

## APPEAL NO. 962504

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 14, 1996, in (city), Texas, with (hearing officer) presiding as hearing officer. With respect to the issue before him, the hearing officer determined that the appellant (carrier) is liable for attorney's fees in the amount of \$1,575.00. In its appeal, the carrier asserts error in the hearing officer's determination that it is liable for the claimant's attorney's fees under Section 408.147(c). In addition, the carrier maintains that the hearing officer erred in ordering that the carrier act upon his order within 15 days of having received it. In his response, the claimant's attorney, (Mr. R), urges affirmance.

## DECISION

Affirmed, as modified.

The underlying facts are largely undisputed. The claimant applied for and received supplemental income benefits (SIBS) for the first, second and third compensable quarters. At a hearing with respect to the claimant's application for SIBS for the fourth compensable quarter, the claimant was found not to be entitled to those benefits. The parties stipulated that the claimant waived entitlement to fifth and sixth quarter SIBS. On February 22, 1996, the claimant completed his Statement of Employment Status (TWCC-52) for the seventh compensable quarter of SIBS. On June 4, 1996, the claimant signed his TWCC-52 for the eighth quarter. On July 26, 1996, a benefit review conference (BRC) was held. The parties entered into an agreement on that date, stating that the "[p]arties agree the claimant is entitled to supplemental income benefits for the 7th and 8th compensable quarters."

On September 23, 1996, the Texas Workers' Compensation Commission (Commission) issued an order approving Mr. R's request for \$1,575.00 in attorney's fees for the period from February 8 to August 21, 1996. That order stated that the fees were to be paid from the claimant's benefits. On November 4, 1996, a second Commission order was issued, again approving \$1,575.00 in attorney's fees for Mr. R during the period of February 8 to August 21, 1996. However, that order provided that the fees were to be paid by the carrier in accordance with Section 408.147(c).

Section 408.147(c) provides, in relevant part:

If an insurance carrier disputes a commission determination that an employee is entitled to supplemental income benefits or the amount of supplemental income benefits due and the employee prevails on any disputed issue, the insurance carrier is liable for reasonable and necessary attorney's fees incurred by the employee as a result of the insurance carrier's dispute . . . .

The carrier maintains that it is not liable for attorney's fees in this instance, because it was not disputing a Commission determination in disputing the claimant's entitlement to SIBS in the seventh and eighth quarters. The carrier acknowledges that in Texas Workers' Compensation Commission Appeal No. 950534, decided May 19, 1995, the Appeals Panel stated that the phrase "commission determination" in Section 408.147(c) refers to the Commission's initial determination of SIBS eligibility. However, the carrier maintains that Appeal No. 950534 is limited to those circumstances where a carrier is contesting continuing entitlement to SIBS. Thus, it asserts, that where, as here, there has been an intervening determination by the Commission that the claimant is not entitled to SIBS and, accordingly, the claimant is applying for reinstated benefits, the carrier is not liable for attorney's fees, even if the claimant prevails. We cannot agree that the holding in Appeal No. 950534 is so limited. To the contrary, that case states that the phrase "commission determination" is synonymous with the phrase "initial determination." Thus, pursuant to Section 408.147(c), when the Commission has made an initial determination that the claimant is entitled to SIBS and the carrier later disputes a claimant's entitlement to SIBS in subsequent quarters, the requirement that carrier is disputing a "commission determination" is satisfied. Thereafter, the carrier's liability for attorney's fees becomes dependent upon whether or not the claimant prevails on a disputed issue. The Commission determination that the claimant was not entitled to SIBS in the fourth compensable quarter does not operate to relieve the carrier of its potential liability for attorney's fees incurred by the claimant because of the carrier's dispute of the claimant's entitlement to a subsequent quarter of SIBS. Rather, the success or failure of its dispute is determinative of its liability for the claimant's attorney's fees.

The carrier also argues in its appeal that the claimant "did not prevail on a disputed issue." However, it simply makes that bald assertion and does not advance any additional argument in that respect. In this instance, the claimant received two quarters of SIBS in accordance with a BRC agreement. We are hard pressed to determine that such an outcome does not amount to the claimant prevailing on a disputed issue.

Finally, the carrier argues that the hearing officer erred in ordering that it reimburse the claimant for any attorney's fees that were deducted from his benefits in accordance with the September 23, 1996, Commission order within 15 days of the date it received the hearing officer's decision and order. The carrier argues that the hearing

officer was without the authority to specify the time frame for compliance with the decision and order, noting that it is fixed by statute and the Commission's rules. In this instance, the hearing officer is ordering the carrier to reimburse the claimant for any attorney's fees taken from the claimant's benefits in accordance with the September 23rd order. As a result, that portion of the hearing officer's order is an order regarding benefits. It is binding during the pendency of an appeal under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(g) (Rule 142.16(g)) and its payment is likewise governed by Rule 142.16. Accordingly, we strike the portion of the order stating that "Carrier is ordered to reimburse Claimant by mailing or personally delivering a valid check to Claimant for this amount within 15 days of receiving this order." The last sentence of the decision and order is modified to state, as follows:

If any fees have been paid or are paid from Claimant's benefits pursuant to the TWCC 152 dated September 23, 1996, Carrier is ordered to reimburse Claimant for this amount in accordance with Rule 142.16.

To the extent that the hearing officer was relying on Rule 152.3(h) in ordering reimbursement in this case, we believe that his reliance thereon was misplaced. Rule 152.3(h) addresses a final order that requires an attorney to reimburse a fee overpayment and is, therefore, inapplicable here.

As modified, the hearing officer's decision and order are affirmed.

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Elaine M. Chaney

Appeals Judge

CONCUR:

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Christopher L. Rhodes

Appeals Judge

## CONCURRING OPINION:

I concur in the result.

In the case before us the claimant received SIBS for the first three quarters, did not receive SIBS for the next three quarters, and the parties entered into an agreement that the claimant was entitled to SIBS for the seventh and eighth quarters.

Section 408.141 provides that an award of SIBS by the Commission or a court shall be made in accordance with the subchapter entitled SIBS. That subchapter includes Sections 408.141 through 408.150 and contains provisions for initial determination of entitlement to SIBS, continued entitlement to SIBS, termination of entitlement to SIBS, and reinitiation of SIBS. Section 408.147(c) provides in part:

If an insurance carrier disputes a commission determination that an employee is entitled to [SIBS] or the amount of [SIBS] due and the employee prevails on any disputed issue, the insurance carrier is liable for reasonable and necessary attorney's fees incurred by the employee as a result of the insurance carrier's dispute . . . .

Rule 130.102 provides that the Commission will make the initial determination of entitlement to and calculation of the amount of SIBS and that the carrier will make subsequent determinations and calculations. Rule 130.103 concerns initial entitlement to SIBS and Subsection (c) of that rule provides that not later than the last day of the impairment income benefit period the Commission shall determine entitlement or non-entitlement to SIBS and provide written notice of the determination to the parties. Rule 130.104 concerns continuing entitlement to SIBS and Subsection (a) of that rule provides that an injured worker initially determined by the Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent quarters if during the filing period the employee met the good faith effort and direct result criteria. Subsection (d) provides that the carrier shall determine continuing entitlement to SIBS and shall send written notice of the determination to the injured employee and the Commission. Subsection (e) states what the notice shall contain if the carrier makes a determination in favor of the claimant and Subsection (f) states what the notice shall contain if the carrier makes a determination adverse to the claimant. Rule 130.105 addresses reinstated or delayed entitlement to SIBS and Subsection (d) of that rule says ". . . . Not later than 10 days after receiving the statement, the carrier shall determine reinstated or delayed entitlement to [SIBS], and send written notice of determination to the injured employee and the commission." Subsections (e) and (f) state what the notices shall contain depending on the determination of the carrier.

Rule 130.108 states:

(a) The claimant or the carrier may request a benefit review conference to contest a determination of entitlement to or amount of [SIBS]. The request must be made as provided by § 141.1 of this title (relating to Requesting and Setting a Benefit Review Conference [BRC]).

(b) A carrier waives the right to contest the commission's initial determination of entitlement or amount from the first compensable quarter if the carrier fails to request a [BRC] within 10 days after the expiration of the impairment benefit period, or within 10 days after receipt of the commission's initial determination, whichever is later.

(c) A carrier waives the right to contest continuing entitlement to amount of [SIBS] for that compensable quarter if the carrier fails to request a [BRC] within 10 days after receipt of the employee's Statement of Employment Status.

(d) A carrier who unsuccessfully contests a commission determination of entitlement or amount is liable for:

(1) all accrued, unpaid [SIBS], and interest on that amount; and

(2) reasonable and necessary attorney's fees incurred by the employee as a result of the carrier's dispute.

Commission rules require that the Commission make the initial determination of an employee's entitlement to SIBS and that determinations after that be made by the carrier.

In Texas Workers' Compensation Commission Appeal No. 950534, decided May 19, 1995, the Appeals Panel stated that the "commission determination" under Section 408.147(c) is the Commission's initial determination of eligibility for SIBS. I do not think it is necessary to rely on Appeal No. 950534 to decide this case and do not think it is necessary to address the carrier's contention that Appeal No. 950534 does not apply to this case because it involves a reinstatement of entitlement to SIBS. A benefit review officer (BRO) signed the agreement on July 26, 1996. Rule 147.4(b) states:

A written agreement reached after a benefit proceeding has been scheduled, whether before, during, or after the proceeding has been held, shall be sent or presented to the presiding officer. The presiding officer will review the agreement to ascertain that it complies with the Act and these rules; if so, sign it, and furnish copies to the parties. A written agreement is effective and binding on the date signed by the presiding officer.

The signature of the BRO made the agreement effective and binding and the action of the BRO was sufficient to be a determination by the Commission. The Appeals Panel may affirm the decision of a hearing officer on any basis reasonably supported by the evidence.

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Tommy W. Lueders

Appeals Judge