

APPEAL NO. 111515-s  
FILED DECEMBER 8, 2011

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 September 22, 2011. With regard to the sole disputed issue before her, the hearing officer determined that the respondent (claimant) is entitled to lifetime income benefits (LIBs) from March 2, 2007, through March 2, 2010, based on the loss of both feet at or above the ankle.

The appellant (carrier) appealed, contending that the hearing officer's decision is contrary to the intent of the legislature, that there should be a provision in the statute which would lessen or eliminate the amount of LIBs paid under the circumstances of this case and that the hearing officer's decision constitutes an unconstitutional violation of the carrier's property rights and due process. The claimant responded, urging affirmance.

DECISION

Affirmed.

Section 410.203(b) was amended effective September 1, 2011, to allow the Appeals Panel to affirm the decision of a hearing officer as prescribed in Section 410.204(a)(1). Section 410.204 was amended by amending subsection (a) and adding subsection (a-1). Section 410.204(a) provides, in part, that the Appeals Panel may issue a written decision on an affirmed case as described in subsection (a-1). Subsection (a-1) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but do not affect the outcome of the hearing. We view this case as a case of first impression.

The background facts are undisputed. On (date of injury), the claimant suffered a catastrophic crush injury to both legs resulting in the amputation of the left leg above the knee and amputation of the right leg below the knee on the date of injury. The parties stipulated that the claimant suffered a compensable injury resulting in bilateral leg amputation at or above the ankle in the course and scope of his employment on (date of injury).

The hearing officer commented in the Background Information that the claimant was fitted for bilateral leg prostheses and returned to part-time work in September 2007, and then full-duty work in November 2007, "earning greater than his pre-injury wages."

The hearing officer also commented that the claimant is currently fully ambulatory with the use of bilateral leg prostheses.

Section 408.161(a)(2) provides that LIBs are paid until the death of the employee for “(2) loss of both feet at or above the ankle.” There are no other qualifiers to this provision and the stipulated facts establish that the claimant has had both feet amputated at or above the ankle. A prior CCH, held on March 3, 2010, determined that the claimant was entitled to LIBs “as of the date of this hearing (March 3, 2010).” The hearing officer’s decision in that case was allowed to become final on June 18, 2010. The parties represent that case has been appealed to District Court. The CCH in the present case involves entitlement to LIBs from March 2, 2007 (the day after the injury and amputation) to March 2, 2010 (the day before the prior CCH).

First addressing the carrier’s argument that Section 408.161(a)(2) is unconstitutional and violates the carrier’s right to due process, the Appeals Panel has many times held that the Texas Department of Insurance, Division of Workers’ Compensation (Division) is an administrative agency of the State of Texas, and does not have the power to determine the constitutionality of statutes, citing State Board of Pharmacy v. Walgreen Tex. Co., 520 S.W. 2d 845, 848 (Tex. Civ. App.–Austin 1975, writ ref’d n.r.e). Appeals Panel Decision (APD) 010851, decided June 7, 2001, and APD 030330-s, decided April 2, 2003. The Appeals Panel’s jurisdiction is limited to reviewing Division CCH decisions and orders. Sections 410.202 and 410.203

The carrier cites Section 402.021 for authority that the 1989 Act “serves to step in and place the claimant in the same position financially and medically as he was prior to the incident.” Our review of Section 402.021 only expresses the intent of the legislature that injured employees be treated with dignity, fairly and have access to prompt, high-quality medical care. In any event, it would be impossible to place the claimant in the same position medically as he was prior to the compensable injury. He will always have the loss of both feet no matter how well he adapts.

The carrier attempts to draw an analogy between LIBs and supplemental income benefits (SIBs) by saying that the injured worker loses entitlement to SIBs upon gaining employment and earning wages commensurate with the pre-injury wage and that LIBs should be treated similarly. We disagree. To be entitled to SIBs one of the core requirements is that the injured worker has not returned to work or has returned to work earning less than 80% of the employee’s average weekly wage as a direct result of the employee’s impairment. There is no similar provision in Section 408.161. Had the legislature intended to condition the payment of LIBs on inability to earn wages or the pre-injury wage they would have added such a provision to Section 408.161. We read every word, phrase, and expression in a statute as if it were deliberately chosen and

presume the words excluded from the statute are done so purposefully. See Mid-Century Ins. Co. v. Tex. Workers' Comp. Commission, 187 S.W.3d 754 (Tex. App.-Austin 2006, no pet.).

Finally, we would note that any decision by the Appeals Panel to the effect that LIBs were not payable if the claimant returned to work, at or greater than his pre-injury wage or that the carrier was entitled to some kind of reduction would be contrary to the express provision of Section 408.161 and result in impermissible informal rule making. See Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex. 1999).

Although not argued at the CCH in this case, we find the courts' holding in Mid-Century, *supra*, to be instructive. In Mid-Century, the carrier sought to have 28 TEX. ADMIN. CODE § 131.1(b) (Rule 131.1(b)) be declared invalid to the extent it required carriers to pay LIBs retroactively from the date of an employee's disability, rather than from the date the employee first qualified for those benefits. The Court of Appeals held that:

An employee is eligible to receive LIBs on the date that employee suffers from one of the conditions specified in [S]ection 408.161. Section 408.161 does not permit payment of LIBs prior to that date. Once an employee is adjudicated eligible to receive LIBs, however, LIBs should be paid retroactively to the date the employee first became eligible.

Applying that principle to the case at hand, the claimant first became eligible for LIBs on the (date of injury), when both feet were amputated above the ankle. The claimant was adjudicated to be eligible to receive LIBs at the prior CCH on March 3, 2010. The prior 2010 CCH only awarded LIBs from the date of the prior CCH because the issue was worded to say "Is the [c]laimant entitled to [LIBs] as of this date . . . ." We hold, with the guidance given in Mid-Century, *supra*, that once LIBs eligibility was judicially or administratively determined, which in this case was March 3, 2010, LIBs should be paid retroactively to the date the employee first became eligible, which in this case was the date of injury (date of injury), when both claimant's legs were amputated above the ankle.

A more recent case Liberty Mutual Ins. Co. v. Adcock, 2011 Tex. App. LEXIS 8407 (Tex. App. Fort Worth, October 20, 2011), holds that the Division has no implied right to review LIBs under Section 408.161 after the initial administrative and appellate remedies have been exhausted. In Adcock, the Division had determined that the claimant in that case was entitled to LIBs due to the total and permanent functional loss of use of his right foot above the ankle and right hand up to and including the right wrist. Several years later the carrier sought to reopen the case asserting the injured worker was no longer entitled to LIBs because he no longer had total and permanent functional

loss of use of the body parts that were the basis of the award. The court concluded that there was no implied right to review LIBs under Section 408.161 after the initial administrative and appellate remedies had been exhausted. We distinguish the Adcock case from the situation in this case because in the instant case the claimant is only seeking the remedy to which he was originally entitled. We apply the holding in Mid-Century, *supra*, that directs that once LIBs eligibility is judicially, or in this case administratively determined, LIBs are to be paid retroactively to the date the claimant first became eligible.

Finding no legal error and sufficient evidence to support the hearing officer's decision, the decision of the hearing officer is affirmed.

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

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3218.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Margaret L. Turner  
Appeals Judge