

APPEAL NO. 950041  
FILED FEBRUARY 22, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq.* (1989 Act). On December 20, 1994, a contested case hearing was held. The claimant was injured on \_\_\_\_\_, while working for (employer), a self-insured carrier. The issues before the hearing officer were stated as whether the carrier was entitled to contribution, and, if so, in what proportion; the claimant's average weekly wage (AWW); and the claimant's correct impairment income benefits (IIBS) rate. The issues as to the entitlement and percentage of contribution and the amount of AWW were resolved by stipulation: the parties agreed that as claimant had a 22% impairment rating (IR), and the extent of impairment from a prior compensable injury was four percent, the amount of contribution to be allowed against IIBS and supplemental income benefits (SIBS) would be 18% (4/22). The parties also stipulated that claimant's AWW was \$663.63.

The hearing officer determined the remaining issue in a manner leaving the claimant with payment of the full amount of his maximum weekly IIBS as calculated under applicable statutes. He determined that the method by which contribution would be credited would be to first compute 70% of claimant's AWW. He then reduced that amount by 18%. The result was \$380.92. However, determining that the maximum IIBS benefit in effect for claimant's date of injury was \$325.00, he rendered this full amount as the IIBS rate.

The carrier appeals, arguing that the hearing officer has in effect allowed no reduction for contribution, which he did not have the discretion to do under Section 408.084, which requires the benefit to be reduced once contribution is determined. The carrier points out that the hearing officer has failed to implement the stipulated percentage of contribution for the effects of claimant's prior compensable injury. There is no response.

DECISION

Finding the hearing officer's decision erroneous as a matter of law, we reverse his determination that claimant's IIBS rate is \$325.00, and render an order that carrier is entitled to reduce the weekly amount of \$325.00 by 18%, yielding a weekly IIBS rate of \$266.50.

This case was tried on stipulated facts. At the beginning of the hearing, the parties stipulated (in addition to provisions on venue and coverage) that claimant sustained a compensable injury on \_\_\_\_\_; that he reached maximum medical improvement on May 24, 1994, with a 22% IR; that the amount of contribution was 18% because four percent of claimant's 22% impairment was due to a prior compensable injury; and that

claimant's AWW was \$663.63. The hearing officer took official notice of the amount of the statutory maximum income benefits applicable to IIBS, as \$325.00 per week.

It was the position of the claimant at the hearing that, notwithstanding the stipulated contribution, carrier could not actually reduce the weekly amount to be paid to the claimant, and that claimant was entitled to be paid the statutory maximum IIBS. It was claimant's position that the amount of contribution should be figured upon calculation of claimant's benefits before applying the statutory maximum. Carrier countered by arguing that the "benefit" from which a reduction for contribution was due would be the actual weekly benefit that claimant could be paid, in this case the statutory maximum benefit.

Contribution is authorized in accordance with Section 408.084. This section states (in pertinent part):

(a)At the request of the insurance carrier, the commission may order that [IIBS] and [SIBS] be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.

Also bearing on the issue is Section 408.126:

Subject to Section 408.061 and 408.062, an impairment income benefit is equal to 70 percent of the employee's [AWW].

Sections 408.061 and 408.062 are the maximum and minimum benefit statutes, respectively, which establish "ceiling" and "floor" amounts for the weekly income benefits paid to all workers. The amount is fixed at a percentage of the state AWW in effect on the date of injury. Sections 408.061(g); 408.062(c).

The hearing officer computed the amount of allowable contribution against 70% of claimant's AWW, not against the weekly amount actually due to him under the statute. Because the maximum amount was less than the hearing officer's calculation of the amount due after "contribution," the hearing officer found that claimant's IIBS rate was \$325.00. This is the same weekly amount that would have been paid if claimant had no prior compensable injury.

The hearing officer's basis for his method is to read Section 408.126 as establishing the IIBS rate at 70% of claimant's AWW, unaffected by the statutory maximum benefit. The claimant had argued that "but for" the statutory maximum allowance, claimant's IIBS would be entitled to 70% of his AWW. The hearing officer, in his decision, recited claimant's argument that the statutory maximum yields an "artificial" maximum IIBS rate. His formula resulted in no reduction of the claimant's weekly IIBS check. The hearing officer stated that the carrier's proposed method, that contribution be applied against the

amount of benefits payable to claimant, would place a "higher relative burden based on income loss on high wage earners than otherwise established by the statutory maximum rate."

We find that the hearing officer's decision is wrong as a matter of law. Section 408.126 must be read as a whole, and it states that amount of IIBS is expressly subject to the statutory maximum and minimum. Section 408.084 expressly allows contribution against the "benefit." The hearing officer's ruling effectively treats the statutory maximum as a guaranteed minimum benefit. We find no statutory or case law support for this interpretation. Although the hearing officer perceives a legislative intent not to charge "high" wage earners with a "relatively higher burden," the effect of the hearing officer's decision is to subject only low wage earners to reduced weekly income benefits. Section 408.084, on its face, applies evenly to IIBS and SIBS, regardless of whether injured workers are classified as "high" or "low" wage earners.

The Appeals Panel has determined many times that the IR itself may not be reduced to account for contribution, citing Montford, A Guide to Texas Workers' Compensation Reform, § 4B.30:

To avoid a "gap" that may otherwise occur between the expiration of [IIBS] and the beginning of [SIBS] if the impairment period is reduced, the authors suggest that contribution under [Section 48.084] should reduce the amount of the weekly impairment benefit rather than the impairment period.

Thus, the only way that a carrier may recover contribution is from weekly benefits. The effect of the hearing officer's decision would be to disallow contribution sought by carriers in the way laid out by the Appeals Panel as the permissible means of obtaining this allowance. *See, for example*, Texas Workers' Compensation Commission Appeal No. 92610, decided December 30, 1992; Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993; Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993; and Texas Workers' Compensation Commission Appeal No. 94451, decided May 23, 1994.

We note that this method of computing contribution is consistent with the approach taken under the previous statute, TEX. REV. CIV. STAT. ANN. Art. 8306 § 12 (repealed). In Hines v. Aetna Casualty and Surety Company, 754 S.W.2d 803, 805 (Tex. App.-Houston [1st Dist.] 1988, writ denied), the Court described the proper methodology as follows:

Section 12 requires that the basic wage figure be determined by first calculating the percentage of average wage and comparing it to the legal monetary limit. Here, the appellant's [AWW] was \$888.46. . . . Applying the set percentage, 66-2/3 of \$888.46 equals \$592.25, which is higher than the

legal weekly limit of \$217. Thus, the basic figure used is \$217. The statute directs that *after* this figure has been determined, the percentage of incapacity caused by the [current, compensable] injury be taken into account. [Emphasis in original.]

The hearing officer noted in his discussion of the evidence that Section 408.084 uses the word "may" which leaves the allowance of contribution discretionary with the Texas Workers' Compensation Commission. That provision has no applicability to this case; not only did the parties agree that the carrier was entitled to contribution, the hearing officer so concluded. Neither party asserted that the hearing officer should exercise his discretion and not allow contribution. The provision cited by the hearing officer does not comprise authority for the calculation method he used.

For these reasons, we reverse the hearing officer's conclusion of law that claimant's IIBS rate is \$325.00, and render a conclusion of law that Claimant's weekly IIBS rate is \$266.50, for a period of 66 weeks beginning from the stipulated date of MMI.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Alan C. Ernst  
Appeals Judge