APPEAL NO. 92291

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On April 28, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that an overpayment of income benefits received by the respondent could not be recouped from respondent's future income benefits. Appellant argues that it acted in good faith in choosing to pay benefits at a higher rate at a time when the 1989 Act had a paucity of interpretation. It adds that respondent should be paid only the correct amount due and cites Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 126.4 to show than an offset can be allowed in certain instances.

DECISION

Finding that the hearing officer correctly interpreted the law and rules applicable to this question, we affirm.

The respondent stated that at the time he was injured on (date of injury), while working for the (employer), he made $120.00 per week for that employer. He also made $16.10 per hour as an employee of (employer). The wages were combined to get an average weekly wage (AWW) which resulted in a temporary income benefit (TIB) of $428.00 per week. The appellant determined AWW for several claimants in such manner prior to learning of Texas Workers' Compensation Commission Appeal No. 91059 (Docket No. redacted) decided December 6, 1991. That opinion held that concurrent employment was not to be considered in computing AWW under the 1989 Act. Appellant then lowered TIBs to reflect only respondent's salary of $120.00 per week and began to offset the excess paid against current payments. Respondent asked for a benefit review conference (BRC). At the BRC, an interlocutory order stated that the current benefit of $84.00 per week, based on an AWW of $120.00 per week, could not be decreased to recoup the overpayment of $9,000.00, or more, paid to respondent. Appellant sought to have that interlocutory order revoked at the contested case hearing.

Appellant, both at hearing and on appeal, does not cite a provision of the 1989 Act which provides for recoupment in the circumstances described. The hearing officer considered four provisions in the 1989 Act which allow recoupment or reimbursement, but not in a manner applicable to this case. He found that appellant was not entitled to a credit for past overpayments.

The provision considered that most closely approaches this case is Article 8308-10.04 (b) of the 1989 Act. That section addresses obtaining or denying benefits fraudulently and the pertinent part thereof reads:

> (b)A person who has obtained excess payments in violation of this section is liable for full repayment plus interest calculated as prescribed by Section 1.04 of this Act. If the person is an employee or person claiming death

> benefits, the liability for repayment may be redeemed from future income or death benefits to which the person is otherwise entitled.

There was no indication that respondent did anything fraudulent in receiving benefits for his injury. The similarity of this provision to the case under consideration occurs in the remedy of redemption from future benefits.

Also considered was Article 8308-4.06 (e) of the 1989 Act which, in a section addressing an employer's initiation of benefits, stated:

> (e)The insurance carrier shall reduce impairment income benefit payments to an employee by an amount equal to any employer payments made under this section that are not reimbursed or reimbursable under Subsection (b) of this section. The insurance carrier shall remit the amount of a reduction under this subsection to the employer who made the payments. The commission shall adopt rules and forms to ensure the full reporting and the accuracy of reductions and reimbursements made under this subsection.

Although not referred to by the hearing officer, subparagraph (b) of 8308-4.06, referred to in subparagraph (e) above, states:

> (b)If the injury is found compensable and the insurance carrier initiates compensation, the insurance carrier shall reimburse the employer for the amount of compensation paid by the employer and to which the employee was entitled under this Act.

This section clearly is limited to situations that arise because of employer payments to the injured employee. In addition, it only allows reduction of payments to an employee when those payments involve impairment income benefits, and, as shown by references to Article 8308-4.06(b) and (e) of the 1989 Act, immediately above, it limits reduction to an amount beyond which the employee was entitled. The section also shows, along with Article 8308-10.04(b), that the legislature did not reject the idea of recoupment or offset from future benefits due an employee, but chose to allow such relief in limited areas rather than to broadly apply it through a general provision.

The hearing officer then looked at two provisions, Articles 8308-6.15(e) and 8308-6.42(e) of the 1989 Act, which state, respectively:

> (e)If a benefit review officer recommends that benefits be paid or not paid, the benefit review officer may issue an interlocutory order to pay or not pay the benefits. The subsequent injury fund shall reimburse an insurance carrier for any overpayments of benefits made pursuant to an order entered under this subsection if that order is reversed or modified at a

> contested case hearing or at arbitration. The commission shall adopt rules to provide for a periodic reimbursement schedule, providing for reimbursement under this subsection at least annually.
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> (e)The decision of the appeals panel regarding benefits is binding during the pendency of an appeal under Chapter F of this article. If the court of last resort in the case finally modifies or reverses an appeals panel decision awarding benefits, the insurance carrier who has paid benefits as required by this subsection may recover reimbursement of any benefit overpayments from the subsequent injury fund.

These two provisions immediately draw attention to a characteristic that distinguishes them from the case on review--a remedy when the commission has ordered payment and is later shown to be in error. While they identify a third area (acting pursuant to an order) in which overpayment will be addressed (the other two were overpayment based on the claimant's fraud and repayment of an employer who had voluntarily begun payments), the two provisions contain a second distinguishing feature. When overpayment is made pursuant to an order, no recoupment is made from the claimant, but rather the subsequent injury fund pays.

It is true that if a commission order were completely reversed there would be no future payments to claimant from which to recoup. However, both above-cited provisions acknowledge that they address not only reversals but also modifications. Perhaps the subsequent injury fund is used when an erroneous order is involved simply for consistency rather than having one form of repayment if modified (recoupment) and another form if reversed (subsequent injury fund). Nevertheless, by using the subsequent injury fund in situations of overpayment described in Articles 8308-6.15(e) and 8308-6.42 (e) of the 1989 Act, the legislature has chosen not to act to prevent "unjust enrichment" on the part of the claimant. Stated another way, the legislature has chosen not to allow recoupment from an employee when overpaid as a result of a mistake or wrong decision on the part of the commission; the legislature then acknowledged that a carrier should not suffer for a mistake by the commission (in the form of an order) by allowing recovery from the subsequent injury fund.

When the legislature has acted in one area of a statute, such as in Article 8308-10.04 where recoupment was allowed based on fraud, it has shown that it could have provided for recoupment in other sections of the statute. *See* Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980), which allowed no implication that proof of intent was required in one section of the Deceptive Trade Practices Act when such requirement was set forth in other sections of that statute. There the Supreme Court said, "(w)hen the Legislature has carefully employed a term in one section of a statute, and has excluded it in another, it should not be implied where excluded." Similarly Lenhard v. Butler, 745 S.W.2d 101 (Tex. App.-Fort Worth 1988, writ denied), said that the statute of limitations set forth in the Medical Liability and Insurance Improvement Act was not available to plaintiff in a medical malpractice suit because her

action was against a psychologist. That Act provided for a cause of action against a "health care provider" or physician and defined "health care provider" to include among others, nurses, podiatrists, and pharmacists but did not include "psychologists." The (city) court said that interpretation by implication was permitted only to supply obvious intent not expressly stated and not to contradict or add to a statute. It added, "(w)e cannot consider the legislature's failure to include psychologists as `health care providers' . . . to be a mere oversight. Under the rules of statutory construction, the express mention of one person, thing, consequence or class is tantamount to the express exclusion of all others." The rule in these cases against implying a word or phrase into a statute would not even allow implying that in Articles 8308-6.15 or 6.42 a carrier could seek recoupment from an overpaid claimant if for some reason money from the subsequent injury fund were unavailable. As stated, Articles 8308-6.15 and 6.42 address commission mistakes embodied in orders that required a carrier to pay; in the case before us, a question of a carrier's own mistake, however well intended, that cost it money is at stake.

The Lenhard case, *supra*, said that words could be implied only to show obvious intent. Another case in which the court would not add words to a statute was Jackson Co. Hosp. Dist. v. Jackson Co. Citizens for Continued Hosp. Care, 669 S.W.2d 147 (Tex. App.-Corpus Christi 1984, no writ). Under a state law, the hospital in this case could not be closed without an election. The emergency room was discontinued without an election and the citizens group brought an action. The court held that a hospital is primarily designed to diagnose and treat inpatients and would not say that an emergency room is essential to a definition of what constitutes a hospital. It stated, "(i)n interpreting a statute, courts should not read additional words into a statute in order to reach a pre-determined meaning. Courts may insert additional words into a statutory provision only when it is clearly necessary to give effect to the obvious legislative intent." Courts have looked to the statute as a whole, not just to an isolated provision, to seek evidence of intent by the legislature. *See* Morrison v. Chan, 699 S.W.2d 205 (Tex. 1985). Other pertinent parts of Article 8308-1.01 through 11.10 will therefore be reviewed to see whether it is necessary to imply that recoupment is broadly allowed in order to give effect to the "obvious legislative intent."

Article 8308-4.32 of the 1989 Act specifically allows for an advance of an income benefit due. As do Articles 8308-6.15 and 6.42, it only takes place upon an order of the commission. Under Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 126.4 (rule 126.4), the application for an advance based on hardship, which the employee makes to the commission, must state that the employee understands that if an advance is granted, future weekly benefits will be reduced. This rule is offered by appellant to show that adjustments are contemplated. In emphasizing the unjust enrichment of the injured worker, appellant adds that Article 8308-2.09 of the 1989 Act calls for the Commission to make rules as necessary for implementing and enforcing the Act.

There is no obvious legislative intent to address all potential unjust enrichment because, as stated previously, Articles 8308-6.15 and 6.42 show that the legislature would allow some "unjust enrichment" by reimbursment through the subsequent injury fund. In

addition, reimbursement thereunder was allowed only after a commission mistake, not a carrier's mistake.

Although not specifically considered by the hearing officer, Article 8308-4.32 does not contradict the principles of statutory construction discussed previously. Again, the legislature has in certain sections described the circumstances under which some types of recoupment, reimbursement, or reduction of future benefits can be made. The last example, advancements, is clearly placed in the statue to assist certain claimants in need, not to show a general intent to assure that money is returned to a carrier.

While not referenced by appellant, Article 8308-4.321 of the 1989 Act also allows for acceleration of impairment benefits based on a request by the worker and subsequent order by the commission. It then allows an offset to reduce the duration of such benefits. Acceleration of impairment benefits under Article 8308-4.321 calls attention to Article 8308-4.27, which allows an employee to elect to commute, in certain instances, the remainder of impairment income benefits. We note that no such authorization exists in regard to TIBs which are to be paid weekly. Although the evidence in the case before us negates any intent by either party to circumvent the inability to commute TIBs, if "recoupment" found in some sections were implied to any excess payment of TIBs, then a "mistake" of math or interpretation of policy could result in overpayment to be followed by recoupment-- a *de facto* commutation of TIBs.

In sum, the 1989 Act provides certain limited areas for reimbursement or recoupment based on fraud, employer payments, an erroneous order of the commission, or upon application of the employee followed by order of the commission. We do not see an obvious legislative intent that calls for an implication that recoupment is allowed in areas of the 1989 Act that do not address it when it is specified elsewhere.

The decision is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge