

APPEAL NO. 061040-s  
FILED JUNE 19, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 5, 2006, a contested case hearing (CCH) was held. The disputed issue at the CCH was whether the appellant (carrier) was entitled to a reduction of the respondent's (claimant) impairment income benefits (IIBs) and/or supplemental income benefits (SIBs) based on contribution from an earlier compensable injury, and if so, by what amount. The hearing officer resolved the disputed issue by deciding that the carrier is not entitled to a reduction of the claimant's IIBs and SIBs based on contribution from an earlier compensable injury. (attorney), an attorney with (law firm), represented the claimant at the CCH. The carrier appealed the hearing officer's decision to the Appeals Panel and the hearing officer's decision became final.

In a Texas Department of Insurance, Division of Workers' Compensation (Division) Order For Attorney's Fees dated March 23, 2006 (Sequence 36), the hearing officer ordered \$280.00 in attorney's fees to be paid to the law firm pursuant to Section 408.147(c) and 28 TEX. ADMIN. CODE § 152.1(f) (Rule 152.1(f)) for dates of service from November 1 through November 30, 2005. In a Division Order For Attorney's Fees dated March 23, 2006 (Sequence 38), the hearing officer ordered \$555.00 to be paid to the law firm pursuant to Section 408.147(c) and Rule 152.1(f) for dates of service from January 3 through January 23, 2006. The carrier has appealed the attorney's fees ordered in Sequences 36 and 38. The claimant filed a response.

DECISION

We reverse the attorney's fees orders in Sequences 36 and 38 and render a decision vacating those orders.

The claimant's response states that on November 3, 2004, the Texas Workers' Compensation Commission (now the Division) found that he was entitled to SIBs; that the carrier contested his entitlement to the first quarter of SIBs; that he retained the law firm to represent him; and that a hearing officer issued a decision and order following a CCH on March 22, 2005, that he was entitled to the first quarter of SIBs. Division records do not reflect an appeal of that decision.

On April 5, 2005, the carrier filed a Carrier's Request For Reduction of Income Benefits Due to Contribution (TWCC-33) requesting a Division order to reduce the claimant's IIBs and SIBs by 100% for the effects of a prior compensable injury. In a Division Order dated April 12, 2005, the Division ordered the carrier to reduce IIBs and SIBs (if any) by 80% for the effects of contribution. In a Notification Of Change In Amount Of Indemnity Benefit Payment (PLN 8) dated April 29, 2005, the carrier notified the claimant that the amount of SIBs he was receiving had decreased effective May 12, 2005, because the Division had approved the carrier to take 80% contribution from his prior impairment rating regarding another work-related injury, noting that the previous

amount of monthly payment was \$1,168.80 and that the new amount of monthly payment is \$233.76. The carrier states in its appeal that the claimant filed three requests on May 23, 2005, July 28, 2005, and October 17, 2005, for a benefit review conference (BRC) to challenge the Division's order on contribution. A BRC was held on November 18, 2005, on the disputed contribution issue. On January 5, 2006, a CCH was held on the disputed contribution issue, the hearing officer decided that the carrier is not entitled to contribution, the carrier appealed the hearing officer's decision to the Appeals Panel, and the hearing officer's decision became final.

In a Division Order for Attorney's fees dated November 30, 2005 (Sequence 18), the hearing officer who presided at the March 22, 2005, CCH on entitlement to first quarter SIBs ordered \$235.00 in attorney's fees to be paid to the law firm from the claimant's benefits for dates of service from November 1 through November 18, 2005.

In a Division Order for Attorney's fees dated December 19, 2005 (Sequence 19), the "Commission" ordered \$75.00 in attorney's fees to be paid to the law firm from the claimant's benefits for dates of service from November 30 through December 9, 2005.

In a Division Order for Attorney's fees dated January 10, 2006 (Sequence 21), the hearing officer who presided at the January 5, 2006, CCH on the contribution issue ordered \$450.00 in attorney's fees to be paid to the law firm from the claimant's benefits for dates of service from January 3 through January 5, 2006.

In a Division Order for Attorney's fees dated February 10, 2005 (Sequence 23), the "Commission" ordered \$60.00 in attorney's fees to be paid to the law firm from the claimant's benefits for a date of service of January 18, 2006.

In a Division Order for Attorney's fees dated March 8, 2006 (Sequence 24), the "Commission" ordered \$330.00 in attorney's fees to be paid to the law firm from the claimant's benefits for dates of service from January 23 through February 15, 2006.

It appears to be undisputed on appeal that the law firm's services in Sequences 18, 19, 21, 23, and 24, related to the contribution issue (attend the November 18, 2005, BRC and the January 5, 2006, CCH, and other services), although the claimant characterizes the contribution dispute as involving entitlement to and amount of SIBs.

According to the Division's Dispute Resolution Information System (DRIS), the law firm called the Division on March 15, 2006, and informed the Division that the law firm had erred in billing for the attorney fees because the fees should have been "SIBs fees." The DRIS note of March 15, 2006, states that attorney fee orders would be canceled, that they would need to be resubmitted for approval, and that the law firm would need to reimburse the claimant for any amount the carrier had paid the law firm from the claimant's benefits. Attached to the claimant's response is an unsigned Division letter dated March 15, 2006, that states "All Division Orders for Attorney's Fees issued prior to this date to attorney [law firm] are rescinded. The orders are being rescinded at the request of the attorney due to a billing error."

In a Division Order for Attorney's Fees dated March 23, 2006 (Sequence 36), the hearing officer who presided at the January 5, 2006, CCH on the contribution issue ordered \$280.00 in attorney's fees to be paid to the law firm pursuant to Section 408.147(c) and Rule 152.1(f) for dates of service from November 1 through November 30, 2005.

In a Division Order for Attorney's Fees dated March 23, 2006 (Sequence 38), the attorney who presided at the January 5, 2006, CCH on the contribution issue ordered \$555.00 in attorney's fees to be paid to the law firm pursuant to Section 408.147(c) and Rule 152.1(f) for dates of service from January 3 through January 23, 2006.

It appears to be undisputed on appeal that the law firm's services in Sequences 36 and 38 related to the contribution issue (attend the November 18, 2005, BRC and the January 5, 2006, CCH, and other services), although the claimant characterizes the contribution dispute as involving entitlement to and amount of SIBs.

The carrier appeals the attorney's fees ordered in Sequences 36 and 38, contending that unrescinded orders exist for the same dates of service; that it was improper to issue the orders pursuant to Section 408.147(c) and Rule 152.1(f) requiring the carrier to directly pay attorney fees to the claimant's attorney because the January 5, 2006, CCH did not address the carrier's dispute of SIBs but instead was on the issue of contribution; that Sequences 18, 19, 21, 23, and 24, were not appealed and became final; that since the claimant's attorney has been paid for dates of service from November 1 through November 30, 2005, through Sequences 18 and 19, claimant's attorney is not entitled to further reimbursement from the carrier through Sequence No. 36; that since the claimant's attorney has been paid for dates of service from January 3 through January 23, 2006, through Sequences 21, 23, and 24, the claimant's attorney is not entitled to further reimbursement from the carrier through Sequence No. 38. The carrier contends that Section 408.147(c) and Rule 152.1(f) apply when a carrier disputes a particular quarter of SIBs; that the issue addressed at the January 5, 2006, CCH concerned contribution as defined under Section 408.084 and addressed whether the carrier is entitled to a credit for IIBs and SIBs; and that there is no legal basis for the application of Section 408.147(c) and Rule 152.1(f) because the claimant disputed the Division's order awarding an 80% contribution.

The claimant responds that he objects to the jurisdiction of the Appeals Panel to review Sequences 36 and 38 because, while the attorney's fees in question were ordered by a hearing officer, no benefit CCH has taken place, nor has any order from a hearing officer been issued following a CCH to invoke the standards of review provided for in Rule 152.3(e); and that a CCH has been scheduled for June 19, 2006, regarding attorney's fees ordered concurrently with the attorney's fees addressed in the appeal so that there is no point of error to address as there has been no decision or order from a hearing officer in regard to the attorney's fees in question. The claimant further responds that "sequences of attorney's fees issued to [law office] were billed in error pursuant to Division Rules 152.1 and 152.2 (whereby fees are deducted from the

Claimant's income benefits) when they should have been billed pursuant to Rule 152.1(f) (whereby the Carrier is directly liable for Attorney's Fees incurred by a Claimant during a SIBs dispute);" that the law firm contacted the Division and requested that all attorney's fees ordered to the law firm prior to March 15, 2006, be rescinded; that the law firm then resubmitted the attorney's fees pursuant to Rule 152.1(f); and that the Division issued Sequences 25 through 40 ordering the previously ordered attorney's fees to be paid pursuant to Section 409.147(c) and Rule 152.1(f).

The claimant further responds that there is legally and factually sufficient evidence to support the issuance of Sequences 36 and 38 and that there was no error in issuing Sequences 36 and 38 requiring the carrier to directly pay attorney fees to the claimant's attorney as Sequences 18, 19, 21, 23, and 24, were rescinded by the Division. The claimant further states that steps have been taken by the law firm to insure that all benefits which were erroneously paid from the claimant's benefits to the law office are secured for him pending final resolution of these appeals and a scheduled CCH. The claimant also responds that Section 408.147(c) applies because "by seeking a 100% contribution award in an attempt to cease paying [claimant] his entitled benefits the Carrier not only disputed entitlement to SIBs, but also the amount of [SIBs]" and that when attorney's fees were incurred by the claimant in the process of "challenging that dispute are properly payable under Section 408.147(c)."

We first address the claimant's jurisdictional argument. Rule 152.3(d) and (e) provide as follows:

- (d) Except as provided in subsection (e) of this section, an attorney, claimant, or carrier who contests the fee fixed and approved by the Commission [now Division] shall request a benefit [CCH]. The request shall be made by personal delivery or first class mail and be filed with the Commission [now Division] field office handling the claim or the central office of the Commission [now Division] no later than the 15th day after receipt of the Commission's [now Division's] order. A claimant may request a hearing by contacting the Commission [now Division] in any manner no later than the 15th day after receipt of the Commission's [now Division's] order. The contesting party other than a claimant shall send a copy of the request by personal delivery or first class mail to the carrier and other parties, including the claimant and attorney.
- (e) An attorney, claimant, or carrier who contests the fee ordered by a hearing officer after a benefit [CCH] shall request review by the appeals panel pursuant to the provisions of Section 143.3 of this title (relating to Requesting the Appeals Panel to review the Decision of the Hearing Officer).

The CCH on the contribution issue was held on January 5, 2006, and the hearing officer who presided at that CCH ordered the attorney's fees in Sequences 36 and 38,

both dated March 23, 2006 (after the Division letter of March 15, 2006, was issued rescinding orders for attorney's fees prior to the date of the letter). It is undisputed that the attorney's fees in Sequences 36 and 38 were for the law firm's services in connection with the contribution dispute, although the claimant characterizes the contribution dispute as a dispute of entitlement to and amount of SIBs. Consequently, Sequences 36 and 38, which the carrier has appealed, were ordered by a hearing officer after a CCH, and the proper way to appeal Sequences 36 and 38 was to timely appeal those sequences to the Appeals Panel under Rule 152.3(e), which the carrier has done.

We next address the matter of whether a carrier's request for and obtaining of an order for reduction of a claimant's IIBs and SIBs due to contribution under Section 408.084 invokes a carrier's liability for payment of a claimant's attorney's fees under Section 408.147(c) and Rule 152.1(f) when the claimant prevails on the contribution issue. We hold that a contribution dispute under Section 408.084 does not make the carrier liable for the claimant's attorney's fees incurred as a result of the contribution dispute under Section 408.147(c) and Rule 152.1(f), even if the claimant prevails in the contribution dispute.

Chapter 408 of the 1989 Act is entitled "WORKERS' COMPENSATION BENEFITS". Subchapter E is entitled "INCOME BENEFITS IN GENERAL." Section 408.084 is in Subchapter E of Chapter 408 and is entitled "CONTRIBUTING INJURY." Section 408.084 provides as follows:

- (a) At the request of the insurance carrier, the commissioner may order that [IIBs] and [SIBs] be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.
- (b) The commissioner shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.
- (c) If the combination of the compensable injuries results in an injury compensable under Section 408.161, the benefits for that injury shall be paid as provided by Section 408.162.

Subchapter H of Chapter 408 is entitled "SUPPLEMENTAL INCOME BENEFITS." Section 408.147 is in Subchapter H and is entitled "CONTEST OF SUPPLEMENTAL INCOME BENEFITS BY INSURANCE CARRIER; ATTORNEY FEES." Section 408.147 provides as follows:

- (a) An insurance carrier may request a [BRC] to contest an employee's entitlement to [SIBs] or the amount of [SIBs].
- (b) If an insurance carrier fails to make a request for a [BRC] within 10 days after the date of the expiration of the [IIBs] 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].

- (c) If an insurance carrier disputes a commissioner's determination that an employee is entitled to [SIBs] or the amount of [SIBs] due and the employee prevails on any disputed issue, the insurance carrier is liable for reasonable and necessary attorney's fees incurred by the employee as a result of the insurance carrier's dispute and for [SIBs] accrued but not paid and interest on that amount according to Section 408.064. Attorney's fees awarded under this subsection are not subject to 408.221(b), (f), and (i).

Rule 152.1 is entitled "Attorney Fees: General Provisions" and subsection (f) provides as follows:

- (f) An attorney for an employee who prevails when a carrier contests a Commission [now Division] determination of eligibility for [SIBs] shall be eligible to receive a reasonable and necessary attorney's fees, including expenses. This fee is payable by the carrier, not out of the employee's benefits and the fee shall not be limited to a maximum of 25% of the employee's recovery. All provisions of these rules, except Section 152.4 of this title (relating to Guidelines for Legal Services Provided to Claimant's and Carriers), apply.

When an insurance carrier requests an order for reduction of SIBs and IIBs under Section 408.084 due to contribution from an earlier compensable injury it is not disputing a commissioner's determination that the claimant is entitled to SIBs or the amount of SIBs due, but instead is requesting a commissioner determination on contribution. The commissioner's order on contribution to reduce IIBs and SIBs due to impairment from an earlier compensable injury may, as in this case, reduce the amount of SIBs, but the order for contribution is not a dispute by the carrier of a commissioner determination that an employee is entitled to SIBs or the amount of SIBs. The order for contribution under Section 408.084 is a determination by the Division that reduction of IIBs and SIBs is appropriate because of contribution from an earlier compensable injury, which does not equate to a dispute of a commissioner determination of SIBs entitlement or the amount of SIBs.

In addition, a determination of entitlement to SIBs and the amount of SIBs due is made on a quarterly basis based on a qualifying period and a dispute of entitlement to SIBs or amount of SIBs due is made by the carrier with regard to a particular quarter or quarters of SIBs eligibility. See Rules 130.100 – 130.110. In particular, Rule 130.108(c), (d), and (e) relate to a carrier's dispute of particular quarters and Rule 130.108(f) provides that an insurance carrier who unsuccessfully contests a determination of entitlement to SIBs is liable for: (1) all accrued, unpaid SIBs, and interest on that amount, and; (2) reasonable and necessary attorney's fees incurred by

the employee as a result of the carrier's dispute which have been ordered by the commission or court. We do not view a carrier's request for and a Division order for reduction of SIBs under Section 408.084 due to contribution from an earlier compensable injury to be a dispute by the carrier of entitlement to SIBs or amount of SIBs for any particular quarter or quarters of SIBs; rather Section 408.084 is the authority by which a carrier may request the commissioner to take into account a documented impairment from an earlier compensable injury. While an order under Section 408.084 for contribution may reduce SIBs, the carrier's request for and the Division's order for contribution is not a dispute of a commissioner's determination that the claimant is entitled to SIBs or the amount of SIBs, and thus when the claimant prevails at a CCH on the contribution issue he has not invoked a carrier's liability for payment of a claimant's attorney's fees under Section 408.147(c) and Rule 152.1(f).

Because the attorney's fee orders in Sequences 36 and 38 were for the law firm's services in contesting on behalf of the claimant the order of contribution under Section 408.084, those attorney's fees orders should not have been ordered to be paid pursuant to Section 408.147(c) and Rule 152.1(f), thereby making the carrier liable for those attorney fees. We reverse the attorney's fees orders in Sequences 36 and 38 and render a decision vacating the attorney's fees orders in Sequences 36 and 38.

The true corporate name of the insurance carrier is **XL SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is:

**KIRK HOOD  
1021 MAIN STREET, SUITE 1150  
HOUSTON, TEXAS 77002 6508.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge