

APPEAL NO. 080713
FILED JULY 17, 2008

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 9, 2008. At the CCH the parties agreed to add the 19th quarter of supplemental income benefits (SIBs) to the two issues in dispute. The issues before the hearing officer were:

- (1) As a result of the Decision and Order of the [prior] CCH, affirmation by the Appeals Panel in Appeals Panel Decision (APD) 052815 and Judicial Review No. 017-216786-06 and pending appeal, does the Texas Department of Insurance, Division of Workers' Compensation (Division) have jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters?
- (2) Is the appellant/cross-respondent (claimant) entitled to SIBs for the 9th through 19th quarters?

The hearing officer determined that as a result of the Decision and Order of the prior CCH, affirmation by the Appeals Panel in APD 052815, and Judicial Review No. 017-216786-06 and pending appeal, the Division does not have jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters. Although the hearing officer determined that the Division did not have jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters, the hearing officer made findings of fact on the merits of entitlement to SIBs for the 9th through 19th quarters. The hearing officer determined that during the qualifying periods for the 9th through 19th quarters of SIBs the claimant: (1) was unemployed or underemployed as a direct result of the impairment from the compensable injury; and (2) made a good faith effort to find employment commensurate with her ability to work.

The claimant appealed the hearing officer's decision that the Division does not have jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters, and the respondent/cross-appellant (carrier) responded, urging affirmance. Also, the carrier cross-appealed the hearing officer's findings of fact on the direct result and good faith criteria for SIBs entitlement, and the hearing officer's Conclusion of Law No. 1, which states that the Division "has jurisdiction to hear this case." The carrier states that Conclusion of Law No. 1 conflicts with Conclusion of Law No. 3, in which the hearing officer determined that the Division did not have jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters.

DECISION

Reversed and rendered.

BACKGROUND INFORMATION

The parties stipulated that: (1) the claimant sustained a compensable injury on _____; (2) the date of maximum medical improvement is October 4, 2002; (3) the claimant has an impairment rating of 17%; and (4) the claimant did not commute any portion of her impairment income benefits. It is undisputed that the qualifying periods for the 9th through 19th quarters of SIBs are from June 12, 2005, through March 8, 2008, as reflected on the SIBs applications for each quarter from the 9th through 19th.

At a prior CCH held on November 4, 2005, the same hearing officer determined that the claimant was not entitled to SIBs for the 1st through 8th quarters. The claimant timely appealed the hearing officer's SIBs decision to the Appeals Panel. A written decision by the Appeals Panel on the claimant's appeal was not issued by the 45th day after the response was due or filed with the Division; therefore, the hearing officer's decision that the claimant was not entitled to SIBs for the 1st through 8th quarters became final and is the final decision of the Appeals Panel effective on February 21, 2006, pursuant to Section 410.204(c). The claimant appealed the Appeals Panel decision to district court. In evidence is a district court final judgment dated February 4, 2008, in which a jury determined that the claimant was not entitled to SIBs for the 1st through 3rd quarters, but the claimant was entitled to SIBs for the 4th through 8th quarters. The evidence reflects that the carrier filed a Motion for New Trial on February 29, 2008.

At the CCH held on April 9, 2008, the issues in dispute were jurisdiction to determine SIBs entitlement and entitlement to SIBs for the 9th through 19th quarters. At the CCH the carrier informed the hearing officer that a Motion for New Trial was pending, and that it also contemplated filing an appeal to the Court of Appeals, therefore the Division did not have jurisdiction to determine whether the claimant was entitled to SIBs for the 9th through 19th quarters. The carrier states in its appeal that "[c]urrently, Carrier's defense counsel has filed a Motion for New Trial based on various errors associated with the jury's verdict." Although the carrier did not provide with its appeal a notice of appeal of the district court's final judgment which was issued on February 4, 2008, the carrier does state in its response that "[c]urrently, Carrier is pursuing an appeal of that verdict based on various errors associated with the jury's findings." No evidence was presented that the district court's judgment has become final.

JURISDICTION TO DETERMINE ENTITLEMENT TO SIBS FOR THE 9TH THROUGH 19TH QUARTERS

Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal under Subchapter F or G (relating to Judicial Review). In Lopez v. Texas Workers' Comp. Ins. Fund, 11 S.W.3d 490 (Tex. App.—Austin 2000, pet. denied), the court held that Section 410.205(b) clearly provides that the ultimate administrative ruling—whether granting or denying benefits—remains in effect until overturned by a final and enforceable judicial decision. Section 410.207 provides that during judicial review of the Appeals Panel decision on any disputed issue

relating to a workers' compensation claim, the Division retains jurisdiction of all other issues related to the claim. In APD 000512, decided April 24, 2000, the Appeals Panel noted that each compensable quarter stands alone and the determinations in one quarter are not necessarily binding on subsequent quarters.

In Conclusion of Law No. 1, the hearing officer determined that the Division has jurisdiction to hear this case, and that determination is supported by the evidence. However, in Conclusion of Law No. 3, the hearing officer determined that as a result of the prior hearing officer's decision, the Appeals Panel decision, and pending appeal for judicial review, the Division does not have jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters. We disagree.

The hearing officer cites APD 990897, decided June 9, 1999, however the facts summarized by the hearing officer in his decision refer to APD 991177, decided July 14, 1999, which references APD 990897. In both APD 990897 and APD 991177, the claimant is the same person, but the disputed issues in each case regard different SIBs quarters. In APD 990897 the disputed issue was whether the claimant was entitled to SIBs for the 15th quarter. In that case the Appeals Panel noted the procedural history of nonentitlement to prior SIBs quarters (11th through 14th). The Appeals Panel reversed the hearing officer's determination that the claimant was entitled to SIBs for the 15th quarter and rendered a new decision that the claimant was not entitled to SIBs for the 15th quarter because the claimant had not been entitled to SIBs for 12 consecutive months under Section 408.146(c) and therefore, ceased to be entitled to any additional income benefits for the compensable injury to include SIBs for the 15th quarter.

In APD 991177, *supra*, the disputed issue was whether the claimant was entitled to SIBs for the 16th quarter. The Appeals Panel noted the procedural history of nonentitlement to prior SIBs quarters (11th through 15th) and there was evidence that the claimant sought judicial review of the 14th quarter in district court. The Appeals Panel affirmed the hearing officer's determination that the claimant was not entitled to SIBs for the 16th quarter. The Appeals Panel stated that "while the decision on the 14th quarter may be pending before a state district court, the Appeals Panel decision on that quarter is binding during the pendency of the appeal" and that "while claimant met the criteria for entitlement to SIBs for the 16th quarter under Section 408.142(a), claimant is no longer eligible for income benefits under Section 408.146(c) because she was not entitled to SIBs for 12 consecutive months." In APD 991177, although there was a pending judicial appeal of a prior SIBs quarter, the Division made determinations on the subsequent SIBs quarter.

In the instant case, the current issue in dispute is whether the claimant is entitled to SIBs for the 9th through 19th quarters, these SIBs quarters were not determined in the prior CCH decision, which became the Appeals Panel decision and was appealed to court, therefore the Division retains jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters pursuant to Section 410.207. Accordingly, the hearing officer erred in determining that as a result of the Decision and Order of the prior CCH,

affirmation by the Appeals Panel in APD 052815 and Judicial Review No. 017-216786-06 and pending appeal, the Division does not have jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters. We reverse the hearing officer's jurisdiction determination and we render a new decision that the Division has jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters.

SIBS QUARTERS 9TH THROUGH 19TH

In APD 992177, decided November 19, 1999, the claimant contended that the Appeals Panel should not decide the issue of permanent loss of entitlement to additional income benefits under Section 408.146(c) until there has been a final adjudication of the issues of entitlement to prior SIBs quarters in the court system. In that case the Appeals Panel stated that “[w]hile the [Division’s] decisions regarding prior quarters may or may not be pending before [sic] state court, the Appeals Panel’s decisions on the prior quarters are binding during the pendency of the appeal” and concluded that the Appeals Panel “may properly address the issue of permanent loss of SIBs entitlement under Section 408.146(c) regardless of whether there has been an appeal of any decisions regarding prior [SIBs] quarters.”

In the instant case, the prior Appeals Panel decision that the claimant is not entitled to SIBs for the 1st through 8th quarters is binding during the pendency of judicial review pursuant to Section 410.205(b). The hearing officer’s findings on the merits of entitlement to SIBs for the 9th through 19th quarters under Section 408.142(a) are supported by the evidence. Although the claimant met the criteria for entitlement to SIBs for the 9th through 19th quarters, the claimant is no longer entitled to income benefits under Section 408.146(c) because she was not entitled to SIBs for 12 consecutive months (nonentitlement to SIBs for the 1st through 8th quarters). Accordingly, we render a decision that the claimant is not entitled to SIBs for the 9th through 19th quarters, because the claimant has permanent loss of SIBs entitlement under Section 408.146(c).

SUMMARY

We reverse the hearing officer’s determination that as a result of the Decision and Order of the prior CCH, affirmation by the Appeals Panel in APD 052815 and Judicial Review No. 017-216786-06 and pending appeal, the Division does not have jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters, and we render a new decision that the Division has jurisdiction to determine entitlement to SIBs for the 9th through 19th quarters.

We render a decision that the claimant is not entitled to SIBs for the 9th through 19th quarters, because the claimant has permanent loss of SIBs entitlement under Section 408.146(c).

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL RAY OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge