

APPEAL NO. 93980

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq.*). On October 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were, essentially, whether the average weekly wage (AWW) for claimant, (claimant), who is the respondent, could be adjusted due to her wage fluctuations as a seasonal employee, and, if so, whether amounts overpaid pending the hearing process could be recouped from her future income benefits. The hearing officer determined that claimant was a seasonal employee, that her AWW for the period from June 4 through August 9, 1993, was \$68.00 per week, and that the carrier could not reduce or suspend claimant's income benefits in order to recoup the overpayment made for this period.

The carrier has appealed, arguing that the hearing officer's decision that benefits could not be recouped is not correct, and it argues the various Appeals Panel decisions having to do with recoupment of overpayments. It argues that it followed the procedure prescribed by the Texas Workers' Compensation Commission (Commission) for seeking adjustment of AWW for a seasonal employee, that it obeyed the directive to keep paying the unadjusted level of benefits pending the dispute resolution process, and that it is not to blame for the fact that the Commission did not set a benefit review conference until near the end of the "season" for which an adjustment is sought. No response was filed.

DECISION

We reverse and remand the hearing officer's decision with regard to recoupment, finding that a hearing officer may order a prospective adjustment of overpaid temporary income benefits (TIBS) when such overpayment results from compliance of the carrier with the rules and procedures of the Commission regarding seasonal employees.

The claimant, a bus driver for a self-insured school district (hereinafter carrier), was injured on (date of injury), and was off work from that point at least until the date of the hearing. The claimant agreed that in the 17 years she worked for the carrier on yearly contracts, she had only worked one summer. Claimant said that she customarily did not receive her salary over a 12 month period, but was paid for the period of time that she was under contract. The claimant used her summer break to be of unpaid volunteer assistance in her community and to her friends. She indicated that she opposed the carrier's proposed seasonal adjustments to her benefits in part because the injury rendered her unable to do her volunteer activities.

The record indicated that on June 25, 1993, the carrier, following the procedure set forth by the Commission, notified claimant that it would seek approval from the Commission for a seasonal adjustment of her TIBS. The carrier sought to adjust her amount of TIBS to \$68.00 per week, the minimum benefit amount, for the period from June 3 through August 10, 1993. The carrier filed this same day a request to the Commission that claimant's AWW

be adjusted from \$270 per week to \$68.00 per week.¹ The claimant opposed this adjustment, which caused a benefit review conference to be set. The benefit review conference was not held until August 6, 1993, and in the meantime, carrier kept paying the TIBS based upon an AWW of \$270 per week, in accordance with Commission prescribed procedure.

The record indicates that a parallel review track was also being pursued during this period with regard to whether claimant reached maximum medical improvement (MMI) and was entitled to impairment income benefits (IIBS). Claimant's treating doctor, (Dr. F), certified that claimant reached MMI on April 28, 1993, with a four percent impairment. The claimant testified emphatically that it was the carrier, and not her, who disputed this, and that she had been examined by a designated doctor, but did not yet have the results of that examination. The sparse record developed on this point² indicated that the carrier filed a TWCC-21 on September 8, 1993, which assessed a reasonable estimate of zero percent impairment, and that claimant's income benefits were ended effective July 21, 1993. Claimant testified that her benefits had been terminated entirely.

We must observe that carrier is in an "overpayment" posture in some degree because of its own timing. The carrier argued at the hearing and in the appeal that it had no standing to file a request for a seasonal adjustment until it knew whether claimant was going to work during the summer. We disagree. Carrier points out that a clarifying TWCC advisory, 93-09, from the executive director of the Commission was not circulated until May 20, 1993. However, the applicable rule for seeking a seasonal adjustment, Tex. W. C. Comm'n Rules, 28 TEX. ADMIN. CODE § 128.5 (Rule 128.5) was effective January 11, 1991. Given that the seasonal adjustment for TIBS is based upon past work history, it is not required for purposes of seeking the adjustment that the carrier first wait to see whether an injured worker will return to work. If it develops after a request is made that an injured worker has returned to work for the same or more than the adjusted AWW, the seasonal adjustment merely becomes moot. We would note that any "overpayment" of TIBS that accrued for June 3rd through June 25th was solely due to the actions of the carrier, and not to the Commission's docket.

However, for the period of time after June 25, 1993, the carrier is correct in pointing out that TWCC Advisory 93-09 makes clear that the carrier who is pursuing a seasonal adjustment cannot on its own, and without approval from the Commission, reduce TIBS. Claimant disputed the proposed reduction, necessitating a benefit review conference. The benefit review conference was not scheduled to occur before August 6, 1993. We must

¹The hearing officer has approved the adjusted AWW carrier sought, although the record would indicate that the AWW adjustment should be "0" because claimant had not worked for wages during the summer months of previous years. However, this has not been appealed and we need not address this discrepancy.

²The carrier's attorney indicated unfamiliarity with facts relating to the status of the IIBs case, notwithstanding that it apparently sought as part of its recoupment relief an order that the TIBS overpayment could be obtained from IIBs. It was the hearing officer, acting under his responsibility to develop a full record, who sought pertinent documents regarding the status of claimant's IIBs.

respectfully observe that the claimant's opposition to the seasonal adjustment, which caused further delay, was without merit in that it appeared to be based upon an inability to do unpaid volunteer work rather than a dispute over her past summer work history.

