APPEAL NO. 990956

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 April 5, 1999. The single issue at the CCH was whether the appellant (self-insured), a self-insured municipality, was entitled to suspend death benefits to offset the payment of an occupational accident policy received by the respondent (claimant). The hearing officer determined that self-insured was not entitled to suspend death benefits to offset the payment of an occupational accident policy. Self-insured appeals, urging that it paid death benefits through a policy it purchased for such purposes and that it is entitled to credit for the benefits that it paid through the policy. Alternatively, self-insured urges that it is entitled to an offset against future death benefits owed to preclude an improper double recovery that would otherwise result. The claimant responds that the decision is correct and supported by the evidence and that an offset is not authorized under the statute.

DECISION

Affirmed.

The deceased worked for self-insured on _____, when he was fatally injured by the inhalation of methane gas. Pursuant to Section 504.011 and a benefit review conference agreement between the parties, self-insured provided workers' compensation benefits under that section. Also agreed upon was the fact that the claimant here, deceased's wife, was an eligible spouse entitled to death benefits, and that there were four eligible children also entitled to death benefits. Sometime before the accident on _____, self-insured apparently purchased an Occupational Accident Plan with (AZ). The policy only covered accidents, which is defined as "an event which is unforeseen, unintended, unplanned and occurs by chance" and is payable to the beneficiary "designated by the Insured on file with us, as to whom loss of life benefits will be paid." In several places on the policy and in bold print it is stated: "This is not Workers' Compensation Insurance" and "THIS IS NOT A POLICY OF WORKERS' COMPENSATION INSURANCE. THE EMPLOYER DOES NOT BECOME A SUBSCRIBER TO THE WORKERS' COMPENSATION SYSTEM BY PURCHASING THIS POLICY. . . ." The current mayor of the self-insured city (apparently not an official at the time of the purchase of the insurance policy or the death) testified that he had investigated the matter; that there were problems with the insurance company; that self-insured assisted the claimant in getting a payment; that the agent who sold the policy to self-insured indicated that it would serve self-insured's purposes (apparently for workers' compensation purposes); that he, the mayor, learned that self-insured did not have workers' compensation at the time; and that self-insured thought it could save money with the policy since workers' compensation was so expensive. He stated it was his understanding that the policy was purchased solely to provide coverage for employees who might be injured on duty.

AZ apparently sent a check for $134,640.00, dated December 16, 1994, in the name of the claimant. Because of a dispute over the policy limits on coverage, the claimant

apparently employed an attorney and a subsequent settlement was reached which, by its terms, the amount could not be disclosed. The settlement agreement was signed by the claimant in her name alone. The claimant testified that she only found out last year that she needed to file with the Texas Workers' Compensation Commission when she was contacted by them and was subsequently sent papers by them. She said the mayor of the city at the time of the death had told her there was no workers' compensation. She did not receive any payments from AZ as a guardian of the children but stated that part of the money was used for their expenses and part of the money was used to pay her lawyer.

Under Section 504.011, a political subdivision "shall extend workers' compensation benefits to its employees" in one of three ways: becoming self-insured, providing coverage under a workers' compensation policy, or entering into an agreement with other political subdivisions providing for self-insurance. Clearly, self-insured here became a self-insured and liable for benefits provided under the Texas Workers' Compensation Act of 1989. Just as clear, the policy with AZ, by its specific terms and nature, was not a workers' compensation policy, although it was a collateral insurance policy for occupational accidents which extended coverage to some situations similar to but not as broad as workers' compensation coverage. Benefits that accrue under the policy are paid to the beneficiary and "[i]n no event may the Policyholder (city) be named as the Beneficiary for any Insured."

Workers' compensation death benefits are set forth in Section 408.181 *et seq.*, and generally provide benefits for a surviving spouse, surviving children, other potential beneficiaries, and include a percent of a decedent's average weekly wage and burial expenses. There is no issue that the decedent's eligible survivors are entitled to all the death benefits provided by the 1989 Act, and that the appellant, as a self-insured city, is liable for those benefits. That a separate, collateral occupational accident policy, which by its very terms does not cover workers' compensation, paid some benefits to a named beneficiary in a lump sum, does not give rise to a right by self-insured to a credit or an offset against future benefits. While self-insured states in its appeal that the payments under the occupational accident policy were made "on behalf of the City," we do not find evidence to support that assertion. The contrary appeared to be the case, as the policy itself precludes the city from being a beneficiary. The evidence also does not support that the AZ policy would qualify to indemnify self-insured. Section 406.052. The hearing officer determined that the payments under the occupational accident policy were made to the beneficiaries (apparently the claimant) and that there were no statutory provisions allowing for the suspension of death benefits to offset payments made under an occupational accident policy. We do not find error in these determinations nor do we conclude the evidence establishes that any benefits were paid by or on behalf of self-insured.

Recoupment or set off against future benefits due by a carrier has been allowed in limited situations where the carrier has inadvertently or erroneously overpaid a particular benefit. *See* Texas Workers' Compensation Commission Appeal No. 961132, decided July 29, 1996. The case under review does not come within those parameters. Nor does this case come with the situation where a claimant brings suit against the wrong doer

responsible for the injury and recovers from such third party giving rise to a subrogation claim by a self-insured and entitlement to contribution in assessing liability for a subsequent injury. *See* Texas Workers' Compensation Commission Appeal No. 950857, decided July 12, 1995.

Self-insured also urges that it is entitled to a future offset as the result would be one of double recovery citing Waite Hill Services, Inc. v. World Class Metal Works, Inc., 959 S.W.2d 182, 184-85 (Tex.1998). While the situation in that case was found to amount to double recovery where a jury awarded identical damages under an insurance policy coverage and under other tort and statutory damages for the identical loss against the same insurer, the situation in the case under review is not analogous. As we have indicated, the AZ was not a workers' compensation policy and did not purport to cover the same benefits (although some) as required by the 1989 Act for workers' compensation purposes. From the evidence presented, the AZ policy appeared to be a separate or collateral policy that provided benefits directly to the deceased's beneficiary for certain injuries. The 1989 Act does not proscribe or prohibit additional or collateral coverage of an employee although recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance. Section 408.001.

We have reviewed the evidence, findings, and conclusions of the hearing officer and find sufficient evidence to support his determination and no legal error. Accordingly, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge