APPEAL NO. 92556

On August 3, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the respondent (claimant) was entitled to receive temporary income benefits (TIBS) from July 10, 1991 through December 31, 1991, plus an additional 15 weeks impairment income benefits (IIBS) as a result of a whole body impairment rating of five percent. The hearing officer further specifically found, citing Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, that the (carrier) may not offset as a credit against IIBS the excess TIBS paid by the carrier from January 1, 1992 to May 12, 1992. The carrier appealed alleging the hearing officer erred by not allowing an offset to the IIBS due claimant, from the excess of TIBS already paid. The carrier also asks the Appeals Panel to overrule Appeal No. 92291, *supra* or at least distinguish it from the present case. No response is filed by the respondent (claimant). The case is decided pursuant to the Texas Workers' Compensation Act (TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq.*) (Vernon Supp. 1991) (1989 Act).

DECISION

The hearing officer's decision is reversed and we render a new decision determining that payments made after December 31, 1991 constituted impairment income.

The facts of the case are not substantially in issue. The hearing officer's discussion and statement of the evidence fairly and accurately sets forth the facts in this case and we adopt the facts as recited for purposes of this decision.

To summarize, and establish some dates, it is agreed that claimant had been working as a construction laborer for (employer) for two and a half hours when he injured his back on (date of injury) while carrying some steel reinforcement bars. The claimant reported the injury and began treatment with (Dr. A), a chiropractic doctor. In November 1991 the carrier asked that an independent doctor see claimant, who was then represented. Claimant's attorney and carrier eventually agreed on (Dr. P), a medical doctor, who examined claimant on December 31, 1991. Dr. P, in a report dated December 31, 1991, stated "[i]t is felt this patient has reached maximal (sic) medical improvement at this stage with regard to treatment." He further stated claimant could ". . . be released to his pre-injury work status no later than 30 days from this point." In the meantime, Dr. A thought he would release the claimant to return to work on January 31, 1992. The claimant disagreed with Dr. A and discharged him in January 1992 and began seeing (Dr. T), a chiropractic doctor. Dr. T released claimant and assigned maximum medical improvement (MMI) of May 12, 1992. The benefit review officer (BRO) designated (Dr. R), a medical doctor, as a designated doctor to determine MMI and impairment, if any. Dr. R, by report and TWCC-69 (Medical Evaluation Report) dated June 9, 1992, assigned MMI on December 31, 1991 and a five percent whole body impairment rating. It was agreed at the contested case hearing (CCH) that there is a five percent impairment rating with the only dispute being the date claimant reached MMI. The hearing officer at the CCH determined MMI was reached on December

31, 1991 and a five percent impairment rating. The hearing officer pointed out that the designated doctor, Dr. R's, report has presumptive weight and that other medical evidence was not to the contrary, noting "[i]n fact, [Dr. R], [Dr. A], the treating physician, and [Dr. P] . . . all agreed in placing the claimant's date of [MMI] within a period of one month."

The carrier has paid a total of $9,995.04 of income benefits over 44 weeks, from July 10, 1991 to May 12, 1992. This amounts to 19 weeks beyond December 31, 1991, the last date claimant was entitled to receive TIBS, as found by the hearing officer who gave presumptive weight to the designated doctor's report.

The issues framed at the CCH were:

a.on what date did the Claimant reach maximum medical improvement;

b.what is the correct impairment rating; and,

c.is the Carrier entitled to apply or take credit for the overpayment of temporary income benefits against the impairment income benefits due to the Claimant?

The impairment rating was agreed to and the hearing officer rendered a decision that MMI was reached as of December 31, 1991 based on the designated doctor's report. The December 31, 1991 MMI has not been appealed and is therefore conclusive. The remaining issue of credit for the excess payments is the issue of this appeal.

Both the BRO and the hearing officer were obviously very concerned by this issue. The hearing officer thoroughly discussed the matter in his decision and, based on that discussion of the case, apparently believed the carrier should be entitled to an off-set or credit for the excess TIBS paid after December 31, 1991. However, after the conclusion of the hearing and while writing his decision, the hearing officer read Appeal No. 92291, *supra*, and felt that decision was controlling in the instant case and that recoupment was not available to the carrier. The carrier in its appeal asks that we either overrule Appeal No. 92291, *supra*, or at least distinguish it.

The carrier advances several arguments. The first is that "income benefits equal income benefits" under the 1989 Act and there is no distinction in the definition section between temporary, impairment and supplemental income benefits. Actually, Article 8308-1.03(26) defines income benefit as ". . . a payment made to an employee for a compensable injury" which does not include medical, death, or burial benefits. Temporary, impairment and supplemental income benefits are not separately defined in Article 8308-1.03. As the carrier points out, Article 8308-4.21 simply provides "[a]n employee is entitled to income benefits to compensate the employee for a compensable injury . . ." and ". . . shall be paid . . . on a weekly basis as and when they accrue." Carrier argues that not to allow it to take credit for income benefits already paid against income benefits that it is found to owe is

inconsistent with Article 8308-4.21. There is no general provision in the Texas Workers' Compensation Act of 1989 which either provides for, or prohibits, reimbursement, recoupment, off-set, or credit for overpayments by carriers. The carrier argues that the legislature "clearly" did not intend to approve windfalls or unjust enrichment to any person involved in the workers' compensation system.

In the alternative, the carrier argues that Appeal No. 92291, *supra*, should and can be distinguished from the instant case. In Appeal No. 92291 the carrier, in that case, miscalculated in computation of TIBS when wages of concurrent employers were combined. Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, held that concurrent employment was not to be considered in computing the average weekly wage. The carrier in Appeal No. 92291 sought to decrease the TIBS in offsetting the excess benefits erroneously paid against current income benefit payments. The Appeals Panel held there are certain limited areas for reimbursement or recoupment in the 1989 Act and that overpayments of the type involved in that case could not be recouped unless there is specific provision for such recoupment. In the instant case, the carrier argues, the injured worker was paid income benefits while the MMI was in dispute, it subsequently appearing an additional 19 weeks of payments were made after MMI was reached. Carrier asserted it was required to make those payments under law, and in accordance with Texas Workers' Compensation Commission Appeal No. 92374, decided August 28, 1992 and under threat of administrative violations if it stopped payments too soon.

Article 8308-4.23(b) states "[t]emporary income benefits continue until the employee has reached maximum medical improvement." In the instant case claimant received TIBS from July 10, 1991 through December 31, 1991. The hearing officer found, as supported by the presumptive weight of the designated doctor's report, that MMI was reached on December 31, 1991. Article 8308-4.26(c) states, "[a]n employee's entitlement to impairment income benefits begins the day after the employee reaches maximum medical improvement and continues until . . . (1) the expiration of a period computed at the rate of three weeks for each percentage point of impairment." *Also see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.8(a) (Rule 130.8(a)) which provides that impairment income benefits accrue on the day after the employee reaches MMI. In this case, claimant's entitlement to IIBS began on January 1, 1992 and continued for 15 weeks (five percent impairment times three weeks for each percentage point). As noted previously the definitions section of the 1989 Act does not distinguish between temporary, impairment or supplemental income benefits, although separate sections provide for each type of entitlement. Consequently by reading Articles 8308-4.23(b) and 8308-4.26(c) as interpreted by Rule 130.8, the carrier, by operation of the provisions in the 1989 Act, began paying impairment benefits on January 1, 1992. The legal effect of the hearing officer's decision, supported by the presumptive weight of the designated doctor, was that MMI was reached on December 31, 1991 and IIBS entitlement began the following day. The carrier is not required to make additional income benefits under the specific label of IIBS as claimant's IIBS began on January 1, 1992.

We are not unmindful of our decision in Appeal No. 92291 and would distinguish that case from the instant situation. This case is unlike Appeal No. 92291 which was a situation where the carrier had miscalculated the amount of TIBS they were paying and subsequently sought to reduce the remaining TIBS to be paid the claimant in accordance with the 1989 Act, and our decision in Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, which specifies how TIBS are to be computed. There was no mistake or issue as to the amount of the payments in this case, nor was there an effort to recoup or take back payments already made to the claimant or to reduce the claimant's ongoing income benefits below those appropriate under the Act. In this case, the carrier made income payments for the time period and in the amount prescribed by law. Consequently, we hold that Appeal No. 92291 does not apply here and is distinguishable on the facts in this case. The carrier here has paid benefits as required and in accordance with the cited sections, and payments made after December 31, 1991 became impairment income entitlements.

The hearing officer's decision and order are reversed and we render a new decision holding that income benefits paid after MMI was reached constituted impairment income benefits.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge