

APPEAL NO. 150499-s
FILED APRIL 29, 2015

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 22, 2015,¹ in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that “[the respondent (claimant)] is entitled to supplemental income benefits (SIBs) for the 11th quarter, July 25, 2014, through October 23, 2014, because [the appellant (carrier)] waived its right to contest [the] [c]laimant’s entitlement to SIBs for the 11th quarter by failing to timely request a benefit review conference (BRC).”

The carrier appealed the hearing officer’s determination, contending that the hearing officer’s determination is unsupported by the evidence. The carrier alleged that the evidence established it timely filed a Request for a [BRC] (DWC-45) along with documentation reflecting its efforts to resolve the disputed SIBs issue with the claimant’s counsel, and therefore the denial by the Texas Department of Insurance, Division of Workers’ Compensation (Division) of the carrier’s DWC-45 was improper. The claimant responded, urging affirmance of the hearing officer’s determination.

DECISION

Reversed and remanded.

The parties stipulated in part that: the claimant sustained a compensable injury on [Date of Injury], which resulted in a final impairment of 19%; the claimant has not commuted any portion of the impairment income benefits; the 11th quarter of SIBs is from July 25 through October 23, 2014; the qualifying period for the 11th quarter of SIBs was from April 12 through July 11, 2014; and the minimum number of weekly work search contacts for the claimant’s county of residence is three. The claimant testified that she was injured when she slipped and fell on a wet floor.

The hearing officer found the following unappealed findings of fact:

5. [The] [c]laimant did not demonstrate an active effort to obtain employment during each week of the qualifying period for the 11th quarter of SIBs.
7. [The] [c]arrier filed its [DWC-45] to dispute [the] [c]laimant’s entitlement to SIBs for the 11th quarter with the Division on July 25, 2014, within 10 days after receiving the application for SIBs.

¹ We note that the decision incorrectly states that the CCH was held on January 22, 2014.

8. On July 30, 2014, the Division denied the [carrier's] DWC-45.
9. [The] [c]arrier did not request an expedited CCH under [28 TEX. ADMIN. Code § 141.1(g) (Rule 141.1(g))] to determine whether there was good cause for failing to meet the requirements of Rule 141.1(d).

The hearing officer determined that the claimant is entitled to 11th quarter SIBs solely on the basis of carrier waiver. The hearing officer stated in the Discussion portion of the decision that the Division's denial of the carrier's DWC-45 noted that the documentation of efforts to resolve the disputed issues prior to requesting a BRC was insufficient. The hearing officer also noted that the carrier did not request an expedited CCH under Rule 141.1(g) to determine whether there was good cause for failing to meet the requirements of Rule 141.1(d). The hearing officer stated that because the carrier's DWC-45 was denied and a complete DWC-45 was not filed within 10 days after receiving the claimant's application for 11th quarter SIBs, the carrier waived its right to contest the claimant's entitlement to SIBs for the 11th quarter by failing to timely request a BRC, and therefore the claimant is entitled to 11th quarter SIBs.

The carrier contended that it presented evidence establishing that it filed a DWC-45 on July 25, 2014, disputing the claimant's entitlement to 11th quarter SIBs, and that it attached to the DWC-45 e-mails between the claimant's attorney and the carrier's adjuster as documentation of its efforts to resolve the disputed issue. We note that in evidence are e-mails from (Ms. J) from the carrier to (Ms. H) with the claimant's attorney's office that are date stamped as received by the Division on July 25, 2014, which is the same date the carrier filed the DWC-45. Also in evidence is a DRIS note dated September 4, 2014, Sequence Number 183 from a Division employee noting that she had "denied the [DWC-45] based on the fact that I [received] only two pages, which was the DWC-45 and no attachments. After reviewing TxComp, I see that the supportive documentation was scanned in and date stamped on the same day just not noticed that they were (sic) should be together. . . ."

The carrier alleged that it had timely filed a complete DWC-45 disputing the claimant's entitlement to 11th quarter SIBs, and that because the Division had improperly denied the DWC-45 it did not waive its right to contest the claimant's entitlement to 11th quarter SIBs.

Section 408.147(b) 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 statement, the

insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

Rule 141.1, effective October 1, 2010, provides in part:

- (d) Request for [BRC]. A request for a [BRC] shall be made in the form and manner required by the [D]ivision. The request shall:
1. identify and describe the disputed issue or issues;
 2. provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues, including but not limited to, copies of the notification provided in accordance with subsection (a) of this section, correspondence, e-mails, facsimiles, records of telephone contacts, or summaries of meetings or telephone conversations . . . ;
 3. contain a signature by the requesting party attesting that reasonable efforts have been made to resolve the disputed issue(s) prior to requesting a [BRC], and that any pertinent information in their possession has been provided to the other parties . . . ; and
 4. be sent to the [D]ivision and opposing party or parties.
- (e) Complete Request. A request that meets the requirements of subsection (d) of this section is a complete request for a [BRC]. The [D]ivision will schedule a [BRC] if the request is complete and otherwise appropriate for a [BRC].
- (f) Incomplete Request. A request for a [BRC] that does not meet the requirements of subsection (d) of this section is an incomplete request and will be denied.
1. A denied request for a [BRC] does not constitute a dispute proceeding, except as provided by subsection (g) of this section.
 2. The [D]ivision will notify the parties if a request is denied and state the reasons for the denial.
 3. Upon notice from the [D]ivision, the requesting party may submit a new request for a [BRC] that meets the requirements of this section.

(g) Incomplete Request Denials. If a party disagrees with the [D]ivision's determination that the request was incomplete, or, if a party has good cause for failing to meet the requirements of subsection (d) of this section, the party may pursue an administrative appeal of the [D]ivision's determination in accordance with Chapter 142 of this title (relating to Dispute Resolution—[CCH]). The party may also request an expedited [CCH] in accordance with [Rule] 140.3 of this title (relating to Expedited Proceedings).

Rule 141.1(g) provides two methods under which a party may pursue a disagreement with the Division's denial: a party may request an expedited CCH in accordance with Rule 140.3, or a party may pursue an administrative appeal of the Division's denial in accordance with Chapter 142 relating to Dispute Resolution. While the hearing officer is correct in finding that the carrier did not request an expedited CCH in accordance with Rule 140.3 regarding the Division's denial of the carrier's DWC-45, that finding alone does not necessarily establish that the carrier failed to avail itself of its ability to challenge the Division's denial under Rule 141.1(g). In evidence is a second DWC-45 filed by the carrier on September 3, 2014, in which the carrier described the disputed issue as follows:

[The] [c]arrier asserts that the [Division] abused its discretion in denying the BRC requested [on July 25, 2014] based on [Rule] 141.1. The [c]arrier included with the [July 25, 2014] DWC-45 its attempts to resolve the issue through documentation showing the date the claims adjuster contacted the claimant's attorney and the representation that counsel would not agree that her client is not entitled to [SIBs]. The communications between the claims adjuster and the claimant's attorney are memorialized in e-mail communications attached to the DWC-45. All documents reflect hand delivery to the [Division] on July 25, 2014.

A BRC was held on October 3, 2014. The BRC report in evidence shows that the two issues unresolved after the BRC were whether the claimant is entitled to 11th quarter SIBs, and whether the carrier waived its right to contest the claimant's entitlement to 11th quarter SIBs by failing to timely request a BRC. The BRC report notes that the carrier's position at the BRC was that it did not waive the right to dispute 11th quarter SIBs because it timely filed a DWC-45 on July 25, 2014, along with documentation showing the carrier's attempts to resolve the issue with the claimant's attorney, and that the Division abused its discretion by denying the July 25, 2014, DWC-45. The carrier argued the same position at the CCH.

The evidence in this case shows that the carrier pursued an administrative appeal of the Division's denial of the carrier's July 25, 2014, DWC-45 under Chapter 142 relating to Dispute Resolution, which is one of the two methods listed in Rule 141.1(g) under which a party may challenge a Division denial of an incomplete DWC-45.

The claimant contended that the facts in Appeals Panel Decision (APD) 111189-s, decided October 3, 2011, are directly applicable to the case on appeal. In that case the carrier timely filed a DWC-45 to dispute the claimant's entitlement to 2nd quarter SIBs; however, the Division denied the carrier's DWC-45. The Division denial noted that all claim information was not provided in Section II of the DWC-45 and that there was an insufficient description of the disputed issue. The claimant in that case argued on appeal that because the carrier's DWC-45 was denied, the carrier waived its right to dispute the claimant's entitlement to 2nd quarter SIBs. The Appeals Panel stated that because the carrier's DWC-45 was incomplete and was denied it did not constitute a dispute proceeding. The Appeals Panel noted that the carrier did not request an expedited CCH under Rule 141.1(g) to determine whether there was good cause for failing to meet the requirements of Rule 141.1(d). The Appeals Panel therefore reversed the hearing officer's determination that the carrier did not waive the right to contest the claimant's entitlement to 2nd quarter SIBs by failing to timely request a BRC, and rendered a new decision that the carrier did waive the right to contest the claimant's entitlement to 2nd quarter SIBs by failing to timely request a BRC.

The carrier in both the instant case and in APD 111189-s, *supra*, did not request an expedited CCH under Rule 141.1(g) to determine whether there was good cause for failing to meet the requirements of Rule 141.1(d). However, unlike the facts in the instant case, there was no evidence in APD 111189-s that the carrier had pursued an administrative appeal of the Division's denial of the carrier's DWC-45 under Chapter 142 relating to Dispute Resolution. As noted above the carrier in the instant case filed a DWC-45 asserting that the Division abused its discretion in denying the carrier's July 25, 2014, DWC-45, because the carrier did file a complete DWC-45 under Rule 141.1(d). The carrier argued this position at both the BRC and the CCH. Therefore, we find the facts in the instant case distinguishable from those in APD 111189-s, and we hold that the carrier in the instant case appealed the Division's denial of its July 25, 2014, DWC-45 under Rule 141.1(g).

The hearing officer based her determination that the carrier waived its right to contest the claimant's entitlement to 11th quarter SIBs on the basis that the carrier's DWC-45 was denied and a complete DWC-45 was not filed within 10 days after receiving the claimant's 11th quarter SIBs application. However, as discussed above the carrier in this case appealed the Division's denial of its July 25, 2014, DWC-45

under Rule 141.1(g). The carrier argued and presented evidence at the CCH that it timely filed a complete DWC-45 under Rule 141.1(d). The hearing officer erred in failing to determine whether or not the carrier filed a complete DWC-45 in compliance with Rule 141.1(d). We reverse the hearing officer's determination that the claimant is entitled to 11th quarter SIBs because the carrier waived its right to contest the claimant's entitlement to 11th quarter SIBs by failing to timely request a BRC, and we remand the issues of whether the carrier waived the right to contest the claimant's entitlement to 11th quarter SIBs and whether the claimant is entitled to 11th quarter SIBs for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the 11th quarter, July 25, 2014, through October 23, 2014, because the carrier waived its right to contest the claimant's entitlement to SIBs for the 11th quarter by failing to timely request a BRC, and we remand these issues to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to determine whether the carrier's July 25, 2014, DWC-45 was a complete DWC-45 as provided in Rule 141.1(d). Once the hearing officer makes this determination, the hearing officer is then to determine whether the carrier waived its right to contest the claimant's entitlement to SIBs for the 11th quarter by failing to timely request a BRC. Once the hearing officer makes this determination, the hearing officer is then to determine whether the claimant is entitled to 11th quarter SIBs.

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 Division, 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 APD 060721, decided June 12, 2006.

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

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge