

APPEAL NO. 94135

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on November 16, 1993, to determine the following issue: whether the carrier, who is the appellant in this action, is entitled to reduce the claimant's impairment income benefits (IIBS) to recoup a previous overpayment of \$9,735.00 in temporary income benefits (TIBS). The hearing officer, (hearing officer), determined that there is no provision in the 1989 Act or its rules which provides for the carrier's right to offset or recoup the overpayment of benefits under the circumstances of this case. Citing Appeals Panel decisions and caselaw interpreting the prior workers' compensation statute, the carrier contends on appeal that the hearing officer erred as a matter of law in determining that the carrier is not entitled to reduce the claimant's IIBS to recoup its earlier overpayment of TIBS. It contends that Texas caselaw generally supports only one satisfaction for injuries, and states that claimant's actions in this case amount to constructive fraud. The claimant responds that the additional payments she received were attributable solely to the carrier's mistake, and she contends that the hearing officer's decision should be affirmed.

DECISION

We reverse the decision of the hearing officer and render a new decision that the carrier is allowed to offset against IIBS the \$9,735.00 in payments to which the claimant was not entitled.

There was virtually no disputed issue of fact in this case, and indeed the circumstances surrounding the overpayment of TIBS to the claimant were stipulated by the parties. Basically, the claimant developed bilateral carpal tunnel syndrome while employed by a self-insured governmental entity (hereinafter carrier). Claimant began losing time from work on March 13, 1992, and her disability continued until July 28, 1992, when she returned to work for the same employer. It was stipulated that neither claimant nor carrier reported claimant's return to work to (employer) (TPA), and accordingly claimant continued to receive TIBS. On November 16, 1992, the claimant changed employers.

According to the stipulations, on January 19, 1993, the TPA received an inquiry from the claimant concerning the amount of a TIBS check she had received. At that time claimant informed the TPA as a postscript that she had changed jobs on November 16, 1992. The stipulations further provide that the TPA first received notice on January 19, 1993, that the claimant had returned to work but did not receive notice of the date; the TPA also was not provided with a medical release indicating that the claimant was able to return to work. The claimant continued to receive TIBS from July 28, 1992, the date she returned to work, through January 29, 1993, for a total overpayment of \$9,735.00.

On May 28, 1993, the claimant's treating physician certified that she had reached maximum medical improvement (MMI), with a whole body impairment rating of 12%. The hearing officer found that the claimant was entitled to the maximum rate of \$306.00 per week for IIBS for 36 weeks, for a total of \$11,016.00 in IIBS. The hearing officer wrote that since

the claimant has been overpaid \$9,735.00 in TIBS, if the carrier is allowed to take a credit for the IBS against the overpayment of TIBS, it would owe the claimant \$1,317.00 in IBS (\$11,016.00 - \$9,735.00 = \$1,281.00). However, a September 2, 1993, interlocutory order requires the carrier to pay the claimant accrued IBS (from May 28, 1993 through September 2, 1993) in the amount of \$3,226.77 including 3.4% interest; it also ordered the carrier to continue paying weekly IBS as they accrue.

The carrier's position was that if it is required to comply with the interlocutory order it will have overpaid benefits to the claimant, who will receive a windfall thereby. However, it argued that Section 408.121(b), which says the carrier shall begin to pay IBS "not later than the fifth day after" the date on which the carrier receives a doctor's report certifying MMI does not prohibit an early payment of IBS. It also argued that under the prior law courts routinely granted relief to carriers in overpayment situations, and that the common law concept of constructive fraud applies to this case. It cites an internal memorandum from the Executive Director of the Texas Workers' Compensation Commission (Commission) as standing for the principal that, "a claimant should never receive more benefits than entitled to under the law."

A few points bear mentioning at the outset. The 1989 Act provides that an employee is entitled to TIBS if the employee has a disability and has not attained MMI. Section 408.101(a). While entitlement to TIBS continues until the employee reaches MMI, Section 408.102(a), the amount is calculated based upon a percentage of the employee's average weekly wage (AWW) minus the employee's weekly earnings after the injury. Section 408.103. While the parties in this case did not specifically so state, we can infer from their stipulations as a whole that the claimant returned to work (and continued to work, after she changed jobs) at the equal or equivalent of her pre-injury wage. Thus she did not have disability, as defined by Section 401.011(16), and her entitlement to TIBS for the period July 28th to January 29th ceased and was replaced by her earnings during that period.

In addition, because TIBS may be adjusted "as necessary to match the fluctuations in the employee's weekly earnings after the injury," see Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.4 (Rule 129.4), the insurance carrier is required to enclose, with the first TIBS payment, a notice that the employee is required to notify the insurance carrier when the employee returns to work, and to report any wages received after the date of injury "while benefits are continuing." Rule 129.3. However, Rule 129.4(c) states that "If the injured employee is still employed by the employer at the time of the injury, the employer is responsible for informing the carrier of changes in the employee's weekly earnings after an injury . . . within 10 days after the end of each pay period" The claimant's employer in this case was also the carrier since it was self-insured. See Sections 401.011(18) and (27). The claimant's lack of affirmative duty to inform the carrier of a return to work (made more acute in this situation, where the employer and the carrier are the same) leads to the conclusion that the unentitled payment of TIBS that occurred at least during the period July 28th to November 16th, arguably was due to the carrier's mistake.

The first Appeals Panel decision to address an overpayment to a claimant--and the case relied upon by the claimant at the hearing and by the hearing officer in reaching his decision--was Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992. In that case the carrier paid TIBS based upon the employee's combined AWWs from concurrent employments. Following this panel's decision in Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, (which held that concurrent employment was not to be considered in computing AWW), the carrier began to offset the excess amounts it had paid against the claimant's current TIBS payments.

In affirming the hearing officer's determination that the carrier's overpayment of TIBS could not be recouped from future TIBS payments, the Appeals Panel in Appeal No. 92291 considered the provisions of the 1989 Act which allow for recoupment or reimbursement and determined that none applied to the facts of the instant case. These included the following: Section 415.008, concerning fraudulently obtaining or denying benefits (in the instant case, as in Appeal No. 92291, there was no allegation that either claimant committed any of the fraudulent acts contained in that section); Section 408.003, concerning reimbursement of benefits payments either initiated or supplemented by an employer, versus a carrier; and Sections 410.032 and 410.205, which allow reimbursement to the carrier of benefit payments, via the subsequent injury fund, made pursuant to a Commission order which is reversed or modified.

The decision in Appeal No. 92291 stated that:

[T]he 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.

Appeal No. 92291 concluded that 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," citing caselaw for the proposition that when 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.

The carrier has argued that subsequent Appeals Panel decisions involving similar fact situations have rejected or distinguished Appeal No. 92291. In Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992, a carrier continued paying income benefits while the claimant's date of MMI was in dispute; as it turned out, the carrier made an additional 19 weeks of payments after the date on which MMI ultimately was determined to have been reached (December 31st). The Appeals Panel held that by operation of the statutory provision that says an employee's entitlement

to IBS begins the day after the employee reaches MMI, the payments the carrier made after December 31st became IBS entitlement. In so holding, that panel stated:

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 . . . 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.

Conversely, in Texas Workers' Compensation Commission Appeal No. 93631, decided September 7, 1993, the carrier improperly ceased payment of TIBS based upon its own doctor's finding of MMI with zero percent impairment. The claimant disputed that doctor's rating, but a subsequently appointed designated doctor agreed with the carrier's doctor's determination of MMI date and impairment rating. The Appeals Panel noted the impropriety of the carrier's initial action, but affirmed the hearing officer's decision not to order further, retroactive TIBS, based upon the fact that the statute clearly authorizes TIBS only up to MMI and "further payment of TIBS after MMI . . . would be a direct violation of Section 408.102(a) "

In Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993, the carrier began paying IBS after the parties agreed that one-third of the claimant's impairment was due to a prior compensable injury. The carrier began paying IBS on March 30th but did not receive the impairment rating until January 8, 1993, at which time the carrier had already paid 40 weeks of IBS at \$300.00 per week. Thereafter, the carrier continued payment of IBS until the 50 weeks were paid. On appeal the claimant contended he had not been aware he was due 75 weeks of benefits and sought an additional 25 weeks of IBS, although at \$200.00 per week, citing as authority Appeal No. 92291. The hearing officer concluded that the carrier "was entitled to receive credit for impairment income benefits previously paid" and that "a claimant should receive the benefits he or she is entitled to under the law--no more or no less." In affirming, the Appeals Panel noted that the carrier in Appeal No. 92291 miscalculated TIBS and sought to recoup such overpayment from future TIBS payments. It also said:

In the instant case, there has been no overpayment and the carrier is not seeking recoupment. The carrier owed, and claimant was entitled to \$15,000.00, which should have been paid over 75 weeks at \$200.00 a week. Claimant actually received \$15,000.00 paid over 50 weeks at \$300.00 a week. Carrier is not seeking to obtain any payments back; but is only seeking to avoid payment of an additional sum to which claimant is not under any theory entitled to receive.

In the final case cited by carrier, Texas Workers' Compensation Commission Appeal No. 93610, decided September 7, 1993, the evidence showed that the carrier paid TIBS at the maximum rate during a period of time in which the claimant worked for a second employer, earning in excess of his pre-injury wages, and that the claimant did not inform the carrier of this job. The hearing officer held that since the matter of repayment of allegedly fraudulently obtained TIBS must be addressed in a hearing under the Administrative Procedure and Texas Register Act, rather than in a contested case hearing, the hearing officer lacked jurisdiction to consider the issue. The hearing officer also ordered the carrier to pay the claimant twelve weeks of IIBS (based on the designated doctor's four percent impairment rating), but stated that "A credit is allowed against this award in the amount of [IIBS], if any, which previously have been paid to claimant." In affirming, the panel noted that the carrier did not appeal the hearing officer's finding that the overpayment of TIBS involved alleged fraud and that therefore the carrier's remedy was to initiate an administrative violation proceeding. One judge concurred in the result, but stated that because Section 410.168(a)(3) gives hearing officers the authority to make an award of benefits, 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." A dissenting opinion stated that the hearing officer erred in not deciding the issue of credit; citing the Act's provisions on disability, the dissent also stated that "equitable adjustments which prevent payment of benefits during a period of nonentitlement are, I believe, within the power of our hearing officers to determine." The dissent added that overpayment during a period of entitlement due to computational errors are a different issue.

While the instant case contains elements common to many of the above-cited decisions, we nevertheless find it distinguishable from the fact situation in Appeal No. 92291, upon which the hearing officer relied. In that case, the carrier sought to rectify its mistake in calculating AWW by reducing the actual amount of TIBS to which the claimant was entitled during a period when the claimant continued to suffer disability and continued to receive TIBS. (Because the carrier reduced claimant's TIBS to reflect earlier overpayment, it actually was recouping its overpaid amounts through claimant's present TIBS benefits.) By contrast, the claimant herein, as a matter of law, did not have disability beginning July 28, 1992, and thus had no entitlement, colorable or otherwise, to TIBS, which were designed by the legislature to assist an employee with respect to a "shortfall" in wages due to a compensable injury during rehabilitation or until the employee reaches MMI. See Montford, A Guide to Texas Workers' Comp Reform, 4B.23. Thus the carrier's payment of income benefits during that period were not TIBS, pursuant to the Act's statutory scheme, and the carrier had no obligation to pay income benefits to the claimant during that period. (This is somewhat analogous to the situation that existed in Appeal No. 92556 where, as a matter of law, claimant's entitlement to TIBS ceased upon the determination that he had reached MMI.) That being the case, coupled with the fact that claimant is now owed impairment income benefits in a statutorily determinable amount, we find that nothing in the statute would prevent an adjustment to IIBS to take into account the previously overpaid amount.

We believe that this can be accomplished consistent with our previous opinion in Appeal No. 92291 and the statutory provisions cited therein. That case stated that

recoupment of benefits directly from a claimant is limited to strictly circumscribed situations. That is still true, and the instant case would have had a different resolution had the claimant's impairment rating been zero, so that there were no amounts to be offset. We would point out that in an appropriate case, a fraudulent claimant with no future IIBS entitlement could still be made the defendant in an action under the Administrative Procedure Act and be subject to a finding that previously paid TIBS, plus interest and penalty, were due.

We also believe the reasoning of Appeal No. 93531 is applicable to this case, despite the fact that there was no overpayment, but rather an acceleration of payment. The panel in that case observed that the claimant had received the amount to which he was entitled, and that the carrier "is only seeking to avoid payment of an additional sum to which claimant is not under any theory entitled to receive."

Because of our reasoning hereinabove, we need not discuss any of the other grounds for reversal advanced by the carrier. With regard to a factually similar case, see Texas Workers' Compensation Commission Appeal No. 94134, decided March 16, 1994, and particularly the concurring opinion which states that this is an appropriate case for the exercise of the hearing officer's authority to make an award of benefits, Section 410.168(a)(3), and which cites caselaw for the proposition that a court must seek out legislative intent "from a general view of the whole enactment," and construe any questioned part of the statute so as to give effect to the legislative purpose (citation omitted).

The decision and order of the hearing officer are reversed to the extent they are inconsistent with this opinion and a new decision and order rendered that the carrier may credit the incorrectly paid amount of \$9,735.00 against the full amount of IIBS it owes claimant. The carrier is further ordered to pay the remaining IIBS as and when they become due.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge