

APPEAL NO. 170558
FILED MAY 2, 2017

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 January 31, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the issue by determining that the respondent/cross-appellant (claimant) is entitled to lifetime income benefits (LIBs) from September 20, 2016. The hearing officer made clear in his decision that the claimant is not entitled to LIBs from September 20, 2016, based on a physically traumatic injury to the brain resulting in incurable imbecility in accordance with Section 408.161, but is entitled to LIBs from September 20, 2016, based upon the total and permanent loss of use of both feet at or above the ankle.

The appellant/cross-respondent (self-insured) appealed the hearing officer's determination that the claimant is entitled to LIBs based upon the total and permanent loss of use of both feet at or above the ankle. The self-insured contends that the hearing officer erred in finding entitlement to LIBs based on a condition not certified for resolution by the benefit review officer and not litigated or argued by either party at the CCH. The claimant responded, urging affirmance. The claimant cross-appealed the hearing officer's finding of fact that the claimant was not entitled to LIBs from September 20, 2016, based on a physically traumatic injury to the brain resulting in incurable imbecility in accordance with Section 408.161. The claimant contended that the evidence does not support the hearing officer's finding. The self-insured responded to the claimant's cross-appeal, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained an injury on (date of injury). Records in evidence establish that the claimant was a K-9 officer and patrol deputy for the employer and was injured in a motor vehicle accident on the date of injury.

The Benefit Review Conference (BRC) Report lists the issue in dispute as follows: "[i]s the [c]laimant entitled to [LIBs] from [October 29, 2016] through the present based on a physically traumatic injury to the brain resulting in incurable imbecility in accordance with [Section 408.161]?" On the claimant's motion without objection from the self-insured at the CCH and upon a finding of good cause, the issue was amended regarding the date of entitlement: "[i]s [the] [c]laimant entitled to [LIBs] from September

20, 2016, based on a physically traumatic injury to the brain resulting in incurable imbecility in accordance with [Section 408.161]?”

The hearing officer found in Finding of Fact No. 3 that the claimant does not suffer from imbecility as a naturally flowing result of his (date of injury), traumatic brain injury. Finding of Fact No. 3 is supported by sufficient evidence. However, the hearing officer determined the claimant is entitled to LIBs from September 20, 2016, because he found that the claimant has the permanent and total loss of use of both feet at or above the ankle as a result of the compensable injury.

Section 410.151(b) and 28 TEX ADMIN. CODE § 142.7 (Rule 142.7) essentially provide that issues not considered at a BRC may only be added by consent of the parties or upon a showing of good cause. While consent may be inferred if the parties actually litigated an issue not otherwise identified, the record in this case does not establish that the parties litigated that the claimant is entitled to LIBs based upon the total and permanent loss of use of both feet at or above the ankle. The specific issue before the hearing officer as certified and amended at the CCH was whether the claimant is entitled to LIBs from September 20, 2016, based on a physically traumatic injury to the brain resulting in incurable imbecility. The hearing officer’s determination that the claimant is entitled to LIBs from September 20, 2016, based upon the total and permanent loss of use of both feet at or above the ankle exceeded the scope of the issue before him. Because there is sufficient evidence to support the hearing officer’s finding that the claimant does not suffer from imbecility as a naturally flowing result of his (date of injury), traumatic brain injury, which was the specific issue at the CCH, we reverse the hearing officer’s determination that the claimant is entitled to LIBs from September 20, 2016, and we render a new decision that the claimant is not entitled to LIBs from September 20, 2016, based on a physically traumatic injury to the brain resulting in incurable imbecility in accordance with Section 408.161. We note this decision does not preclude the claimant from filing a claim for LIBs based upon a different theory of entitlement contained in Section 408.161.

SUMMARY

We reverse the hearing officer’s determination that the claimant is entitled to LIBs from September 20, 2016, as exceeding the scope of the issue, and we render a new decision that the claimant is not entitled to LIBs from September 20, 2016, based on a physically traumatic injury to the brain resulting in incurable imbecility in accordance with Section 408.161.

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

**TRACY SEILER, RISK MANAGEMENT SERVICES DIRECTOR
TEXAS ASSOCIATION OF COUNTIES
1210 SAN ANTONIO
AUSTIN, TEXAS 78701.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge