APPEAL NO. 94134

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 16, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole remaining issue at the time of the hearing was whether the appellant (employer/carrier) was entitled to reduce the respondent's (claimant) impairment income benefits (IIBS) to recoup a previous overpayment of temporary income benefits (TIBS). The hearing officer, relying on the opinion of the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, determined that the employer/carrier was not entitled to the relief sought. The employer/carrier appeals this decision arguing that the issue is not one of recoupment of money already paid to the claimant, but of set-off to preclude a double recovery by the claimant because of a "good faith" mistake by the employer/carrier, and that the hearing officer's decision is incorrect as a matter of law. The claimant replies that she was unaware that she was not authorized TIBS after she returned to her previous employment and no longer had disability, but that it was the responsibility of the employer/carrier to calculate the correct payment. She also contends that she committed no fraud, that she should not now be penalized for the mistake of the employer/carrier, and that the hearing officer's decision was correct as a matter of law. Also decided today, Texas Workers' Compensation Commission Appeal No. 94135, decided March 16, 1994, addresses essentially the same issues presented in this case.

DECISION

We reverse the decision and order of the hearing officer and render a new decision that the employer/carrier may set off against claimant's IIBS entitlement, the amount of TIBS which were paid to the claimant after her return to work on May 4, 1992, ended her disability.

The essential facts of this case are not in dispute and were stipulated by the parties. Briefly, the claimant suffered an injury (bilateral carpel tunnel syndrome) on (date of injury), in the course and scope of her employment as a health claims auditor for the (employer), the employer/carrier in this case. The claimant was paid TIBS from February 20, 1992, through January 27, 1993. However, she returned to work at her full pre-injury salary on May 4, 1992, thus ending her disability and entitlement to TIBS. Sections 401.011(16) and 408.101(a). For unexplained reasons, the employer/carrier's adjuster was not informed of the claimant's return to work until January 29, 1993, and she continued to receive TIBS until January 27, 1993.[1] The claimant reached maximum medical improvement (MMI) with a 14% impairment rating (IR) on May 3, 1993, and was entitled to IIBS in the amount of

[1]Contrary to the stipulation made by the parties, the claimant asserts for the first time on appeal that her physician "mailed periodic reports on her condition to (the adjuster) and was informed of medical progress and date of return to work." This contention was not made at the hearing and no evidence in support of it was introduced at the hearing. We will not now consider it for the first time on appeal. *See* Section 410.203(a) and Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993.

$306.00 per week for 42 weeks, for a total $12,852.00.[2] Section 408.121(a). Thus, the claimant was overpaid TIBS for the period from May 4, 1992, when she returned to work and her disability ended, through January 27, 1993, when the adjuster learned of her return to work, in the amount of $12,235.00. If the employer/carrier were allowed to take a credit or set-off for the overpayment of TIBS against IIBS, the amount of IIBS still owed would be $617.00.

We note at the outset that the parties used various terms such as set-off, credit, recoupment, or recovery as shorthand for various theories of relief. Our resolution of the issue depends not on the words used, but on whether the relief sought is authorized by the 1989 Act, the Rules of the Texas Workers' Compensation Commission (Commission) and previous decisions of the Appeals Panel.

Although the hearing officer reviewed numerous decisions of the Appeals Panel in reaching his decision and order, he considered Appeal No. 92291, *supra*, as controlling. In that case, the first in a series addressing the issue of the effect of past overpayments of income benefits on future obligations of carriers, the carrier mistakenly combined the wages of two jobs in computing the claimant's average weekly wage (AWW) on which it based TIBS. Upon learning of the error, the carrier unilaterally reduced the AWW to reflect only the salary of the job out of which the compensable injury arose and began to offset prior excess TIBS paid against current TIBS payments. The hearing officer in that case considered four provisions of the 1989 Act dealing with recoupment or reimbursement, found none of them applicable to the facts of the case before him and denied the carrier the relief sought. The Appeals Panel affirmed, relying on standard principles of statutory construction, and held that the express mention in the 1989 Act of specific circumstances in which credit or recoupment was permitted was tantamount to the exclusion of all other circumstances. Since the 1989 Act permitted recovery only in cases of fraud (Section 415.008), certain employer initiated payments where the employer is not the carrier (Section 408.003), overpayments due to a Commission order later found to be erroneous (Section 410.032), and certain advancements and accelerations (Sections 408.085 and 408.129), the legislature, according to that decision, did not authorize recovery of carrier overpayment in other cases. For that reason, the Appeals Panel refused to extend recoupment or recovery to that case of admitted "unjust enrichment" due simply to the mistake of the carrier where the claimant continued to suffer disability.

Later decisions of the Appeals Panel which addressed this issue of recoupment or recovery of overpayments of income benefits, with the exception of Texas Workers' Compensation Commission Appeal No. 93610, decided September 7, 1993, and Texas Workers' Compensation Commission Appeal No. 93067, decided March 11, 1993, have distinguished Appeal No. 92291.[3] For example, in Texas Workers' Compensation

[2]The parties stipulated that the weekly maximum IIBS entitlement was $307.00, for a total IIBS entitlement (42 x $307.00) of $12,894.00. The hearing officer found the weekly maximum to be $306.00 for a total of $12,852.00. This finding was not specifically challenged and we do not disturb it on appeal.

[3]In Texas Workers' Compensation Commission Appeal No. 93024, decided February 25, 1993, and Texas

Commission Appeal No. 92556, decided December 2, 1992, the hearing officer, expressly relying on Appeal No. 92291, refused to allow a carrier a credit against IIBS payments for its previous excess payments of TIBS after the claimant reached MMI with a five percent IR. Because the date of MMI was in dispute until determined by the contested case hearing officer, the carrier continued to pay TIBS some five months beyond the date finally decided by the hearing officer to be the date of MMI. The Appeals Panel reversed the decision of the hearing officer and allowed the carrier a credit for the excess TIBS payments. In so doing, the Appeals Panel pointed out that 1989 Act "does not distinguish between temporary, impairment or supplemental income benefits, although separate sections provide for each type of entitlement." As a result, the "legal effect" of the hearing officer's finding of the MMI date was that all income payments paid after that date were in fact IIBS, and the carrier was not required "to make additional income benefits under the specific label of IIBS. . . ." The Appeals Panel further distinguished Appeal No. 92291, by pointing out that in Appeal No. 92556 there was no mistake or issue as to the amount of the payments due, nor was there an effort to take back payments already made to the claimant or to reduce the claimant's ongoing income benefits below those "appropriate under the Act."

Texas Workers' Compensation Commission Appeal No. 92576, decided December 14, 1992, involved the payment of TIBS to a claimant after the claimant received and rejected what the hearing officer later determined to be a bona fide offer of employment. *See* Section 408.103(e) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5). The hearing officer refused to allow the carrier a credit for those TIBS paid after the claimant rejected the bona fide offer of employment to offset TIBS found owing based on a later period of disability arising out of the same compensable injury. The Appeals Panel reversed and allowed the carrier to adjust the lump sum payment of TIBS it had been ordered to pay for the later period of disability "to account for" the earnings imputed to the claimant by virtue of the bona fide offer of employment. In so doing, the Appeals Panel distinguished Appeal No. 92291, *supra*, pointing out again that, in that case, there was no statutory authority to correct the carrier's mistake while in the case being considered, both the Act and Commission Rules entitled the carrier to an adjustment in a lump sum settlement to take into account the claimant's imputed wages. *Compare* Texas Workers' Compensation Commission Appeal No. 93404, decided July 8, 1993, which affirmed a hearing officer's decision not to allow a reduction in TIBS to account for severance pay because severance pay was not properly considered under the 1989 Act to be "wages" on which TIBS is calculated.

In Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993, the carrier began paying IIBS after the date of MMI at the rate of $300.00 per week based on a 35% IR assigned by the treating doctor without taking into account that one-third of the impairment was due to a pre-1990 injury. Although this rating was disputed, the carrier did not receive notice that a designated doctor assigned a 25% IR until it had already paid 40 weeks of IIBS. The carrier continued paying IIBS at the rate of $300.00 per week

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Workers' Compensation Commission Appeal No. 92705, decided February 16, 1993, no overpayment was established.

for another 10 weeks again without taking into account possible rights to contribution for one third of this amount (which was not disputed) for the previous injury. It then suspended payments altogether. Although the carrier had paid the claimant IIBS at the higher rate, without regard to the one-third contribution for the previous injury, for 50 weeks (in effect paying $300.00 per week for 50 weeks instead of $200.00 for 75 weeks), a procedure the hearing officer found the claimant did not disagree with, the claimant nonetheless sought an additional 25 weeks of IIBS at a reduced rated, this time taking into account contribution. The hearing officer found that the claimant was entitled to 75 weeks of IIBS, but gave the carrier credit for the IIBS previously paid. The Appeals Panel affirmed agreeing that the 1989 Act set the claimant's entitlement to IIBs at a total of $15,000.00, and that the hearing officer acted reasonably and in accordance with the law in reducing future IIBS payments to take into account contribution for the previous injury. The Appeals Panel distinguished Appeal No. 92291, *supra*, by noting that, unlike the earlier case, there had been no overpayment and the carrier was not seeking to get any payment back from the claimant, but only "to avoid payment of an additional sum to which claimant is not under any theory entitled to receive." To do otherwise in that case "would create an unjust and inequitable windfall for the claimant in this particular situation."

In Texas Workers' Compensation Commission Appeal No. 94074, decided February 23, 1994, the Appeals Panel addressed the question of whether a carrier who paid over $23,000.00 in TIBS based on an AWW initially calculated to be $625.34 (resulting in maximum TIBS of $428.00 per week) but which was then reduced to an AWW of $165.11 for a total TIBS entitlement of $12,350.00 (based on a statutory date of MMI) could be ordered to pay $3,112.74 more in TIBS based on the claimant's recalculation of income earned during a portion of the period for which TIBS was payable. The hearing officer rejected this claim for additional TIBS and the Appeals Panel affirmed observing that insofar as her claim constituted a challenge to her lower AWW it was barred by the doctrine of *res judicata* and that the fact of a possible reimbursement to the carrier from the subsequent injury fund did not entitle her to further TIBS. The Appeals Panel went on to note that Appeal No. 92291, cited by the claimant in support of her position, was clearly distinguishable. In that case, according to the Appeals Panel, the carrier's miscalculation of the proper amount of TIBS was responsible for its predicament. It then attempted to recoup the overpayment by reducing future TIBS to which the claimant, who still had disability, was due. None of these conditions were present in Appeal No. 94074, *supra*. More to the point, according to the Appeals Panel, was Appeal No. 93531, *supra*, which involved the determination and payment of a specific amount due and paid to the claimant under the law. This amount having been determined and paid, the payment of anything more would have been clearly wrong and unjust.[4]

[4]Texas Workers' Compensation Commission Appeal No. 93610, decided September 7, 1993, is not directly relevant to the case under appeal, because, unlike the case we here consider, Appeal No. 93160 deals with fraudulent receipt of TIBS. It is, however, of more than passing interest because of Judge's observation, in his concurring opinion, that "[a]s for the authority of a hearing officer to apply a credit against IIBS for the overpayment of TIBS, it seems to me that because the hearing officer is expressly authorized to make an award of benefits (Section 410.168(a)(3)), the hearing officer has such implied powers as are necessary to effectuate that express authority including the power to apply a credit or offset in an appropriate case." In addition, Judge states in her

Having reviewed the decision and order of the hearing officer in the case now under appeal, as well as our previous decisions discussed above and referenced by the hearing officer and the parties, we believe that Appeal No. 92291, *supra*, is distinguishable on its facts from this appeal and reliance by the hearing officer on this decision was misplaced. The key consideration in Appeal No. 92291 was that the carrier attempted to recover previous overpayments from benefits still owed and being paid to the claimant while he continued to suffer disability. The fact that the carrier's mistake resulted in a windfall recovery for the claimant was considered secondary to principles of statutory construction and a desire by the Appeals Panel to ensure that ongoing entitlements were not reduced to the degree that it might leave an injured worker significantly uncompensated, a result that the 1989 Act clearly intended to avoid.

Our analysis of the case now under appeal in light of our previous decisions, especially Appeal No. 92291, *supra*, begins with the observation that the payment of benefits to a claimant must be based on some underlying statutory entitlement. *See, e.g.*, Section 410.168(a) which directs a hearing officer to "award benefits due." (Emphasis added.) At the hearing, the carrier introduced into evidence, and now refers to it on appeal, a November 4, 1992, memorandum from the Executive Director of the Commission, which states: "A Claimant should receive the benefits he or she is entitled to under the law--no more or no less." *See also* Appeal No. 93531, *supra*. While this memorandum does not represent binding precedent or the force of law, it does bring a conceptual balance to bear on an overbroad reading of Appeal No. 92291, *supra*. Benefits cannot be substantially enhanced solely because a carrier has made a mistake.

In the case under appeal, the claimant had no entitlement, not even a colorable claim, to TIBS under the 1989 Act after she returned to work and no longer had disability. In addition, as in Appeal Nos. 94074 and 92556, *supra*, the amount of overpayment of TIBS and the amount of the later IIBS entitlement were both precisely known and could be offset. No attempt was being made to recover any of the TIBS overpayment from the claimant other than by crediting such against future income benefits. Unlike Appeal No. 92291, where the claimant would have been forced to live on reduced TIBS while still having disability, the claimant in the case under appeal was working at her pre-injury wage, and, as an aside, points to no hardship or disadvantage that a recoupment or set-off against later IIBS would impose. Finally, we do not consider the fact that we cannot characterize the excess TIBS paid before MMI to have been *de facto* IIBS, *see* Appeal No. 92556, *supra*, fatal to set-off or credit against IIBS. Clearly the claimant had no entitlement to the excess TIBS paid to her. The carrier sought, through the dispute resolution process, credit against other payments owed the claimant. Substantial payments to which the claimant was not entitled having been made, we know of no principle of law, equity or sound policy that would require the carrier to make the same payments again as IIBS. In this case, the claimant has received, or will receive, all the IIBS to which she is entitled. The carrier simply has no

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dissenting opinion, that a hearing officer has the authority to make "[e]quitable adjustments" which prevent payment of benefits during a period of nonentitlement citing Appeal No. 92556, *supra*, as an example.

further liability for IIBS under the 1989 Act. To require the carrier to do more because of its "mistake" in making excess TIBS payments does not, as the claimant contended at the hearing, "penalize" her,[5] but, on the contrary, "would seriously distort, if not pervert the entire compensation scheme intended by . . . the 1989 Act." Texas Workers' Compensation Commission Appeal No. 93631, decided September 7, 1993.

In view of our disposition of this case, we need not address the arguments of the carrier that the conduct of the claimant amounted to "constructive fraud" and hence relief was available to the carrier under the principles enunciated in Appeal No. 92291, *supra*, or that the remedy of set-off is available under the common law of Texas. We note however that the Rule 129.4(d) requirement to advise the carrier of any employment while receiving TIBS applies only where the employee is employed by a different employer.

The decision and order of the hearing officer are reversed to the extent inconsistent with this opinion and a new decision is rendered that the employer/carrier is allowed a credit in the amount of $12,235.00 against IIBS owed the claimant. The carrier shall pay any remaining unpaid accrued IIBS in a lump sum with interest. The carrier shall pay any remaining IIBS at the rate of $306.00 per week as they accrue.

Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur in the result.

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the result reached by Judge. In Texas Workers' Compensation Commission Appeal No. 93610, decided September 7, 1993, the hearing officer determined that the claimant did not have disability after he went to work for another employer on September 21, 1992, and that he reached MMI on February 17, 1993 with a four percent impairment rating. The evidence showed that the claimant was paid TIBS from October

[5]In her testimony, the claimant candidly admitted that she used the overpayment to pay bills, including medical bills unrelated to her compensable injury.

24, 1991, until October 28, 1992, and the claimant testified he did not inform the carrier of his employment with his new employer because he was unaware of any requirement that he do so. One of the disputed issues was whether the carrier could take a credit against future income benefits for the TIBS paid claimant while he was working. The hearing officer determined that she was without jurisdiction to determine the issue in that it concerned the alleged fraudulent obtaining of TIBS and was thus a matter for "an APTRA Hearing." The majority of the Appeals Panel considering the carrier's appeal affirmed the hearing officer noting that the carrier had not challenged on appeal the hearing officer's determination that she lacked jurisdiction over the issue because it involved alleged fraud. In a concurring opinion, I stated the following:

> As for the authority of a hearing officer to apply a credit against IIBS for the overpayment of TIBS, it seems to me that because the hearing officer is expressly authorized to make an award of benefits (Section 410.168(a)(3)), the hearing officer has such implied powers as are necessary to effectuate that express authority including the power to apply a credit or offset in an appropriate case.

