APPEAL NO. 020432-s
FILED APRIL 10, 2002

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 16, 2002, with hearing officer, to resolve the following disputed issues:

1. Does the [Texas Workers' Compensation] Commission have jurisdiction to reopen the issue of entitlement of [sic] Lifetime Income Benefits [LIBs] based on a prior Decision and Order dated December 16, 1999; and

2. Does the [respondent] claimant continue to be entitled to [LIBs].

Following an earlier hearing on the issue of the claimant's entitlement to LIBs, held on December 14, 1999, the hearing officer found that the compensable injury of _____, involved an injury to the spine; that as a result of that injury, the claimant "has no substantial utility of his legs" as of the hearing date; and that the claimant's "loss of function in his legs is permanent." Based on these findings, the hearing officer concluded that the claimant is entitled to LIBs and issued his Decision and Order, which was not appealed. Following the hearing held on January 16, 2002, the hearing officer found that as of the date of that hearing the claimant "does have substantial use of his legs"; that "the claimant's condition has changed materially since the [prior hearing]"; and that the appellant's (self-insured) evidence of the claimant's use of his legs presented at that hearing was not discoverable "by due diligence" before the prior hearing. These findings have not been appealed. Notwithstanding these findings, however, the hearing officer concluded that the Commission "does not have jurisdiction to re-open the issue of entitlement to [LIBs] based on a prior Decision and Order dated December 16, 1999," and that "the claimant continues to be entitled to [LIBs]." These conclusions, which have been appealed, correspond to the two disputed issues framed by the benefit review officer (BRO) in the November 28, 2001, benefit review conference report.

The self-insured has appealed, contending that the hearing officer erred in reaching his legal conclusions because the Commission retains continuing authority and supervision over the claim and has the implied authority to "reopen" the issue of continued entitlement to LIBs based on evidence of substantial change in the claimant's condition. The self-insured further contends that the hearing officer erred in failing to find that the claimant "secured his award of LIBs by fraud" and that the claimant's fraud, in addition to his substantial change in condition, provides yet another basis for the Commission to reopen the claimant's entitlement to LIBs. The self-insured asserts that while Section 415.008 of the 1989 Act has provisions for administrative penalties and the repayment of benefits fraudulently obtained, the 1989 Act does not provide a specific remedy for stopping the continued payment of LIBs in these circumstances. The self-insured requests that the Appeals Panel reverse the hearing officer's Decision and Order and "enter an order denying claimant further [LIBs]." The claimant filed a response presenting counter

arguments and urging that the hearing officer's decision be affirmed.

DECISION

Reversed and a new decision rendered that the claimant does not remain entitled to LIBs.

The evidence adduced at the hearing on January 16, 2002, reflected that the self-insured became aware that the claimant did not have permanent loss of function in his legs when he was seen by another employee walking out of a store unassisted by a walker, cane, or other device, and an investigation of his medical condition was initiated. The self-insured arranged for surveillance of the claimant to confirm the employee's statements and a videotape in evidence shows the claimant driving his car and walking without the assistance of a wheelchair, walker, or cane on three separate occasions in August and October 2001. By letter dated August 14, 2001, the self-insured asked the claimant to attend an independent medical examination by Dr. O for an assessment of his current medical condition. The claimant's written response stated, "I do not agree. Unable to go out of town unless in ambulance laying down . . . ." The self-insured then filed a Required Medical Examination [RME] Notice or Request For Order (TWCC-22) with the Commission on September 7, 2001, requesting a medical evaluation of the claimant's condition and, consequently, the order was granted and the claimant was examined by Dr. O on October 18, 2001. The videotape in evidence shows the claimant walking without assistance both before and after the RME exam and his physical movements are also described in the report of the videographer. Dr. O was asked to view the videotape. Dr. O's report dated October 18, 2001, states that during the claimant's examination, he "did not demonstrate any ability to walk or [sic] did he try"; that he "entered the office using a wheelchair independently"; that "the videotape of [the claimant] shows him walking independently without a walker around a motor vehicle examining the vehicle"; and that "[a]fter reviewing the video tape it appears that [the claimant] has not lost the use of his legs."

