

APPEAL NO. 051130-s  
FILED JULY 12, 2005

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 April 14, 2005. The disputed issues were whether the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the first, second, and third quarters, and whether the appellant/cross-respondent (carrier) waived its right to contest the claimant's entitlement to SIBs for the third quarter by failing to request a benefit review conference (BRC). The hearing officer resolved the disputed issues by deciding that the claimant is not entitled to SIBs for the first and second quarters; that the claimant is entitled to SIBs for the third quarter; and that the carrier waived its right to dispute entitlement to SIBs for the third quarter by not timely requesting a BRC. The claimant appeals the hearing officer's determinations that she is not entitled to SIBs for the first and second quarters. The carrier appeals the hearing officer's determinations that the claimant is entitled to SIBs for the third quarter and that the carrier waived its right to dispute entitlement to SIBs for the third quarter by not timely requesting a BRC. Neither party filed a response.

DECISION

Affirmed in part and reversed and rendered in part.

**SIBs ENTITLEMENT**

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The hearing officer found in favor of the claimant on the direct result criterion for SIBs entitlement for the first, second, and third quarters. With regard to the good faith criterion for SIBs entitlement, the hearing officer found that during the qualifying periods for the first and second quarters, the claimant did not attempt in good faith to obtain employment commensurate with her ability to work, but that during the qualifying period for the third quarter the claimant did attempt in good faith to obtain employment commensurate with her ability to work. We conclude that the hearing officer's determinations that the claimant is not entitled to SIBs for the first and second quarters, but is entitled to SIBs for the third quarter, are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and those determinations are affirmed.

**WAIVER**

One of the disputed issues at the CCH was whether the carrier waived its right to contest the claimant's entitlement to SIBs for the third quarter by failing to timely request a BRC. The carrier appeals the hearing officer's determination that it waived its right to dispute entitlement to SIBs for the third quarter by not timely requesting a BRC.

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 (d) and (e) provides as follows:

- (d) 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] is filed, the carrier shall dispute entitlement to the subsequent quarter by requesting a [BRC] as provided by § 141.1 of this title (relating to Requesting and Setting a [BRC]) within 10 days after receiving the Application for [SIBs]. A carrier waives the right to contest the entitlement to [SIBs] for the subsequent quarter if the request is not received by the commission within 10 days after the date the insurance carrier received the Application for [SIBs]. The insurance carrier does not waive the right to contest entitlement to [SIBs] if the carrier has returned the injured employee's Application for [SIBs] pursuant to § 130.104(c) of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters).
- (e) Insurance Carrier Disputes; Subsequent Quarter Without Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the carrier did not pay [SIBs] during the quarter immediately preceding the quarter for which the Application for [SIBs] is filed, the carrier shall send the determination to the injured employee within 10 days of the date the form was filed with the insurance carrier and include the reasons for the carrier's finding of non-entitlement and instructions about the procedures for contesting the carrier's determination as provided by subsection (b) of this section.

Texas Workers' Compensation Commission (Commission) Advisory 99-02, issued April 13, 1999, states that a carrier is not required to request a BRC if it finds nonentitlement and did not pay SIBs in the quarter that immediately preceded the quarter for which the Application for [SIBs] (TWCC-52) was filed.

In Texas Workers' Compensation Commission Appeal No. 032868-s, decided December 11, 2003, the Appeals Panel stated that "[T]he 1989 Act and rules contain no specific provisions relating to the factual situation where the immediately preceding quarter is actively under dispute at the time the carrier receives the TWCC-52 for the subsequent quarter" and that "the proper approach, when the rule does not fit the

factual situation is to return to the statutory provision in the 1989 Act – Section 408.147(b).” In that decision, the Appeals Panel held that “when the issue of entitlement to the prior quarter of SIBs is ongoing and the claimant submits a TWCC-52 for the subsequent quarter, the carrier must timely request a BRC if it wishes to dispute the subsequent quarter, and failure to do so results in waiver as provided in Section 408.147(b).”

Subsequent Appeals Panel decisions have cited Appeal No. 032868-s, *supra*, for the proposition that where the immediately preceding quarter is “actively under dispute” at the time the carrier receives the TWCC-52, the carrier must comply with the provisions of Section 408.147(b). Texas Workers’ Compensation Commission Appeal No. 041362, decided July 27, 2004; and Texas Workers’ Compensation Commission Appeal No. 041726, decided September 2, 2004.

In the instant case, the first quarter for SIBs was from April 8 to July 7, 2004. The claimant filed her TWCC-52 for the first quarter on April 6, 2004, and the Commission issued a notice of nonentitlement dated April 7, 2004.

The second quarter for SIBs was from July 8 to October 6, 2004. The claimant’s TWCC-52 for the second quarter is dated June 24, 2004. The carrier issued a notice of nonentitlement and filed a TWCC-45 (Request for BRC) with the Commission on June 30, 2004, requesting a BRC on entitlement to second quarter SIBs. A Commission Dispute Resolution Information System (DRIS) entry dated July 1, 2005, reflects that the Commission denied the carrier’s dispute on second quarter SIBs for the reason that the carrier was not required to file a TWCC-45 because no income benefits were paid during the previous three months.

The third quarter for SIBs was from October 7, 2004, to January 5, 2005. The claimant’s TWCC-52 for the third quarter is dated September 28, 2004. There is no assertion that the carrier did not issue a notice of nonentitlement. A DRIS entry dated October 20, 2004, reflects that the claimant’s attorney called the Commission and asked whether the carrier had filed a TWCC-45 and the entry stated that there was no record of a TWCC-45. A DRIS entry of October 21, 2004, reflects that the Commission received a TWCC-45 that day and another DRIS entry of the same day reflects that a dispute was added on SIBs entitlement for the third quarter. The DRIS entries do not state who filed the TWCC-45 on the third quarter, but it is undisputed that the carrier did not file a TWCC-45 on the third quarter. Consequently, it must have been the claimant who filed the TWCC-45 on the third quarter. Another DRIS entry of October 21, 2004, reflects that a Commission employee called the carrier’s adjuster and left a message advising the adjuster that an attorney had requested a BRC on the third quarter and also stating in the DRIS entry that the first and second quarters “were not pursued.” Yet another DRIS entry also dated October 21, 2004, reflects that a proceeding was being scheduled on the issue of third quarter SIBs, with no mention of first or second quarter SIBs. A BRC was held on November 22, 2004, on the issues of entitlement to first, second, and third quarter SIBs and waiver of the carrier’s right to dispute the third

quarter. How issues regarding entitlement to first and second quarter SIBs were included at the November 22, 2004, BRC is not reflected in the CCH record.

The carrier disputes the following finding of fact and conclusion of law:

### **FINDING OF FACT**

10. Carrier did not file a TWCC-45 with the Commission requesting a BRC within 10 days of its receipt of Claimant's TWCC-52 and although it had not paid benefits for the previous two quarters, the liability for payment for at least the previous quarter was still in dispute for in excess of 10 days after it received the TWCC-52.

### **CONCLUSION OF LAW**

4. Additionally, Carrier has waived its right to dispute entitlement to the third quarter by not timely requesting a [BRC].

It is undisputed that the carrier did not pay second quarter SIBs. Thus, it would not be required to file a TWCC-45 under Rule 130.108(e) for the third quarter. However, if the facts of the case fall within our decision in Appeal No. 032868-s, *supra*, then the carrier would have had to file a TWCC-45 for the third quarter. The carrier does not take issue with our decision in Appeal No. 032868-s, but asserts that Appeal No. 032868-s does not apply to the facts of the instant case because at the time the carrier received the claimant's TWCC-52 for the third quarter, the second quarter was not "actively under dispute." We do not know the date the carrier received the claimant's TWCC-52 for the third quarter. The hearing officer states in his decision that it was presumably filed before the third quarter began on October 7, 2004. We do know that the TWCC-52 for the third quarter is dated September 28, 2004, and prior to that date the Commission had denied the carrier's request for a BRC on the second quarter. There is nothing in the CCH record to reflect that there was an active dispute with regard to the second quarter as of the date of the TWCC-52 for the third quarter and a DRIS entry of October 21, 2004, reflects that the first and second quarters were not pursued. Consequently, we agree with the carrier's assertion that the second quarter was not actively under dispute at the time of the filing of the TWCC-52 for the third quarter and thus Appeal No. 032868-s does not apply. We conclude that the hearing officer erred in determining that the carrier waived its right to dispute entitlement to SIBs for the third quarter by not timely requesting a BRC.

### **CONCLUSION**

We affirm the hearing officer's determinations that the claimant is not entitled to SIBs for the first and second quarters, but is entitled to SIBs for the third quarter. We reverse the hearing officer's decision that the carrier waived its right to dispute entitlement to SIBs for the third quarter by not timely requesting a BRC and we render a

new decision that the carrier did not waive its right to dispute entitlement to SIBS for the third quarter.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge