APPEAL NO. 070063-s
FILED MARCH 22, 2007

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 December 5, 2006. The hearing officer determined that while the appellant/cross-respondent (claimant) has totally and permanently lost the functional use of his legs, the claimant's legs have not been permanently paralyzed due to the compensable spinal injury and therefore the claimant "is not entitled to lifetime income benefits [LIBs] based on the loss of and/or the total and permanent loss of use of both feet as of this date."

The claimant appealed asserting that if his legs are not functional, they have no use as a member of his body and therefore he is entitled to LIBs citing Section 408.161 and case authority. The respondent/cross-appellant (self-insured), in a response and timely cross-appeal, contends that the hearing officer correctly followed the principles of statutory construction in deciding the case and appeals the hearing officer's determination that the claimant has totally and permanently lost the functional use of his legs on a sufficiency of the evidence basis. The claimant filed a response to the self-insured's cross-appeal, urging that the evidence sufficiently supports the hearing officer's decision that he has lost the functional use of his lower extremities.

DECISION

Affirmed in part and reversed and a new decision rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he was a 21 year employee of the self-insured and that on _____, he injured his low back moving/lifting some computer monitors. The claimant's testimony indicates that he had nonwork-related spinal surgery in January 1999. The medical records indicate that the claimant "underwent a posterior spine reconstructive surgery with multiple level laminectomy and a decompression of his lumbar spine" with instrumentation, fusion L3 through L5, and pedicle screws bilaterally and a cage placed at L4-5 in December 2001. Other medical records indicate that the claimant "has a terribly failed back syndrome."

TOTAL AND PERMANENT LOSS OF FUNCTIONAL USE OF THE LEGS

The self-insured appeals the hearing officer's determination that due to the compensable injury, the claimant has totally and permanently lost the functional use of his legs. The hearing officer's determination that the claimant has totally and permanently lost the functional use of his legs is supported by sufficient evidence and is affirmed. We construe the hearing officer's determination to be the equivalent of a finding that the claimant's legs no longer possess any substantial utility as members of his body.

ENTITLEMENT TO LIBS

The applicable statutory provision is Section 408.161 which states in pertinent part:

> § 408.161. **LIFETIME INCOME BENEFITS**.
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> (a) Lifetime income benefits are paid until the death of the employee for:
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> ***
>
> (2) loss of both feet at or above the ankle;
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> ***
>
> (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg;
>
> (b) For purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part.

We have affirmed the hearing officer's finding that due to the compensable injury, the claimant has totally and permanently lost the functional use of his legs. The self-insured contends, based on principles of statutory construction, that with a spinal injury, the claimant can only be entitled to LIBs if he meets the requirements of Section 408.161(a)(5). The hearing officer comments, in his Background Information, that Section 408.161(a)(5) "requires a showing of total and complete paralysis of the affected limbs before a spinal injury will entitle the claimant total LIBs for 'loss' of the extremities." The hearing officer found that the claimant had totally and permanently lost the functional use of his legs but was not entitled to LIBs because the claimant's legs were not completely paralyzed due to the compensable injury.

The Appeals Panel has addressed this argument previously in Appeals Panel Decision (APD) 94689, decided July 8, 1994, a case in which the injured employee slipped and fell injuring her low back. The injured employee in that case had two spinal surgeries and eventually it was determined she could not get and keep employment that requires use of the legs. The Appeals Panel, in that case, commented that it was clear that the hearing officer believed that to qualify for LIBs the claimant had to show paralysis of her lower extremities. The Appeals Panel in APD 94689 quoted Section 408.161 of the 1989 Act and compared it to the corresponding section in the "old law," (pre-1989 Act) provision which was commonly cited as TEX. REV. CIV. STAT. ANN., art. 8306 § 11a (Vernon 1967). The Appeals Panel, stated:

> Obviously these two provisions [the pre-1989 Act and 1989 Act] are very similar and in fact virtually identical in equating the loss of use of [a] member with its loss. This would indicate that the Texas legislature in enacting the 1989 Act did not intend to change the substantive law in this

area. This view is further supported in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4B.31 at 4-134-5 (1991):

> Commentary-Section 4.31
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> * * *
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> b. Section 4.31(b) [Now Section 408.161(b)]: Definition of loss. A key term in the determination of lifetime income benefits is "loss." Under Section 4.31(b) the total and permanent loss of use of [a] member is considered to be the same as the loss of that member. "Total loss" appears to be the same concept as "total loss of use," a concept for determining benefits for specific injuries under prior law.
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> Montford then cites with approval the following prior law definition of total loss of use found in the Texas Pattern Jury Charges:
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> "Total loss of use" of a member of the body exists whenever by reason of injury such member no longer possesses any substantial utility as a member of the body or the condition of the injured member is such that the worker cannot get and keep employment requiring the use of such member. 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4B.31 at 4-135 footnote 468.

APD 94689, *supra*, went on to point out that the above definition of total loss of use was approved by the Texas Supreme Court in Travelers Insurance Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962) and has consistently been applied since then. APD 94689 concluded that:

> Under the prior law this definition of loss of use has been applied to cases where the claimant asserted loss of use of the legs due to a spinal injury. *See, e.g.*, Service Lloyds Insurance Company v. Slay, 800 S.W.2d 359 (Tex. App.-El Paso 1990, writ denied).[1] Thus we hold in the present case that the correct standard in determining whether the claimant is entitled to LIBs is whether her legs no longer possess any substantial utility as members of her body or whether the condition of her legs is such that she cannot get and keep employment requiring the use of legs.

APD 992445, decided December 16, 1999, was also a case in which the injured employee sustained a compensable spinal injury, had spinal surgery, and eventually the condition worsened rendering the injured employee unable to walk. A doctor testified that although the injured employee had some motor or sensory function in his lower

[1] The Slay case involved an injured employee who had a neck and upper back injury and the jury found the injury produced permanent total loss of use of both legs. The appeals court affirmed the trial court's award of LIBs based on a total loss of use of both legs; however, Slay does not expressly mention the definition of total loss of use set forth in Seabolt.

extremities, "the claimant has no substantial utility of either leg, he is a functional paraplegic." APD 992445 discusses Sections 408.161(a)(2) and 408.161(a)(5), cites Seabolt, *supra*, and notes that the Seabolt test is disjunctive. The carrier in that case, as in the present case, argued that the injured employee must meet the requirements of Section 408.161(a)(5) to be entitled to LIBs, and that the Seabolt case is inapplicable because the injured employee's injury is to the spine rather than to the legs. APD 992445, discusses APD 972171, decided December 8, 1997, a case in which the injured employee was found to be entitled to LIBs, holding:

> We decline to follow the argument of the carrier and dicta in Appeal No. 972171, *supra*, that with a spinal injury, a claimant can only be entitled to LIBs if they meet the requirements of Section 408.161(a)(5). [APD 94689, *supra*, and APD 982995, decided February 4, 1999], specifically rejected this argument on the basis that the legislature did not intend in 1989 to change the prior law regarding LIBs, and under prior law the definition of loss of use was applied to cases where the claimant asserted loss of use of the legs due to a spinal injury. *See* Service Lloyds Insurance Co. v. Slay, 800 S.W.2d 359 (Tex. Civ. App.-El Paso [1990], writ den'd).

In APD 030009, decided February 6, 2003, the Appeals Panel affirmed a hearing officer's decision awarding LIBs under Section 408.161(a)(2) where the injured employee had a spinal injury resulting in severe limitations in his ability to use his legs to the point that the limitations prevented the injured employee from getting and keeping employment requiring the use of his legs, and rejected the argument that because a spinal injury was involved, the only way the injured employee could prove entitlement to LIBs was to show permanent and complete paralysis of his legs under Section 408.161(a)(5).

The self-insured, in its response in this case, cites case law on statutory construction that every provision of a statute must be given meaning and therefore the claimant, who had an injury to the spine and not his legs, can only be found entitled to LIBs under Section 408.161(a)(5). The self-insured argues that when the legislature enacted Section 408.161(a)(5), it intended LIBs entitlement to be limited to permanent and complete paralysis of the extremities as a result of a spine injury. The "old law" provision in art. 8306, § 11(a)(5) had a similar provision regarding an injury to the spine resulting in permanent and complete paralysis of both arms or both legs or of one arm and one leg. As has been noted in both APD 94689, *supra* and APD 992445, *supra,* the provisions of the pre-1989 Act and the comparable provisions in Section 408.161 are "virtually identical" in equating the loss of use of a member with its loss. As noted in APD 94689 this would indicate that the legislature did not intend to change the substantive law in this area where the definition of loss of use was applied to cases in which the claimant asserted entitlement to LIBs based on the loss of use of the legs due to a spinal injury. We would further note that in 1997 the legislature amended Section 408.161 to allow for LIBs for a brain injury resulting in incurable insanity or imbecility, and that the legislature again amended Section 408.161 in 2001 providing LIBs for certain burn injuries and that neither amendment changed Sections 408.161(a)(2) and

408.161(a)(5). The 1989 Act was again amended in 2005 with no change to Sections 408.161(a)(2) and (a)(5). This would indicate to us that the legislature did not intend to change the interpretation that the courts and the Appeals Panel have given to Sections 408.161(a)(2) and (a)(5).

The self-insured also cites Hartford Underwriters Insurance Co. v. Burdine, 34 S.W.3d 700 (Tex. App.-Fort Worth 2000, no pet.), a case in which the injured employee sustained an injury to her lumbar spine but was found to be entitled to LIBs based on the total loss of use of the legs and/or feet as defined in Seabolt, *supra*. The self-insured contends that Burdine is a pre-1989 Act case that was appealed on issues relating to the weight of the evidence on total loss of use and not to the point of statutory construction raised by the self-insured in this case and therefore has little precedent. Nonetheless, Burdine has approved entitlement to LIBs based on total and permanent loss of use of the legs and/or feet, as defined in Seabolt, where the injury was to the spine. In Slay, *supra*, the court also affirmed entitlement to LIBs based on a spine injury which resulted in total loss of use of both legs.

In Texas Employer's Insurance Association v. Gutierrez, 795 S.W.2d 5 (Tex. App.-El Paso 1990, writ denied) the court stated that a finding of total loss of use of the leg also encompasses the loss of the foot at or above the ankle. *See also* Texas General Indemnity Co. v. Martin, 836 S.W.2d 636 (Tex. App.-Tyler 1992, no writ) where the court stated if the leg cannot be used, neither can the foot. In Pacific Employers Insurance Company v. Dayton, 958 S.W.2d 452 (Tex. App.-Fort Worth 1997, pet. denied), the court noted that the definition of "total loss of use" as applied to the 1989 Act should include the requirements of Section 408.161 that the loss of use be both total and permanent, and rejected the argument that the standards applied to loss of use under the prior law should not apply to cases decided under the 1989 Act. *Id* 459.

Considering the applicable law, we reverse the hearing officer's decision that the claimant is not entitled to LIBs based on the loss of and/or the total and permanent loss of use of both feet as of this date and render a new decision that the claimant is entitled to LIBs.

SUMMARY

We affirm the hearing officer's determination that due to the compensable injury the claimant has totally and permanently lost the functional use of his legs. We reverse the hearing officer's determination that the claimant is not entitled to LIBs based on the loss of and/or the total and permanent loss of use of both feet and render a new decision that the claimant is entitled to LIBs based on the total and permanent loss of use of both feet at or above the ankle as of the date of the CCH.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge