

APPEAL NO. 033137-s
FILED JANUARY 20, 2004

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 November 3, 2003. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter, and that the respondent (carrier) did not waive the right to contest the claimant's entitlement to first quarter SIBs. The claimant appealed, asserting legal error and arguing that the hearing officer's determinations are against the great weight of the evidence. The carrier responded, urging affirmance.

DECISION

Reversed and rendered.

Because resolution of the issue of whether or not the carrier waived the right to contest the claimant's entitlement to SIBs for the first quarter is dispositive to the outcome of this matter on appeal, waiver will be addressed first. The hearing officer made the following findings of fact, none of which have been disputed on appeal, which are critical to the legal determination of whether or not the carrier waived the right to contest the claimant's entitlement to first quarter SIBs:

8. The Claimant signed an [Application for [SIBs] (TWCC-52)] for [first] quarter [SIBs] on April 22, 2003, and through his attorney faxed this application to the Carrier on the same day.
9. The Carrier received the Claimant's [TWCC-52] for [first] quarter [SIBs] on April 22, 2003.
10. The Carrier disputed the Claimant's entitlement to [first] quarter [SIBs] by filing a [Request for a Benefit Review Conference (BRC) (TWCC-45)] with the [Texas Workers' Compensation Commission (Commission)] on April 24, 2003.
11. By letter dated May 7, 2003, the Commission determined that the Claimant was entitled to [first] quarter [SIBs].
12. The Carrier did not file with the Commission a second request for a [BRC] (TWCC-45) after receiving the Commission's initial determination of entitlement to [first] quarter [SIBs].

In his Statement and Discussion of the Evidence, the hearing officer concluded that the "Carrier clearly disputed first quarter [SIBs] under the theory presented by the Claimant within 10 days of the application, or 'statement' as used in Section 408.147. It complied

with the statute. The compliance with the statute also constituted compliance with [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c))] under the guidance contained in [Texas Workers' Compensation Commission Appeal No. 030554, decided April 16, 2003] for the interpretation of the word 'after.' I find that the Carrier timely requested a [BRC] and did not waive the right to contest the Claimant's entitlement to first quarter [SIBs]."

Section 408.147(b) provides the following:

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 [IIBs] period or within 10 days after receipt of the employee's statement [TWCC-52], 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 the following:

Insurance Carrier Dispute; First Quarter. If a carrier disputes a commission finding of entitlement to, or amount of, [SIBs] for the first quarter, the insurance carrier shall request a [BRC] as provided by § 141.1 of this title (relating to Requesting and Setting a [BRC]) within 10 days after receiving the commission determination of entitlement. A carrier waives the right to contest the commission's determination of entitlement to, or amount of, [SIBs] for the first quarter if the request is not received by the commission within 10 days after the date the insurance carrier received the determination.

Section 402.061 provides the following:

The commission shall adopt rules as necessary for the implementation and enforcement of this subtitle.

On appeal, the claimant asserts that the carrier waived the right to contest the claimant's entitlement to first quarter SIBs due to its failure to comply with Rule 130.108(c), and additionally asserts that Appeal No. 030554, *supra*, is distinguishable on its facts, and not applicable to this case. The carrier asserts that the hearing officer should be affirmed despite the fact that it did not file a TWCC-45 within 10 days of receiving the Commission's initial determination of entitlement as is required by Rule 130.108(c), because it did file a TWCC-45 in accordance with Section 408.147(b). The carrier asserts that Section 408.147(b) allows a carrier to file a TWCC-45 prior to the Commission making its initial determination of entitlement. The carrier points to Appeal No. 030554 as being supportive of its position that an early filing constitutes a timely dispute. Finally, the carrier asserts that the hearing officer should be affirmed because Rule 130.108(c) does not contemplate the factual scenario presented in this case, therefore, the case should be decided by returning to the provisions of Section 408.147(b), which does not require the carrier to wait until the Commission makes its

initial determination of entitlement before filing its TWCC-45. As authority for this proposition, the carrier cites Texas Workers' Compensation Commission Appeal No. 032868-s, decided December 11, 2003.

The hearing officer erred in determining that the carrier did not waive the right to contest the claimant's entitlement to first quarter SIBs. The carrier maintains that Section 408.147(b) provides two options for contesting entitlement to first quarter SIBs and that as such, it could either contest entitlement in this instance by filing its request for a BRC within 10 days of the expiration of the IIBs period or within 10 days of the date it received a copy of the claimant's application for first quarter SIBs. We find no merit in this argument. The distinction drawn as to what is required of the carrier in order to avoid waiver in Section 408.147(b) is the result of the acknowledgement of the differences in how a claimant is to apply for first quarter SIBs as opposed to subsequent quarters. That language does not, as the carrier argues, provide options for the carrier of how it will contest entitlement to first quarter SIBs. Rather, it merely identifies how the carrier can timely contest entitlement to both first quarter SIBs and subsequent quarters. Rule 130.108(c) is clear and unambiguous. It explicitly mandates what, and when, a carrier must do if it intends to dispute a claimant's entitlement to first quarter SIBs. Before the Commission issues the initial determination regarding entitlement or nonentitlement, there is nothing to dispute and, indeed, if the Commission determines that the claimant is not entitled to SIBs for the first quarter, the carrier has nothing to dispute. Rule 130.108(c) specifically provides that it is receipt of the Commission's initial determination of entitlement, not the claimant's application, which triggers the carrier's obligation to request the BRC in order to avoid waiver. We note additionally that Rule 130.103(a) provides that the Commission's determination of entitlement or nonentitlement to first quarter SIBs "shall be made not later than the last day of the [IIBs] period"; thus, the 10-day periods in Rule 130.108(c) and in Section 408.147(b) are defined as the same period. Any action taken by the carrier to dispute the claimant's entitlement to first quarter SIBs prior to the Commission's initial determination of entitlement is simply premature and of no effect.

We cannot agree with the hearing officer's reliance on Appeal No. 030554, *supra*, to support his determination that the carrier's request for a BRC filed before the Commission made the initial determination of entitlement to SIBs was effective to avoid waiver in this case. For the hearing officer to have read Appeal No. 030554 as providing a different interpretation of the word "after" is an over reading of that case. In Appeal No. 030554, the claimant filed her TWCC-52s for second and third quarter SIBs before the Commission had made its initial determination of the claimant's entitlement to first quarter SIBs. The carrier in that case argued that because Section 408.143 requires that the applications for subsequent quarters of SIBs be filed after the Commission's initial determination, the claimant's prematurely filed applications cannot serve as the required applications and it should be relieved of liability for SIBs in accordance with Rule 130.105. In Appeal No. 030554, we noted, as had the hearing officer, that the carrier did not return the applications to the claimant when they were prematurely filed; rather, the carrier processed those applications. That observation is significant because Rule 130.104(c) addresses what is supposed to happen when an

application for SIBs is prematurely filed. Rule 130.104(c) provides, in relevant part, that where the application is filed early the carrier “shall return the form to the injured employee with detailed instructions on when the form is required to be filed. Any form returned to the injured employee because the form was filed early shall not be subject to the provisions of § 130.108 of this title (relating to Contesting Entitlement to [SIBs]).” The carrier in Appeal No. 030554 did not avail itself of the remedy provided in Rule 130.104 for dealing with a premature filing. Rather, it processed those applications and attempted to fashion a remedy that was not provided for in either the 1989 Act or the Commission’s Rules. As such, Appeal No. 030554 should not be read as a broad pronouncement that the word “after” can in some instances mean “before” as the hearing officer appears to believe, but should be recognized instead as a determination by the Appeals Panel that the relief that the carrier requested in that case simply was not available under the statute and rules.

The hearing officer’s determination that the carrier did not waive its right to contest entitlement to SIBs for the first quarter is reversed and a new decision rendered that the carrier did waive its right to contest entitlement to first quarter SIBs under Rule 130.108(c) and that the claimant is, therefore, entitled to first quarter SIBs. Because we have rendered a determination that the claimant is entitled to SIBs pursuant to Rule 130.108(c), we need not consider the claimant’s appeal of the hearing officer’s determination that she did not sustain her burden of proving entitlement to first quarter SIBs on the merits.

The true corporate name of the insurance carrier is **FIDELITY & GUARANTY INSURANCE UNDERWRITERS, INC.** and the name and address of its registered agent for service of process is

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

Elaine M. Chaney
Appeals Judge

CONCUR:

Margaret L. Turner
Appeals Judge

Edward Vilano
Appeals Judge