

## APPEAL NO. 94074

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 13, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue submitted for resolution was whether the claimant is entitled to additional temporary income benefits (TIBS). The hearing officer determined that the appellant, claimant herein, has no further entitlement to TIBS in this case, based on her average weekly wage (AWW) and the amount of TIBS claimant has already been paid.

Claimant disagrees with certain of the hearing officer's determinations, contending that she is entitled to an additional \$3,112.74 in TIBS and requests that we reverse the hearing officer's decision and render a decision ordering the carrier to pay the additional TIBS. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

### DECISION

The decision of the hearing officer is affirmed.

In order to fully understand the parties' contentions in this case, it is necessary to refer back to a prior, 1993 benefit review conference (BRC), CCH and appeal to the Appeals Panel which resulted in Texas Workers' Compensation Commission Appeal No. 93602, decided August 31, 1993. By way of background, claimant was employed by (employer) employer herein, as a sales representative. Claimant's wages consisted solely of commissions and although she had been employed by the employer for a number of years, she had not worked regularly for the employer for the 13 weeks immediately preceding the injury. Claimant suffered a back injury on (date of injury). Apparently, the carrier initially denied benefits and eventually a BRC was held on April 14, 1993. One of the issues at the BRC was the proper AWW. After the BRC, the benefit review officer (BRO) entered an interlocutory order ordering TIBS be paid claimant based on an AWW of \$685.34 effective April 14, 1993. Carrier proceeded to pay TIBS at the maximum weekly rate of \$428.00 for disability beginning June 25, 1992. A CCH was held on June 9, 1993, where the issues included the AWW and whether claimant was entitled to TIBS from the date of injury to the date of the CCH. As claimant had not been employed by the employer for 13 consecutive weeks prior to the injury, both parties submitted names of "similar employees" whose wages were to be used in calculating the AWW. The hearing officer at the first CCH found neither of the employees whose names had been submitted was a similar employee performing a similar service and determined the AWW to be \$165.11 based on a fair, just and reasonable calculation. The hearing officer determined that:

[Claimant] is entitled to 26 weeks of temporary income benefits beginning on August 7, 1991, calculated on the basis of 75% of her average weekly wage of \$165.11 less her post-injury earnings, and she is entitled to temporary income benefits calculated at 70% of her average weekly wage less her post-injury

earning thereafter for so long as disability exists, and she has not reached maximum medical improvement. The Interlocutory Order dated April 14, 1993, is superseded by this decision and order.

That decision was appealed to the Appeals Panel which affirmed the hearing officer's decision in Appeal No. 93602, *supra*.

Claimant continued to have disability and the parties stipulated, and the hearing officer (in the instant case) found that claimant reached statutory maximum medical improvement (MMI) of 104 weeks "as a matter of law on August 11, 1993." Carrier proved, and it is not disputed, that it had paid \$23,033.82 in TIBS, pursuant to the interlocutory order of April 14, 1993, for disability between June 23, 1992, and August 3, 1993.

Carrier contends, and the hearing officer found, that "[t]he total amount of [TIBS] in this case that the Claimant could be entitled to for 105 weeks, exclusive of interest if any, based on her AWW, is \$12,350.40."

Claimant disagrees with the following determinations of the hearing officer:

#### **FINDINGS OF FACT**

4. The Claimant's AWW was previously established to be \$165.11 by another Hearing Officer of the Texas Workers' Compensation Commission, and such was affirmed by the Appeals Panel in Appeal No. 93602.
6. The total amount of temporary income benefits in this case that the Claimant could be entitled to for 105 weeks, exclusive of interest if any, based on the AWW, is \$12,350.40.

#### **CONCLUSIONS OF LAW**

5. Based on the Claimant's AWW and the amount of temporary income benefits that she has already received, the Claimant has no further entitlement to temporary income benefits in this case under the Act.

Claimant submitted a statement of weekly earnings beginning August 12, 1991, through May 18, 1992, listing the amount she earned each week, if anything, and computing the difference between that amount and her compensation rate at that time. Claimant contends this amounts to \$3,112.74. Claimant further contends that the hearing officer in the first CCH specifically awarded, and the Appeals Panel affirmed, the payment of 26 weeks of TIBS beginning August 7, 1991, calculated on 75% of her AWW and 70% of her AWW thereafter, less post-injury earnings, and that, never mind that \$23,033.82 TIBS have been paid, specific payments for the weeks between August 7, 1991, and May 22, 1992, less post-injury earning, had not been made. In fact, claimant contends that the Appeals Panel must have specifically intended that result by affirming the hearing officer's decision.

We reject claimant's contentions on the following basis.

By challenging the hearing officer's recitation that claimant's AWW was previously established to be \$165.11, and asserting the employee she had named was a similar employee performing similar services and therefore her AWW should be \$643.34 as recommended by the BRO in the April 14, 1993, BRC, claimant is seeking to relitigate that issue. In Texas Workers' Compensation Commission Appeal No. 93663, decided September 15, 1993, and Texas Workers' Compensation Commission Appeal No. 931049, decided December 31, 1993, the Appeals Panel discussed the doctrine of *res judicata* and stated that doctrine is applicable where a final judgment upon a matter is conclusive of the rights of the parties in all other actions on the issues adjudicated in the first suit. The first hearing officer's decision as to claimant's AWW was affirmed by the Appeals Panel in Appeal No. 93602, *supra*, and judicial review of that decision has not been sought. The doctrine of *res judicata* does not permit the claimant to reopen the issue of her AWW.

Secondly, claimant states in her appeal that Section 410.032 provides that the subsequent injury fund will reimburse a carrier for overpayments made pursuant to an interlocutory order. Claimant seems to be urging that windfall overpayments are permissible as long as they are paid out of the state's subsequent injury fund rather than by the carrier. Because a carrier is entitled to reimbursement for overpayments made pursuant to an order of the Commission does not mean claimant is entitled to further payments.

Claimant cites Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, for the proposition that "the legislature [actually the Appeals Panel decision in Appeal No. 92291] has chosen not to allow the recoupment from an employee when overpaid as a result of a mistake or wrong decision on the part of the Commission." That is somewhat of a misstatement of the case; however generally, Appeal No. 92291 held that the 1989 Act provides only certain limited areas for reimbursement or recoupment (fraud, erroneous order of the Commission) and the legislature has not acted to prevent "unjust enrichment" on the part of the claimant. Appeal No. 92291 has some important factual and legal distinctions from the instant case. In that case, the carrier miscalculated TIBS by improperly combining wages of two employees to obtain the AWW. After making payments according to its own improperly calculated AWW, the carrier then sought to recoup the overpayment by reducing future income benefits to which the claimant (in that case) was entitled. In the instant case, the carrier did not make a mistake in calculating the AWW but instead paid benefits in accordance with a Commission interlocutory order. Further, carrier, at this point, is not seeking to reduce future payments which may be due to claimant (apparently the entire \$23,033.82 has already been paid), nor is the carrier seeking to recoup, from the claimant, overpayments it has made. So far as we know from the record, the claimant is not being required to either reimburse or return the overpayments she has received nor is there an effort to recoup or otherwise take back payments already made. Carrier only seeks to avoid being required to make even further overpayments.

Claimant is correct in saying we have not had any previous cases precisely on this

point. However, in Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993, a contribution case (see Section 408.084), the claimant was entitled to receive impairment income benefits (IIBS) at \$200.00 a week for 75 weeks (\$15,000.00). Carrier began paying IIBS at the rate of \$300.00 a week. Because the issue of contribution was not addressed and resolved until carrier had paid 40 weeks at \$300.00 a week, the carrier proposed continuing payment of IIBS at \$300.00 a week for 50 weeks, giving claimant the \$15,000.00 to which she was entitled. The claimant, after receiving the \$15,000.00, subsequently requested an additional 25 weeks of IIBS at \$200.00 a week. The hearing officer in that case determined that the claimant was not entitled to additional IIBS and cited Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992, for the "general principle" that "a claimant should receive the benefits he or she is entitled to under the law--no more no less." The Appeals Panel, in Appeal No. 93531, *supra*, affirmed the hearing officer, stating that ". . . all the IIBS have been paid . . . , the claimant interposed no objection to the method of payment and . . . payment of additional IIBS is not due by law and would result in a clearly wrong or unjust result . . . ." Applying those same general principles to the instant case, claimant is entitled to 105 weeks of TIBS, exclusive of interest, based on an AWW of \$165.11 for a total of \$12,350.40. Claimant has received TIBS for 105 weeks totaling \$23,033.82 and neither the carrier nor anyone else is requesting from claimant a reimbursement or recoupment of any of the overpayment. We see no basis upon which to disturb the hearing officer's decision and find no basis upon which to order the payment of additional TIBS.

Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determinations. In considering all the evidence in the record, we find that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Alan C. Ernst  
Appeals Judge