(See also Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(a)(2) (Rule 142.16(a)(2)) which provides, as does Section 410.168(a), that the hearing officer shall issue a decision on benefits which includes a determination of whether benefits are due and, if so, an award of benefits due.) In my judgment, this is an appropriate case.

In Stauffer v. City of San Antonio, 344 S.W.2d 158, 160 (Tex. 1961), the Texas Supreme Court stated that "[a]n administrative agency . . . has only such powers as are expressly granted to it by statute together with those necessarily implied from the authority conferred or duties imposed." *And see* Sexton v. Mount Olivet Cemetery Ass'n, 720 S.W.2d 129, 137-138 (Tex. App.-Austin 1986, writ ref'd n.r.e.) for an extensive discussion of the rules of statutory construction concerning the powers of administrative agencies. In this regard, the Sexton court at 137 commented as follows:

> In any case of statutory construction, the court must follow the "cardinal rule" which requires that it seek out the legislative intent from a general view of the whole enactment; and, once that intent has been ascertained, it follows as a matter of course that the court shall construe any questioned part of the statute so as to give effect to the legislative purpose. [Citation omitted.] The court is not responsible, however, for omissions in legislation; rather, it must simply give a true and fair interpretation of the statutory language, which means an interpretation that is neither forced, exaggerated, nor strained, and the meaning settled upon must be one suggested by the statutory language and one the language will fairly sanction and clearly sustain. [Citation omitted.]
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It is axiomatic that [administrative] agencies are creatures of statute and have no inherent authority. They may, therefore, exercise only those specific powers conferred upon them by law in clear and express language, and no additional authority will be implied by judicial construction. However, with respect to *a* power specifically granted the agency, the full extent of *that* power must be ascertained with due regard for the rule that the Legislature generally intends that an agency should have by implication such authority as may be *necessary* to carry out the specific power delegated, in order that the statutory purpose might be achieved. Moreover, the Legislature impliedly intends, as a general rule, that an agency should have whatever power is *necessary* to fulfill a function or perform a duty placed expressly in the agency by the Legislature. The Legislature does not intend that agency functions be an exercise in futility. [Citations omitted.]

The hearing officer in the case we consider found, among other things, that there is no provision in the 1989 Act or in the Commission's Rules "which provides for the Carrier's right to offset or recoup the overpayment of benefits under the circumstances described in this case." However, the total amount of TIBS to which claimant was then entitled under the 1989 Act for her period of disability and the total amount of IIBS to which she was entitled based on her impairment rating were both determinable at the time of the hearing below. Indeed, the parties stipulated that claimant received an overpayment of $12,235.00 in TIBS and that without a credit for the TIBS overpayments claimant would be entitled to IIBS in the amount of $12,852.00.

The hearing officer was expressly authorized and required by the 1989 Act and the rules both to determine the benefits due claimant and to award such benefits. In my view, under the circumstances of this case, such express authority included the implied authority to grant a credit or offset against the income benefits due claimant for the amount of income benefits already paid to her to which she was not entitled. The 1989 Act does not provide for the payment of income benefits to injured employees in amounts exceeding those to which they are entitled nor, in my judgment, was the authorization of excess payments intended by the Legislature. Section 415.008, which addresses the fraudulent obtaining of benefits, provides that a person who has obtained excess payment in violation of the section shall be liable for full repayment. In my view, however, the legislature did not intend by including that provision to foreclose hearing officers from taking into account claimants' receipts of income benefits to which they were not entitled when determining and awarding income benefits still due them. *Compare* Martinez v. Texas Employment Commission, 570 S.W.2d 28 (Tex. Civ. App.-Corpus Christi 1978, no writ.)

Philip F. O'Neill
Appeals Judge