At the January 16, 2002, hearing, the claimant testified that his condition has not changed; that he can walk sometimes, spontaneously; that he uses a wheelchair, walker, and cane to assist him in walking; and that the videotape does not depict a true account of his ability to walk because the two times he was videotaped walking to church, he fell once he got past the church doors. The claimant testified that he is under medical treatment with Dr. T, and that he was referred to Dr. K for further evaluation. Dr. K's report dated December 6, 2001, states that the claimant has "paraplegia of both lower extremities which does not follow any definite anatomic pattern at present," and that the claimant "was reluctant to consider further electrodiagnostic evaluation."

JURISDICTION

The hearing officer erred insofar as he concluded that the Commission does not have "jurisdiction" of an issue of continued entitlement to LIBs. Notwithstanding that the

hearing officer's prior Decision and Order dated December 16, 1999, became final since it was not appealed (Section 410.169), the Commission certainly retains continuing general jurisdiction over the claim. The claimant is entitled to certain medical benefits during his lifetime (Section 408.021) and the Commission retains jurisdiction to resolve disputes concerning medical treatment. Unlike other income benefits which cease after the expiration of 401 weeks, excluding death benefits, LIBs may be paid for a claimant's lifetime and we perceive no rational basis for holding that the Commission has no continuing jurisdiction to resolve disputes over entitlement to these benefits.

The self-insured contends that there is evidence of a medical change of condition in the claimant's legs and that, in view of the hearing officer's unappealed finding to that effect, the Commission has the implied power to resolve the issue of the claimant's continued entitlement to LIBs. We agree. While the issue framed by the BRO was couched in terms of the reopening of a final Commission order, we believe the actual issue in dispute is the raising and resolving of a disputed issue concerning the claimant's continued entitlement to LIBs under the circumstances of this case. While we find no express provision in the 1989 Act or in the Commission's rules authorizing and providing a mechanism for the raising, and resolving, of a disputed issue concerning continued entitlement to LIBs once initially determined, we do find some indications that the Texas Legislature contemplated that the Commission would exercise an implied power to do so.

In Sexton v. Mt. Olivet Cemetery Ass'n, 720 S.W.2d 129 (Tex. App.-Austin 1986, writ ref'd n.r.e.), the court restated the "cardinal rule" of statutory construction to the effect that "the court must seek out the legislative intent from a general view of the whole enactment; and, once that intent has been ascertained, it follows as a matter of course that the court shall construe any questioned part of the statute so as to give effect to the legislative purpose. [Citation omitted.]" The court also stated certain rules of substantive law applicable to administrative agencies and bearing upon statutory construction as follows:

> It is axiomatic that such agencies are creatures of statute and have no inherent authority. They may, therefore, exercise only those specific powers conferred upon them by law in clear and express language, and no additional authority will be implied by judicial construction. However, with respect to a power specifically granted the agency, the full extent of that power must be ascertained with due regard for the rule that the Legislature generally intends that an agency should have by implication such authority as may be necessary to carry out the specific power delegated, in order that the statutory purpose might be achieved. Moreover, the Legislature impliedly intends, as a general rule, that an agency should have whatever power is necessary to fulfill a function or perform a duty placed expressly in the agency by the Legislature. The Legislature does not intend that agency functions be an exercise in futility. [Citations omitted.]
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> The agency may not, however, on a theory of necessary implication from a

> specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes.
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> * * * * *
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> These general rules have particular application in the matter of determining whether an agency has the power to reopen administrative proceedings with a view toward reconsidering its earlier adjudicative order, after it has become effective, and possibly modifying or rescinding that order.
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> * * * * *
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> Even in the absence of an express and specific delegation of the power to reopen an administrative proceeding, it is rather simple in many cases to conclude that the Legislature intended that the agency have that power as a necessary adjunct to other powers it has delegated to the agency, or as a necessary adjunct of the duties and functions expressly assigned the agency, it being manifest that the Legislature must have intended a workable and effective exercise of the powers expressly and specifically granted the agency, directed in most cases toward protecting the public interest and not the private interests of the regulated persons, organizations, or activities. In such cases, the power to reopen may be implied.

The predecessor statute, Vernon's Ann. Civ. St. Art. 8306, Sec. 12d, expressly authorized the Commission's predecessor agency to review any award or order ending, diminishing, or increasing compensation previously awarded upon its own motion or upon the application of any person interested showing a change of condition, mistake, or fraud. That provision was not carried over into the 1989 Act. There is, however, the express authority in Section 409.021(d) to reopen the issue of "the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier." Although this provision expressly applies to the claimed injury, it does reflect that the Legislature applied the concept of reopening in the 1989 Act. It could be argued, by extension, that it applies to benefits as well. Further, Section 415.008, Fraudulently Obtaining or Denying Benefits; Administrative Violation, provides in subsection (c), in part, that a person who has obtained an excess payment in violation of this section is liable for full repayment plus interest and that "[i]f the person is an employee . . . the repayment may be redeemed from future income benefits . . . to which the person is otherwise entitled." Applying this provision to LIBs necessarily envisions the ability of the Commission under Chapter 410 of the 1989 Act to determine entitlement to future LIBs. We observe that the Commission itself has stated the policy in Texas Workers' Compensation Commission Advisory No. 93-04, dated March 9, 1993, that "[w]orkers should receive what they are entitled to--no more, no less." Accordingly, we determine that the Commission does have "jurisdiction" to consider and resolve the disputed issue of the claimant's continued

entitlement to LIBs under the circumstances of this case. Based on the unappealed findings of fact, we reverse the decision and order of the hearing officer and render a new decision and order that the claimant is not entitled to a continuation of LIBs. The unappealed finding of the hearing officer that "as of the date of the hearing, the claimant does have substantial use of his legs," governs the date of cessation of entitlement to LIBs.

FRAUD

The self-insured also contends that the hearing officer failed to make a finding of fact regarding fraud. The Appeals Panel has held that "fraudulently obtaining workers' compensation benefits is an administrative violation requiring notice of the violation charged and notice of the right to request a hearing conducted under the [Administrative Procedure Act]" and that a "[CCH] is not the proper forum to determine an administrative violation." *See* Texas Workers' Compensation Commission Appeal No. 93610, decided September 7, 1993; Texas Workers' Compensation Commission Appeal No. 982588, decided December 17, 1998 (Unpublished); and Section 415.008. The Appeals Panel has no authority to order administrative penalties and repayment of fraudulently obtained income benefits. *See* Texas Workers' Compensation Commission Appeal No. 992523, decided December 29, 1999. Section 415.031 provides for the initiation of administrative violation proceedings; Section 415.032 provides for the investigation of the violation and notice of the charge and right to request a hearing; and Section 415.034(a) (effective for a hearing beginning on or after January 1, 1996) provides that the State Office of Administrative Hearings shall set a hearing. The self-insured argues that initiating an administrative violation proceeding pursuant to Section 415.031 does not provide an adequate remedy unless the Commission accepts jurisdiction, because the LIBs would continue to be paid to the claimant for the rest of his life. Our determination that the Commission has jurisdiction over the issue of the claimant's continued entitlement to LIBs and our rendition of a new decision that the claimant is not entitled to future LIBs lays this problem of the self-insured to rest. The hearing officer did not err in not making a finding of fact on fraud.

The decision and order of the hearing officer are reversed and a new decision and order are rendered that the claimant is not entitled to a continuation of LIBs.

The true corporate name of the insurance carrier (self-insured) is **DEEP EAST TEXAS SELF INSURANCE FUND** and the name and address of its registered agent for service of process is

TOM LANG
314 HIGHLAND MALL BLVD.
SUITE 202
AUSTIN, TEXAS 78752.

Philip F. O'Neill
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The majority determines that the Texas Workers' Compensation Commission (Commission) has the "implied authority" to "resolve the disputed issue of the claimant's continued entitlement to lifetime income benefits (LIBs)" based upon the factual determinations that there has been a substantial change in the claimant's condition such that he does have substantial use of his legs as of the date of the January 16, 2002, hearing, and that the carrier could not, through the exercise of due diligence, have discovered the evidence of the claimant's use of his legs before the prior hearing where the claimant was determined to be entitled to LIBs. I do not believe that such implied authority exists and further believe that if any remedy is available to the carrier in this instance, it is found in Section 415.031. The proposition that the Commission has the implied authority the majority recognizes has initial facial appeal in that it seems fair that where, as here, there is a change in condition such that the claimant can no longer satisfy the requirements of Section 408.161 and establish entitlement to LIBs, he should not continue to receive those benefits. However, my concern that the Commission does not have that authority is two-fold. Initially, it should be noted that the predecessor workers' compensation statute contained Art. 8306, sec. 12d, entitled "Change of condition, mistake or fraud; review." That section provided:

> Upon its own motion or upon the application of any person interested showing a change of condition, mistake or fraud, the [Industrial Accident] Board at any time within the compensation period, may review any award or order, ending, diminishing or increasing compensation previously awarded, within the maximum and minimum provided in this Law, or change or revoke its previous order denying compensation, sending immediately to the parties a copy of its subsequent order or award. Provided, when such previous order has denied compensation, application to review same shall be made to the Board within twelve months after its entry, and not afterward. Review under this Section shall be only upon notice to the parties interested.

The Disposition Table, which shows where the subject matter of the former articles is found in the 1989 Act, reveals that Art. 8306, sec. 12d was not carried over to the 1989 Act. Based upon well-settled rules of statutory construction, I believe that the Legislature's omission of that provision from the 1989 Act demonstrates a legislative intent to change

the law. *See* Chapin v. Putnam Supply Co., 124 Tex. 247, 76 S.W.2d 469 (1934) and the cases cited therein. In my view, the failure to carry forward the express authority to modify an award into the 1989 Act significantly undermines an argument that the Commission has an implied authority to make such a modification. If the Commission were to have had such authority, it would seem that the express authority would simply have been included in the 1989 Act.

The second source of my concern that we have the implied authority recognized by the majority comes from the decision in Lumbermens Mut. Cas. Co. v. Manasco, 971 S.W.2d 60 (Tex. 1998). In that case, the Supreme Court determined that a claimant could not use the "substantial change of condition" language of Section 410.307 to obtain reconsideration of his impairment rating (IR) where he had failed to appeal a hearing officer's determination of his IR to the Appeals Panel and, thus, the hearing officer's decision became final pursuant to Section 410.169. In so doing, the Manasco court stated:

> The clear wording of section 410.307 dictates that Manasco's attempt to reopen his [IR] must fail. Manasco failed to appeal the [IR] decided by the contested case hearing officer on September 22, 1993. Thus, he failed to exhaust administrative remedies, and the September 22, 1993 [IR] of seven percent became final. *See* TEX. LAB. CODE § 410.169. Because Manasco failed to exhaust administrative remedies, he was not entitled to judicial review of his [IR]. He cannot use a second set of administrative proceedings to bootstrap a belated appeal for judicial review of the unappealed [IR]. Allowing claimants to do so would distort the Workers' Compensation Act beyond its intent.

Id. at 64. In this instance, the carrier did not appeal the hearing officer's December 16, 1999, determination that the claimant is entitled to LIBs and that determination became final pursuant to Section 410.169. Section 408.161 specifically states that LIBs "are paid until the death of the employee" and, unlike with other income benefits and death benefits, no provision is made in the statute for termination of LIBs. Thus, in this case, there is a final Commission order that LIBs are to be paid to the claimant until his death. In permitting the Commission to resolve the issue of whether the claimant continues to be entitled to LIBs, the majority is doing exactly what the Manasco court states is prohibited, namely permitting the carrier to "use a second set of administrative proceedings to bootstrap a belated appeal" of a final benefits determination.

For the reasons stated above, I would affirm the hearing officer's determination that the Commission does not have the authority to reopen the final determination that the claimant is entitled to LIBs.

Elaine M. Chaney
Appeals Judge