We can readily distinguish the overpayment situation here from that set forth in Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992. In that case, the issue was whether the carrier could on its own reduce TIBS when it made a unilateral computational error wholly beyond the claimant's control or fault. By contrast, the carrier here has sought Commission approval of an adjustment clearly allowed under Section 408.043(a), and through Rules 128.5 and 129.4. Further, the carrier did so within, and not after, the seasonal period for which adjustment was sought. The hearing officer was asked to consider the "overpayment" issue as part and parcel of his determination of an adjustment to the AWW of a seasonal worker.

Section 408.043(a) makes clear that the carrier can adjust temporary income benefits to match seasonal fluctuations for seasonal workers based upon past work history. The hearing officer agreed that claimant was a seasonal worker³ for purposes of this statute. Rule 128.5(c) states:

The [AWW] for computing [TIBS] may be increased or decreased to more accurately reflect the seasonal nature of the employment, if such an adjustment would more accurately reflect the wages the employee could reasonably have expected to earn during the period that [TIBS] are paid. Evidence of earnings shall be submitted at the time the adjustment is requested. The evidence should include proof of the employee's earnings in corresponding time periods of previous years. In case of dispute, the commission shall set a benefit review conference to consider whether an adjustment should be made.

Rule 129.4, the general rule authorizing adjustment to the weekly TIBS benefit, states that:

(b)If a seasonal employee's [AWW] is adjusted, as described in Rule 128.5 of this title . . . the carrier shall adjust the [TIBS] paid to the seasonal employee.

TWCC Advisory 93-09 sets out the "nuts and bolts" of the procedure to be followed, and the forms to be used in seeking the adjustment under Rule 128.5. It makes clear that a disability determination officer is the first Commission employee to review this request, which is essentially held open for two weeks to allow the employee to dispute. If there is a

³This finding was not appealed. We would note that the finding would appear to have support in Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993, in which the Appeals Panel concluded that disability for a school district employee did not end based upon past work history but that a carrier could seek a seasonal employee's adjustment where past work history indicated a pattern of nonemployment during the summer.

dispute, then the case is directed toward a benefit review conference with the possibility of a contested case hearing. The thrust of this advisory is that the carrier cannot make the adjustment unless and until Commission approval is given.

Although the statute's language arguably would be broad enough, standing alone, to allow the carrier to make an adjustment without approval, the Commission has determined that there be agency oversight of any proposed adjustment. We do not believe that it was also the intent of the Commission that an approved seasonal adjustment be rendered meaningless if, because of the Commission's docket (and not due to a late request from the carrier), approval is not made until near the end of the "season" for which an adjustment is sought. We believe that, as part of the approval process, the dispute resolution personnel of the Commission have the implied authority to give prospective effect to any approved seasonal adjustment. We regard the issue of whether an overpayment can be taken out of future benefits as not purely a "recoupment" request but a request to give prospective effect to the approved seasonal adjustment, and that such is within the discretion of the finder fact as part of the responsibility to make an award of benefits due. See Section 410.168(a)(3).

It is clear, however, that Section 408.043(d), the applicable rules, and TWCC Advisory 93-09 authorize a seasonal adjustment only against TIBS, not broadly against other income benefits to which a claimant could become entitled. Thus, we cannot agree with the hearing officer's observation, in his Statement of the Evidence, that the 1989 Act does not refer to TIBS and IIBS as "distinct separate income benefits." To the contrary, the eligibility for these benefits, the losses for which they compensate, the methods for calculating them, and the allowable adjustments are distinct and separate. TIBS is the "lost wage" component of workers' compensation income benefits, based on the effect of the injury on employability; IIBS is the compensation for bodily impairment resulting from the injury, not dependent upon whether the injured worker can, or has, returned to employment. We do not believe that it is within the implied powers of the Commission dispute resolution officer to effectuate a seasonal adjustment against either impairment or supplemental income benefits.

Accordingly, we agree that the statutes and rules authorize a benefit review officer, or a hearing officer, to evaluate whether to give any prospective effect to a seasonal adjustment to the AWW for purposes of future payment of TIBS (but not other income benefits) when the operation of the required dispute process causes a final agency resolution to be deferred until near the end of the seasonal period. We do not hold that such an adjustment is compelled, only that a trier of fact may order such an adjustment, taking into account the amount of future TIBS that are likely to be paid, the timeliness of the carrier's request such that overpayment can be considered to have resulted primarily from the Commission's procedures, and the amount of any overpayment that has accrued while dispute resolution procedures were being followed. We therefore reverse the hearing officer to the extent that he declined to consider an adjustment to any future TIBS because he felt he was without authority to do so, and remand the case for consideration (on an expedited basis) of whether any future TIBS amounts due may be reduced to give effect to the approved seasonal adjustment. As the facts indicate a parallel track of a dispute over impairment, we reiterate our previous decision, in *Texas Workers' Compensation*

Commission Appeal No. 92556, decided (date of injury), that TIBS paid for a period where it is ultimately determined that IIBS were due may be considered to be payment of IIBS for the period of overlap only.

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 Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge