

APPEAL NO. 960303
FILED MARCH 22, 1996

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 11, 1996. The issue at the CCH was whether the carrier could reduce the claimant's supplemental income benefits (SIBS) in order to recoup an overpayment of temporary income benefits (TIBS). The appellant, claimant, was injured on _____, while employed by employer.

The hearing officer held that although neither the claimant or the carrier were at fault in causing an overpayment of TIBS to occur, the overpayment was created by a reversal of the hearing officer's decision, and is not therefore recoverable from the Subsequent Injury Fund (SIF) as are overpayments from reversals at other levels of the dispute resolution system. The hearing officer therefore ordered that overpaid TIBS be recouped from claimant's future income benefits.

The claimant has appealed, arguing that as the overpayment of TIBS resulted by action of the Texas Workers' Compensation Commission (Commission), claimant should not be penalized by sacrificing SIBS. The carrier responds that it believes the appeal to be untimely, and that it is entitled to recoup such benefits. The claimant responded to this by pointing out that the appeal was timely filed, and repeating his arguments in favor of reversal.

DECISION

We reverse and render.

The appeal in question was timely filed. Although the cover letter was dated January 18th, the decision was not mailed out on that date. January 19th was a state holiday and mail would not have been sent out in the ordinary course of business. Our records indicate that the carrier's representative did not pick up the decision until January 22, 1996. Given these facts, we have no basis to doubt that the claimant did not receive his decision on January 26, 1996, and the appeal was timely filed within the statutory time frames, including the limits set forth in Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.3 (Rule 102.3).

The facts relative to the issue here were undisputed. The hearing officer, in a decision rendered on June 7, 1995, after reversal and remand, held that claimant had disability for the periods from January 30 through April 5, 1992, and from April 17 through 26, 1992, and from September 26, 1992, to the date of maximum medical improvement (MMI), or July 6, 1993. TIBS were paid in a lump sum to the claimant for this period of disability. However, the determination on disability was reversed in Texas Workers' Compensation Commission Appeal No. 951064, decided August 7, 1995. It is a fair characterization to say that the basis for reversal was the failure of claimant to

carry his burden of proof to clearly delineate the dates of periods of intermittent disability, rather than because claimant had misrepresented his ability to work.

Claimant's attorney at the CCH that was the subject of Appeal No. 951064, *supra*, did not respond to that appeal, nor was the Appeals Panel decision thereafter appealed to court. Claimant subsequently was determined to have a 16% impairment rating (IR), which, if not commuted, would entitle him to SIBS.

At the CCH in issue, the claimant was represented by a different attorney. The parties stipulated that the amount of TIBS paid pursuant to the reversed decision and order was "between \$14,000 and \$16,000." No oral testimony was presented at the CCH. In her discussion, the hearing officer notes that the TIBS were not overpaid due to fault of either party. The discussion then goes on to note that the carrier, not being permitted in this instance to recover overpayment from the SIF, finds itself "between a rock and a hard place" and should be permitted to recoup the overpayment from claimant's future benefits. No limits were put on the amount that could therefore be recouped, and the order is broad enough to allow the carrier to entirely withhold the amounts of SIBS to which the claimant might otherwise be entitled. The hearing officer cites Texas Workers' Compensation Commission Appeal No. 94135, decided March 16, 1994, as authorization for blanket recovery of TIBS in this case from future benefits.

We would note that there is no statutory basis for the recoupment argued for here. While the Appeals Panel has allowed recoupment to occur in some situations as a matter of equitable adjustment, those situations have generally had to do with periods of overlapping benefits, where payment of one type of benefit was, in effect, an advancement of the next tier of benefits, pending resolution of applicable time periods and amounts. Concerning whether recoupment may be made, across the board, whenever a hearing officer's decision to pay benefits is reversed, we do not agree that Appeal No. 94135, *supra*, may be so broadly interpreted. In that case, there was conduct on the part of the injured worker that, "as a matter of law," precluded TIBS eligibility: she had returned to work for her preinjury wage during the time in question but failed to disclose that to the carrier. We believe that this decision is limited to analogous facts. Appeal No. 94135 also discusses the line of recoupment cases that followed Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, which denied a recoupment of TIBS overpaid through computational error, and stated:

[T]he legislature has chosen not to allow recoupment from an employee when overpaid as a result of 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 [SIF].

Although this decision refers to the SIF provisions in the 1989 Act as indicative of legislative intent against recoupment for reversed Commission orders, we do not

believe that this decision makes the existence of SIF reimbursement the dominant concern where recoupment is sought. Undoubtedly, the claimant in this case will also be "between a rock and a hard place" should his SIBS be lowered or eliminated altogether to recoup amounts to which, unlike the claimant in Appeal No. 94135, *supra*, he had a colorable claim at the time those TIBS were paid. As stated previously by the Appeals Panel, the purpose of workers' compensation laws is to compensate injured workers for injuries sustained on the job. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. Most recently, in reversing a decision in which a hearing officer had allowed recoupment against accrued TIBS and SIBS, the Appeals Panel stated that permitting a reduction of benefits that represents income replacement defeats the purpose of such benefits. Texas Workers' Compensation Commission Appeal No. 951962, decided January 2, 1996. We believe that in this case, comparison of the hardships to be undergone by each party from a situation which is the fault of neither, measured against the purpose of the 1989 Act, mandates a decision against recoupment.

We therefore reverse, and render a decision that the carrier is not entitled to recoup the TIBS paid to claimant pursuant to the hearing officer's June 1995 decision from any future SIBS to which he may be entitled.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge