

APPEAL NO. 182242
FILED DECEMBER 10, 2018

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 August 29, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the appellant (claimant) is entitled to supplemental income benefits (SIBs) for the fifth quarter from April 9 through July 8, 2017; (2) the respondent (carrier) did not waive its right to contest the claimant's entitlement to SIBs for the fifth quarter by failing to timely request a benefit review conference (BRC); and (3) the carrier is relieved of liability for SIBs because of the claimant's failure to timely file an Application for [SIBs] (DWC-52) for the fifth quarter for the entire fifth quarter.

The claimant appealed the ALJ's determinations on carrier waiver and timely filing. The carrier responded, urging affirmance of the ALJ's determinations. The ALJ's determination that the claimant is entitled to SIBs for the fifth quarter from April 9 through July 8, 2017, has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reformed in part, and reversed and rendered in part.

The evidence reflects that the claimant sustained a compensable injury on (date of injury), resulting in a 26% impairment rating (IR).

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

CLERICAL CORRECTIONS

On appeal the claimant states that the ALJ made errors in the written stipulations which "seem different than what the parties stipulated to at the CCH," specifically Findings of Fact Nos. 1.B through 1.D and 1.G. We have reviewed the record and note that Findings of Fact No. 1.B. (employer) and 1.D (IR) conform to the stipulations made

by the parties at the CCH; however, Finding of Fact Nos. 1.C (carrier) and 1.G. (work search) are incorrect.

In Finding of Fact No. 1, the ALJ states that the parties stipulated to the following facts:

1.C. On (date of injury),¹ [e]mployer provided workers' compensation insurance with TPCIGA for Lumbermens Underwriting Alliance Carrier.

1.G. The [DWC-52] sent to [the] [c]laimant by TPCIGA on January 13, 2017 listed a minimum of 5 work search efforts for each quarter of the qualifying period of the fifth quarter.

A review of the record reveals that the parties' stipulations were as follows:

1.C. On (date of injury), [e]mployer provided workers' compensation insurance with Lumbermens Underwriting Alliance, *an impaired carrier* (emphasis added).

1.G. The [DWC-52] sent to [the] [c]laimant by TPCIGA on January 13, 2017, listed 5 minimum work search efforts for each *week* of the qualifying period for the fifth quarter (emphasis added).

We note that the ALJ listed TPCG for Lumbermens Underwriting Alliance as the true corporate name of the insurance carrier. However, the carrier information sheet in evidence lists the carrier's true corporate name as TPCIGA for Lumbermens Underwriting Alliance, An Impaired Carrier, Estate No. 852.

SIBS CARRIER WAIVER

The evidence reflects that a decision and order was mailed to the parties on June 8, 2017, in which the ALJ determined that the claimant was entitled to SIBs for the fourth quarter and that decision was not appealed. At the CCH the parties acknowledged that the carrier had paid the fourth quarter. The evidence reflects that the carrier received the claimant's DWC-52 for the fifth quarter on June 12, 2018, more than a year after the Texas Department of Insurance, Division of Workers' Compensation's (Division) determination on the fourth quarter of SIBs. In evidence is the carrier's notice of non-entitlement for the fifth quarter of SIBs dated June 19, 2018.

¹ We note that at the CCH the ALJ referenced the date of injury as (date), rather than (date of injury); however, the ALJ's written stipulation referring to the date of injury as (date of injury), is supported by the record and is correct.

Also, in evidence is a certified mail receipt addressed to the claimant with a notation stating, in part, “5th Q 52” and a date of delivery of June 25, 2018. There is no evidence the carrier filed a request for a BRC to dispute the claimant’s entitlement to SIBs for the fifth quarter.

Section 408.147(b) provides as follows:

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].

28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c)) provides as follows:

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 [DWC-52] is filed, the insurance carrier shall dispute entitlement to the subsequent quarter by requesting a [BRC] as provided by [Rule] 141 of this title (relating to Dispute Resolution—[BRC]) within 10 days after receiving the [DWC-52]. An insurance carrier waives the right to contest the entitlement to [SIBs] for the subsequent quarter if the request is not received by the [Division] within 10 days after the date the insurance carrier received the [DWC-52]. The insurance carrier does not waive the right to contest entitlement to [SIBs] if the insurance carrier has returned the injured employee’s [DWC-52] pursuant to [Rule] 130.104(c) of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters).

Rule 130.108(d) provides as follows:

Insurance Carrier Disputes; Subsequent Quarter Without Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the insurance carrier did not pay [SIBs] during the quarter immediately preceding the quarter for which the [DWC-52] is filed, the insurance 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 insurance carrier’s finding of non-entitlement and instructions about the procedures for contesting the insurance carrier’s determination as provided by subsection (a) of this section.

In this case, the prior quarter of SIBs was paid by the carrier at the time the carrier received the claimant's DWC-52 for the subsequent quarter of SIBs and the carrier did not request a BRC to dispute entitlement to SIBs for the fifth quarter. Accordingly, we reverse the ALJ's determination that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the fifth quarter by failing to timely request a BRC and we render a new decision that the carrier waived its right to contest the claimant's entitlement to SIBs for the fifth quarter by failing to timely request a BRC.

TIMELY FILING OF THE FIFTH QUARTER OF SIBS APPLICATION

Section 408.143(c) provides that failure to file a statement under that section relieves the insurance carrier of liability for SIBs for the period during which a statement is not filed. Rule 130.104(c) provides, in part, that except as otherwise provided in that section, a DWC-52 shall be filed no later than 7 days before, and no earlier than 20 days before, the beginning of the quarter for which the injured employee is applying for SIBs. Rule 130.105(a) provides, in part, that an injured employee who does not timely file a DWC-52 with the insurance carrier shall not receive SIBs for the period of time between the beginning date of the quarter and the date on which the form was received by the insurance carrier. Rule 130.105(a) does contain some exceptions to the timely filing of the SIBs application, but none of those exceptions applied in this case.

The evidence reflects that the claimant filed a DWC-52 for the fifth quarter on June 12, 2018. Although we rendered in this decision that the carrier waived its right to contest the claimant's entitlement to SIBs for the fifth quarter, the evidence established that the claimant did not file his DWC-52 for the fifth quarter until June 12, 2018; therefore, the claimant shall not receive the fifth quarter SIBs from April 9 through July 8, 2017. See Appeals Panel Decision 130837, decided May 20, 2013. Accordingly, the ALJ's determination that the carrier is relieved of liability for SIBs because of the claimant's failure to timely file a DWC-52 for the fifth quarter for the entire fifth quarter is supported by sufficient evidence and is affirmed.

SUMMARY

We reform Finding of Fact No.1 as follows:

1.C. On (date of injury), [e]mployer provided workers' compensation insurance with Lumbermens Underwriting Alliance, an impaired carrier.

1.G. The [DWC-52] sent to [the] [c]laimant by TPCIGA on January 13, 2017, listed 5 minimum work search efforts for each week of the qualifying period for the fifth quarter.

We reverse the ALJ's determination that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the fifth quarter by failing to timely request a BRC and we render a new decision that the carrier waived its right to contest the claimant's entitlement to SIBs for the fifth quarter by failing to timely request a BRC.

We affirm the ALJ's determination that the carrier is relieved of liability for SIBs because of the claimant's failure to timely file a DWC-52 for the fifth quarter for the entire fifth quarter.

The true corporate name of the insurance carrier is **TPCIGA FOR LUMBERMENS UNDERWRITING ALLIANCE, AN IMPAIRED CARRIER, ESTATE NO. 852** and the name and address of its registered agent for service of process is

**MARVIN KELLY
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge