

APPEAL NO. 032868-s
FILED DECEMBER 11, 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 October 14, 2003. The hearing officer determined that: (1) the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter; (2) the claimant is not entitled to SIBs for the sixth quarter; (3) the claimant is not entitled to SIBs for the seventh quarter; and (4) the respondent (carrier) did not waive its right to contest the claimant's entitlement to fourth and sixth quarter SIBs by failing to timely request a benefit review conference (BRC). The claimant appeals these determinations on legal and sufficiency of the evidence grounds. The carrier urges affirmance.

DECISION

Affirmed in part, reversed and rendered in part.

We first address the hearing officer's determinations that the claimant is not entitled to SIBs for the fourth and sixth quarters, and that the carrier did not waive its right to contest the claimant's entitlement to SIBs for those quarters due to its failure to timely request a BRC. The record reflects that the carrier received the claimant's Application for [SIBs] (TWCC-52) for the fourth quarter on October 23, 2002, and that it timely paid the claimant SIBs for that quarter; that the carrier received the claimant's TWCC-52 for the sixth quarter on April 15, 2003, and that it timely paid the claimant SIBs for that quarter; that at the time the carrier received the claimant's TWCC-52 for the fourth quarter, the claimant's entitlement to SIBs for the third quarter was still in dispute (the hearing officer issued a determination of nonentitlement for third quarter SIBs on February 14, 2003); and that at the time the carrier received the claimant's TWCC-52 for the sixth quarter, the claimant's entitlement to SIBs for the fifth quarter was still in dispute (the hearing officer issued a determination of nonentitlement for fifth quarter SIBs on May 8, 2003).

Both the claimant and the carrier point to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108 (Rule 130.108) to support their respective positions regarding the issues of the claimant's entitlement to SIBs for the fourth and sixth quarters, and carrier waiver. The claimant asserts that Rule 130.108(e) does not apply to the facts of this case, and that the carrier should not be allowed to use it to avoid waiver. The claimant argues that at the time the carrier should have requested a BRC for the fourth quarter, the claimant's entitlement to third quarter SIBs was still in dispute. It is the claimant's position that, because the third quarter was still in dispute, the carrier had an obligation to request a BRC within 10 days of receiving her TWCC-52 for the fourth quarter pursuant to Rule 130.108(d). The claimant asserts that the same is true for the sixth quarter. At the time the carrier should have requested a BRC for the sixth quarter, the claimant's entitlement to fifth quarter SIBs was still in dispute. The claimant cites to Appeals Panel decisions to support her position in this regard. The carrier argues that

since it did not pay the claimant SIBs for the third and fifth quarters, it did not have to request a BRC on the fourth and sixth quarters pursuant to Rule 130.108(d), because Rule 130.108(e) applies. The carrier likewise cites Appeals Panel decisions to support its position in this regard.

There is clearly Appeals Panel authority to support both the claimant's and the carrier's position on the application of Rule 130.108 and the issue of carrier waiver in situations where the previous SIBs quarter is still in dispute when the carrier receives the TWCC-52 for the subsequent quarter. Rule 130.108(d) requires a carrier to request a BRC within 10 days of receiving a claimant's TWCC-52 if it intends to dispute entitlement to that quarter, and it has paid SIBs for the immediately preceding quarter for which the subsequent TWCC-52 is filed. If the carrier fails to request a BRC as required by Rule 130.108(d), it waives the right to contest entitlement to SIBs for the subsequent quarter. Rule 130.108(e) provides that if a carrier disputes entitlement to a subsequent quarter and the carrier did not pay SIBs during the quarter immediately preceding the quarter for which the TWCC-52 is filed, the carrier shall send the determination to the claimant within 10 days of the date the TWCC-52 was filed. Rule 130.108(e) does not contain a waiver provision, nor any consequence at all, for the carrier's failure to send the required notice to the claimant in a timely manner. The 1989 Act and rules contain no specific provisions relating to the factual situation where the immediately preceding quarter is actively under dispute at the time the carrier receives the TWCC-52 for the subsequent quarter.

We resolve our previously conflicting decisions by holding that the proper approach, when the rule does not fit the factual situation, is to return to the statutory provision in the 1989 Act—Section 408.147(b) which provides as follows:

- (b) 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 [TWCC-52], the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

In light of this holding, the proper interpretation of Rule 130.108 in situations such as the one before us is contained in Texas Workers' Compensation Commission Appeal No. 021866, decided September 11, 2002, which states:

The carrier argues that the hearing officer erred in finding that the carrier waived its right to contest the claimant's entitlement to SIBs because the carrier failed to timely request a BRC. The carrier admits that it did not timely file a request for a BRC, which normally would result in it waiving its right to contest entitlement to SIBs. The carrier argues that [Rule 130.108(e)] relieved it of the obligation to timely dispute entitlement to fifth quarter SIBs because it did not pay SIBs for the fourth quarter. However, we held in Texas Workers' Compensation Commission Appeal No.

020302, decided March 26, 2002, that Rule 130.108(e) would not operate to relieve the carrier of its duty to request a BRC where, as here, the issue of entitlement to the prior quarter of SIBs was ongoing at the time the carrier should have requested the BRC.

We are not persuaded by the carrier's assertion that this application of Rule 130.108 will require carriers to "gaze into a crystal ball or procure a time machine in order to determine whether at some point it will ultimately pay benefits to a claimant for a particular quarter." Pursuant to Rule 130.108(d) and (e), the carrier is required to make a determination and take some action regarding entitlement to SIBs for a given quarter within 10 days of the filing of the TWCC-52. Neither a crystal ball nor a time machine is necessary for a carrier to determine whether or not it is going to dispute a given quarter of SIBs, unless the intent is to test the waters and see how it fared on the merits at the CCH for the preceding quarter. This is especially so since each quarter of SIBs stands on its own. To be clear, we hold that when the issue of entitlement to the prior quarter of SIBs is ongoing and the claimant submits a TWCC-52 for the subsequent quarter, the carrier must timely request a BRC if it wishes to dispute the subsequent quarter, and failure to do so results in waiver as provided in Section 408.147(b). In the absence of a specific rule, this holding is consistent with the "liberal interpretation" of the 1989 Act mandated by Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999).

Finally, the 1989 Act and the rules are silent as it relates to a situation where the carrier pays SIBs and later decides to go back and contest the quarters for which it has already found entitlement and paid. We find that to allow a carrier to make a determination that a claimant is entitled to SIBs for a given quarter, actually pay the benefits, and to then allow the carrier to come back at a later date and dispute the claimant's entitlement for that quarter would be manifestly unjust. The carrier is charged with the responsibility of reviewing the claimant's TWCC-52 and determining whether or not the claimant is entitled to SIBs for a given quarter. Once that determination is made, the carrier is required to take action. A claimant should not be penalized if the carrier makes an initial determination that the claimant is entitled to SIBs and makes the payments, and only later for some reason decides to reverse its earlier decision and challenge entitlement. If such behavior by the carrier were allowed, there would never be any finality for the claimant during his or her entire SIBs eligibility period. The claimant would always have to be concerned that the carrier may attempt to come back at a later date, possibly a considerable amount of time later, and contest entitlement to SIBs, despite a previous carrier determination of entitlement and payment of the benefits. This concern is especially meritorious when one considers the consequences of Rule 130.106(a), which deals with a claimant's permanent loss of entitlement to SIBs. For the above reasons, we hold that once a carrier makes the determination that the claimant is entitled to SIBs for a given quarter, and actually pays the benefits, it can no longer contest the claimant's entitlement for that quarter.

We next turn to the hearing officer's determination that the claimant is not entitled to SIBs for the seventh quarter. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Rule 130.102. The SIBs criterion in issue is whether the

claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the seventh quarter. The claimant asserted that she had no ability to work due to her compensable injury. The hearing officer found that the claimant did not meet the requirements of Rule 130.102(d)(4), that the claimant failed to submit a medical narrative showing how her compensable injury caused an inability to work during the relevant qualifying period, and that during the relevant qualifying period the claimant possessed an ability to work and did not perform any job searches. Whether a claimant satisfied the good faith requirement for SIBs entitlement is a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing (Section 410.165(a)) and as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We conclude that the hearing officer's decision regarding the seventh quarter is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's determination that the claimant is not entitled to SIBs for the fourth and sixth quarters is reversed, and a new decision is rendered that the claimant is entitled to SIBs for the fourth and sixth quarters. The hearing officer's determination that the claimant is not entitled to SIBs for the seventh quarter is affirmed.

The true corporate name of the insurance carrier is **THE ST. PAUL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge