APPEAL NO. 030330-s
FILED APRIL 2, 2003

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 3, 2002, with the record closing on December 6, 2002. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the seventh quarter; that the claimant is entitled to lifetime income benefits (LIBs) based on the total and permanent loss of use of both eyes; and that the respondent (Subsequent Injury Fund (SIF)) is liable for LIBs pursuant to Section 408.162.

The appellant/cross-respondent (carrier) appeals the hearing officer's determinations that the claimant is entitled to SIBs for the seventh quarter and that he is entitled to LIBs. The carrier contends that the hearing officer erred in not admitting and considering the medical report of Dr. R.

The claimant appeals the hearing officer's determination that the SIF is liable for LIBs pursuant to Section 408.162. The claimant contends that the determination that the SIF is liable for LIBs is ambiguous and without sufficient direction to guide the parties' actions to pay benefits to the claimant.

The SIF filed a response to the claimant's appeal, the claimant filed a response to the carrier's appeal, and the carrier filed a response to the claimant's appeal. We do not agree with the claimant's assertion that the carrier has not appealed the hearing officer's determination that the claimant is entitled to LIBs because the carrier has appealed that determination (regarding the total and permanent loss of use of the right eye).

DECISION

We reverse the hearing officer's decision that the claimant is entitled to SIBs for the seventh quarter and that he is entitled to LIBs, and we remand the case to the hearing officer. We also reverse the hearing officer's determination that the SIF is liable for LIBs because that determination is dependent upon the determination that the claimant is entitled to LIBs.

EXCLUSION OF DR. R's REPORT

We hold that the hearing officer erred in excluding Dr. R's report from evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.2(8) (Rule 142.2(8)) provides that the hearing officer is authorized to rule on the admissibility of evidence. The standard of review on evidentiary rulings of a hearing officer is abuse of discretion, and in determining whether there was an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Texas Workers'

Compensation Commission Appeal No. 941414, decided December 6, 1994. At the carrier's request, the Texas Workers' Compensation Commission (Commission) appointed Dr. R as a designated doctor under Rule 130.110 to determine if the claimant's medical condition had improved sufficiently to allow the claimant to return to work. Rule 130.110 provides for giving the designated doctor's report presumptive weight. Dr. R examined the claimant during the qualifying period for the seventh quarter and reported that the evidence was against the claimant's statement that he was effectively blind and that the claimant is fit to return to work with suitable restrictions. The claimant objected to the admission of Dr. R's report, contending that it was improperly acquired under Section 408.151 and Rule 130.110. The hearing officer determined that the appointment of Dr. R was erroneously made and excluded the report from evidence.

It is clear that Dr. R should not have been appointed as a designated doctor under Rule 130.110 because the claimant had not reached the second anniversary of his initial entitlement to SIBs. *See* Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. The hearing officer also noted that a dispute did not exist under Rule 130.110(b).

The Appeals Panel has previously considered what the status is of a report of a designated doctor who is improperly appointed under Rule 130.110. In Appeal No. 020041-s, *supra*, the Appeals Panel held that although the designated doctor's report was not entitled to presumptive weight under Rule 130.110, because the dispute regarding the claimant's work status arose prior to the second anniversary of the claimant's initial entitlement to SIBs and because the report was written after the end of the qualifying period in issue, and thus could not have been received by the Commission until after that qualifying period ended, the report could be considered under Rule 130.102(d)(4) in determining SIBs entitlement. In Texas Workers' Compensation Commission Appeal No. 022186, decided October 4, 2002, the hearing officer correctly noted that the report of the designated doctor appointed under Rule 130.110 was not entitled to presumptive weight because the second anniversary requirement was not met and the Appeals Panel found no error in the hearing officer having given the report the same consideration as any other medical record.

In several other decisions where the designated doctor's report was not given presumptive weight under Rule 130.110 because the report was received by the Commission after the qualifying period in issue had ended, the Appeals Panel approved consideration of the report as a medical report regarding the claimant's ability to work. Texas Workers' Compensation Commission Appeal No. 021439, decided July 24, 2002; Texas Workers' Compensation Commission Appeal No. 021486, decided July 9, 2002; Texas Workers' Compensation Commission Appeal No. 012999, decided January 28, 2002; Texas Workers' Compensation Commission Appeal No. 012090, decided October 8, 2001; and Texas Workers' Compensation Commission Appeal No. 002327, decided November 20, 2000. In Appeal No. 012090, *supra*, the Appeals Panel stated: "The fact that the designated doctor's report cannot be given presumptive weight does not mean it cannot be considered as a medical record applicable to the question of whether the

claimant has the ability to work." In Appeal No. 002327, *supra*, the Appeals Panel stated: "If the hearing officer determines that the designated doctor's report is not entitled to presumptive weight, the hearing officer may consider it just as he or she considers other medical reports in the record."

We note that neither Section 408.151 nor Rule 130.110 provide for the exclusion from evidence or nonconsideration of a designated doctor's report where the designated doctor is not properly appointed. As noted, the Appeals Panel has determined that such reports are not given presumptive weight, but can be considered by the hearing officer. There is no assertion that Dr. R's report was not timely exchanged with the claimant. In Schenck v. Ebby Halliday Real Estate, 803 S.W.2d 361 (Tex. App.-Fort Worth 1990, no writ), cited by the claimant, the court upheld the exclusion of a real estate appraiser's report and testimony as a sanction for abuse of discovery. We are not dealing here with sanctions for abuse of discovery, but rather with a mistake made by the Commission in prematurely appointing a designated doctor under Rule 130.110.

We hold that the hearing officer erred in excluding the report of Dr. R from evidence and in not considering that report. We cannot say that the error was harmless. Based on our prior decisions, Dr. R's report would not be entitled to presumptive weight, but can be considered as any other medical report would be considered. Dr. R opined on the claimant's asserted blindness as well as his ability to work. Dr. R's report is relevant on both the issues of SIBs and LIBs. On remand, the hearing officer should admit Dr. R's report into evidence and consider it with regard to the issues of the claimant's entitlement to SIBs and LIBs. Of course, under Section 410.165(a), the hearing officer is the sole judge of the weight and credibility of the evidence. In addition, with regard to Rule 130.102(d)(4), the Appeals Panel has stated that whether another record shows an ability to work is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 023218, decided February 3, 2003. However, the Appeals Panel has also stated that "in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record." Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000.

With regard to the carrier's assertion that Rule 130.110 is unconstitutional, the Appeals Panel has held that it does not have the authority to determine the constitutionality of statutes or agency rules. Texas Workers' Compensation Commission Appeal No. 010851, decided June 7, 2001.

SIF LIABILITY FOR LIBS

It is not disputed that the claimant has been blind in his left eye since early childhood. It is also undisputed that the claimant sustained a compensable injury on March 4, 1998, when he was involved in a motor vehicle accident; that the carrier was the workers' compensation insurance carrier for the claimant's employer on the date of the compensable injury; that the claimant reached maximum medical improvement

(MMI) on April 28, 1999; and that he has a 32% impairment rating (IR). The compensable injury includes an injury to the claimant's right eye as well as other injuries.

Section 408.161(a) provides in pertinent part that LIBs are paid until the death of the employee for: (1) total and permanent loss of sight in both eyes. 408.161(b) provides that for purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part. Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex. 1962) set forth a test for determining a total loss of use. *See also* Texas Workers' Compensation Commission Appeal No. 983000, decided February 3, 1999, which applied the Seabolt decision to a dispute regarding entitlement to LIBs for a total and permanent loss of sight in both eyes.

Section 408.162 provides:

> (a) If a subsequent compensable injury, with the effects of a previous injury, results in a condition for which the injured employee is entitled to [LIBs], the insurance carrier is liable for the payment of benefits for the subsequent injury only to the extent that the subsequent injury would have entitled the employee to benefits had the previous injury not existed.
>
> (b) The [SIF] shall compensate the employee for the remainder of the [LIBs] to which the employee is entitled.

Rule 131.1 is entitled "Initiation of [LIBs]". Rule 131.2 is entitled "Calculation of [LIBs]". Rule 131.3 is entitled "Carrier's Petition for Payment of Benefits by the [SIF]," and it provides:

> (a) When an insurance carrier reasonably believes that an injured employee may be eligible for [LIBs] from the [SIF], the insurance carrier shall petition the commission for payment of [LIBs] from the [SIF]. The petition shall be writing and contain the following [(1) through (5) state what is to be contained in the petition].
>
> (b) The commission shall order the payment of [LIBs] from the [SIF] if it finds that the effects of the two injuries combined entitle the employee to [LIBs].
>
> (c) The insurance carrier shall pay to the employee weekly benefits as ordered by the commission.
>
> (d) The [SIF] shall compensate the employee for the remaining [LIBs] for which the insurance carrier is not liable.

One of the issues at the CCH was whether the SIF is liable for LIBs pursuant to Section 408.162 of the Texas Labor Code. The hearing officer concluded that "The [SIF] is liable for [LIBs] pursuant to Section 408.162 of the Texas Labor Code." The claimant appeals that determination. The claimant contends that the appealed determination is ambiguous and without sufficient direction to guide the parties' actions to pay benefits to the claimant. The claimant states that the Commission must provide guidance to the carrier and the SIF as to the proportion and time duration that each is responsible for payment of LIBs. We note that the 75% LIBs rate (Section 408.161(c)) is greater than the rates for temporary income benefits (except for Section 408.103(b)), impairment income benefits (IIBs), and SIBs (Sections 408.103(a), 408.126, and 408.144(b)). The claimant states:

> Briefly, the claimant contends that the Appeals Panel should order the SIF to pay the difference in the compensation rate between IIBs/SIBs and LIBs (with interest, for accrued but unpaid benefits retroactive to MMI) and the full amount of LIBs beyond the expiration of 401 weeks. The carrier should pay the amount of benefits it would pay in the absence of a LIBs finding – in other words, the full IIBs rate for the [IR] (which it did pay), and the full SIBs rate until the expiration of 401 weeks.

In essence, the claimant does not want to have to apply for SIBs for the remainder of the 401-week period (*see* Section 408.083 regarding the 401-week provision); he wants the carrier to pay SIBs without having to apply for SIBs. The claimant requests that we either render a decision as outlined in his appeal or remand the case to the hearing officer for a determination on these issues.

The carrier states in its response that under Section 408.162 it is only liable for SIBs if and when the claimant shows himself entitled to SIBs, and that the claimant must still comply with the requirements to show entitlement for SIBs each and every quarter. The carrier asserts that there is nothing in the 1989 Act or Commission rules to suggest that it is automatically liable for SIBs up to 401 weeks after the date of injury.

The SIF contends in its response that the Appeals Panel should not follow the suggested interpretation of Section 408.162 outlined in the claimant's request for review. The SIF contends that the carrier is not required to pay the full SIBs rate until the expiration of 401 weeks; that the carrier is to continue to review and calculate the claimant's SIBs on a quarterly basis; and that under Section 408.162, the claimant is not entitled to LIBs until after the claimant has exhausted receiving SIBs. The SIF maintains that the correct interpretation of Section 408.162 requires the carrier to continue to pay SIBs for 401 weeks with the SIF paying any difference between the amount paid by the carrier and the amount of LIBs due, and that only at the end of 401 weeks would the SIF continue with full payment of LIBs. The SIF states that Section 408.162 requires the SIF to pay only the difference between what the carrier owes to the claimant and the amount of LIBs to which the claimant is entitled, that Section 408.162 neither relieves the carrier from paying SIBs nor requires the carrier to pay SIBs at a full rate, and that there is nothing in the 1989 Act or Commission rules to

suggest that the carrier is automatically liable for SIBs up to the 401st week after the date of injury.

We first note that since the SIF's liability for LIBs is dependent upon a determination that the claimant is entitled to LIBs, and since we have reversed and remanded both the SIBs seventh-quarter issue and the LIBs issue to the hearing officer due to the error in excluding Dr. R's report from evidence, a determination on the respective liabilities of the SIF and the carrier cannot be made at this time.

However, the Appeals Panel has addressed several matters regarding LIBs. For example, in Texas Workers' Compensation Commission Appeal No. 012554, decided December 5, 2001, the Appeals Panel held that under all subsections of 408.161(a), LIBs accrue from the date of disability. In Texas Workers' Compensation Commission Appeal No. 990321, decided March 24, 1999, the Appeals Panel stated:

> Section 408.162(a) provides that "the insurance carrier is liable for the payment of benefits for the subsequent injury only to the extent that the subsequent injury would have entitled the employee to benefits had the previous injury not existed." "Remainder" is defined as the number left after a subtraction. Webster's Ninth New Collegiate Dictionary 996 (9th ed. 1983). It is clear that the carrier's liability is limited to benefits the claimant is entitled to had the previous injury not existed. The SIF is liable for the remainder, the number left after the amount of the benefits due the claimant for the subsequent injury is subtracted from the LIBs amount. We believe that the hearing officer correctly followed the LIBs statute and rule in determining that, from the date that the claimant's LIBs accrued, the SIF was liable for the amounts which exceeded the weekly benefits due from the carrier and remains so liable until no further weekly benefits are due from the carrier after which time the SIF is solely liable for the claimant's LIBs.

In Texas Workers' Compensation Commission Appeal No. 992715, decided January 13, 2000, the Appeals Panel affirmed a hearing officer's determination that the claimant in that case was not entitled to SIBs for the first and second quarters, which determination was apparently based on the claimant's failure to meet the good faith criterion for SIBs by showing that he had no ability to work during the qualifying periods, and affirmed the hearing officer's determination that the SIF should pay LIBs for those quarters. In affirming the hearing officer's decision, the Appeals Panel stated: "Liability of the SIF for LIBs during a period in which the claimant is not entitled to income benefits from the carrier is, in fact, mandated by our decision in Appeal No. 990321."

In the instant case, we are unable to agree with the claimant's assertion that the carrier is liable for payment of SIBs for the remainder of the 401-week period provided for in Section 408.083. This is so because SIBs are applied for quarterly, entitlement to SIBs is determined quarterly, and SIBs are calculated quarterly. Sections 408.143 and 408.144; Rules 130.102 and 130.104. In Texas Workers' Compensation Commission

Appeal No. 000886, decided June 12, 2000, the Appeals Panel stated: "The statutory requirements for SIBs are different from that of LIBs and SIBs entitlement is determined quarterly."

We reverse the hearing officer's decision that the claimant is entitled to SIBs for the seventh quarter, that the claimant is entitled to LIBs, and that the SIF is liable for LIBs, and we remand the case to the hearing officer to admit Dr. R's medical report into evidence and to consider that report on the issues of SIBs and LIBs entitlement.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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 R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

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Robert W. Potts
Appeals Judge

CONCUR:

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Chris Cowan
Appeals Judge

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Terri Kay Oliver
Appeals Judge