision that the carrier has waived its right to contest the claimant's entitlement to SIBs for the 9th quarter by failing to timely request a BRC in accordance with Rule 141.1.

In that we have reversed the hearing officer's determination on the carrier waiver issue, we also reverse the hearing officer's determination that the claimant is not entitled to SIBs for the 9th quarter and render a new decision that the claimant is

entitled to SIBs for the 9th quarter, April 27, 2011, through July 26, 2011, on the basis of carrier waiver. We do not render an opinion on the claimant's other theories of recovery under Rules 130.102(d)(1)(D) or 130.102(d)(1)(E).

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

**MR. RON O. WRIGHT, PRESIDENT
6210 HWY 290 EAST
AUSTIN, TEXAS 78723.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge