

APPEAL NO. 111189-s  
FILED OCTOBER 3, 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 25, 2011. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second quarter, April 8 through July 7, 2011, and that the respondent (carrier) did not waive the 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 determination that the claimant is not entitled to SIBs for the second quarter and that the carrier did not waive its right to contest entitlement to SIBs for the second quarter. The carrier responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on (date of injury); (2) the qualifying period for the second quarter of SIBs was from December 25, 2010, through March 25, 2011; (3) during the qualifying period for the second quarter of SIBs the claimant was unemployed; (4) during the qualifying period for the second quarter of SIBs the claimant made no work search effort and was not enrolled in a vocational rehabilitation program as defined by 28 TEX. ADMIN. CODE § 130.101 (Rule 130.101); and (5) the claimant received SIBs for the first quarter.

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

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].

Rule 130.108(c) provides as follows:

- (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 Application for [SIBs (DWC-52)] is filed, the insurance carrier shall dispute entitlement to the subsequent quarter by requesting a [BRC] as provided by [Rule] 141 of this title (relating to [Requesting and Setting a 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]. The insurance carrier does not waive the right to contest entitlement to [SIBs] if the insurance carrier has returned the injured employee's [DWC-52] pursuant to [Rule] 130.104(c) of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters).

The parties stipulated that the claimant received SIBs for the first quarter. The hearing officer's finding that the carrier received the DWC-52 (for the second quarter) on April 1, 2011, was not appealed. In evidence is a Request for a BRC (DWC-45) from the carrier which was filed with the Division on April 11, 2011. The Division denied the DWC-45 requested by the carrier on April 13, 2011. The denial notes that all claim information was not provided in Section II and that there was an insufficient description of the disputed issue.

The claimant argues on appeal that because the DWC-45 was denied, the carrier waived its right to dispute the claimant's entitlement to the second quarter of SIBs.

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 [Rule] 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).

Although not specific to waiver of the right to contest SIBs entitlement, the preamble to Rule 141.1 does discuss a situation regarding whether an incomplete request for a BRC would be sufficient to meet a deadline that would result in stopping the first certification of maximum medical improvement (MMI) and impairment rating (IR) from becoming final.

The preamble to Rule 141.1, in pertinent part, provides:

Comment: A commenter recommends that the Division modify [Rule] 141.1(f) of this title to provide that submitting an incomplete request for a BRC will be sufficient to stop the first certification of [MMI] and [IR] from becoming final under [Section] 408.123(e).

Agency Response: The Division disagrees. The Division has noted instances where parties will submit a [DWC-45] for the purposes of preventing a first certification of MMI or IR from becoming final under [Section] 408.123(e) and [Rule] 130.12 of this title (relating to Finality of the First Certification of [MMI] and/or First Assignment of [IR]), but specifically say on the form that they do not want to proceed with a BRC. The purpose of requesting a BRC is to resolve a dispute and a party submitting a BRC request should be prepared to move forward with the BRC at the time the request is made. The purpose of these rules is to provide a timely and efficient mechanism to parties who need to resolve disputes regarding certain aspects of a workers' compensation claim. Consequently, if a party wants to dispute the first certification of MMI or IR on a claim, then [Rule] 130.12 of this title requires a party to either request a BRC or request a designated doctor examination. After a complete request is submitted, approved, and a BRC scheduled, the party has established a dispute of the first certification of MMI and/or IR in accordance with [Section] 408.123(e), effective as of the date the request was filed. A party may obtain a CCH under [Rule] 141.1(g) of this title to determine that they had good cause for filing an incomplete request for a BRC and retain the original date of filing the request for a BRC. (35 TexReg 7430, 2010).

See *also* Appeals Panel Decision 111006-s, decided September 15, 2011.

In the instant case, although a DWC-45 was filed on April 11, 2011, it was incomplete and was denied and therefore, did not constitute a dispute proceeding. We note that the carrier did not request an expedited CCH under Rule 141.1(g) to determine whether there was good cause for failing to meet the requirements of Rule 141.1(d). Since the DWC-45 was denied and a complete DWC-45 was not filed within 10 days after receiving the application for SIBs for the quarter at issue, the hearing officer erred in deciding that the carrier did not waive the right to contest the claimant's entitlement to SIBs for the second quarter by failing to timely request a BRC. Accordingly, we reverse the hearing officer's determination that the carrier did not waive the right to contest the claimant's entitlement to SIBs for the second quarter by failing to timely request a BRC and render a new decision that the carrier did waive the right to

contest the claimant's entitlement to SIBs for the second quarter by failing to timely request a BRC.

### **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 reverse the hearing officer's determination that the carrier did not waive the right to contest the claimant's entitlement to SIBs for the second quarter by failing to timely request a BRC and render a new decision that the carrier did waive the right to contest the claimant's entitlement to SIBs for the second quarter by failing to timely request a BRC.

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 **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Thomas L. Knapp  
Appeals Judge