

APPEAL NO. 991397

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 May 11, 1999, with the record closing on June 8, 1999. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the second compensable quarter, and whether the respondent (carrier) was entitled to suspend the claimant's SIBS to recoup a previous overpayment of impairment income benefits (IIBS). The hearing officer determined that the claimant was entitled to SIBS for the second compensable quarter and that the carrier was entitled to recoupment. No appeal has been filed on the SIBS issue and the claimant appeals only the issue of carrier's entitlement to recoupment, urging that prior Appeals Panel decisions have not allowed recoupment from SIBS. Carrier responds, urging that the cases cited by the claimant are distinguishable and that the decision of the hearing officer was correct regarding the recoupment issue.

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____, reached statutory maximum medical improvement (MMI) on November 14, 1997, and ultimately received a 16% impairment rating (IR) from the designated doctor in an amended report (he initially did not find MMI in 1996). Although surgery was recommended, the claimant declined surgery and was assessed an 11% IR on June 5, 1996, by her doctor. The carrier initiated IIBS but since the designated doctor did not certify MMI, temporary income benefits were reinitiated and paid through November 14, 1997, the MMI date. The claimant disputed the 11% IR, and on July 30, 1998, was assessed a nine percent IR by a designated doctor. The claimant's condition worsened and she underwent spinal surgery on October 1, 1998. Nine weeks after surgery, the Texas Workers' Compensation Commission (Commission) sent the claimant back to be examined by the designated doctor, who indicated she may not be at clinical MMI and that her range of motion may improve and assessed a 29 % IR at that time. According to an affidavit from the carrier's adjuster the Commission advised the carrier to issue additional benefits to the claimant based on the 29% IR. According to the affidavit, subsequent to this order of the Commission, the carrier was faxed a corrected MMI date of November 14, 1997. The carrier issued checks on January 18, 1999, based upon the 29% IR, in a lump sum and continued IIBS payments through March 5, 1999.

Following a medical examination by a carrier doctor on December 11, 1998, wherein a 12% IR was assessed, the carrier disputed the 29% IR. The Commission sent the carrier's doctor's report to the designated doctor and, following a reexamination, the designated doctor changed his assessment to 16%. With the final IR being 16% and the carrier having paid IIBS pursuant to direction of the Commission based on the 29%, the claimant has been overpaid by more than \$6000.00.

With the correct IR being stipulated to be 16%, the ending date for IIBS was October 16, 1998, and the beginning date for the first quarter of SIBS was October 17, 1998. The only SIBS quarter in issue was the second quarter, which ran from January 16, 1999, through April 16, 1999, and the filing period for that quarter ran from October 17, 1998, and ended on January 15, 1999. The claimant was awarded second quarter SIBS and that issue is not on appeal.

The hearing officer, noting the confusion caused by the Commission's actions and the various assessments of IRs at various times, determined that the claimant received an overpayment of IIBS, and that to require the carrier to nonetheless pay SIBS for this same period would result in an egregious wrong. He held that the carrier is entitled to suspend SIBS payments in order to recoup the previous overpayment. Citing several Appeals Panel decisions that did not allow recoupment from SIBS of previous overpayment of income benefits, the claimant urges the hearing officer's decision is erroneous. We do not agree under the circumstances presented in this case.

In Texas Workers' Compensation Commission Appeal No. 951962, decided January 2, 1996, the Appeals Panel stated that to permit a reduction of benefits that represent income replacement defeats the purpose of those benefits and disallowed a carrier to offset for overpaid SIBS for accrued but unpaid SIBS and TIBS. Similarly, in Texas Workers' Compensation Commission Appeal No. 961039, decided July 12, 1996, the Appeals Panel did not permit recoupment of an overpayment of a SIBS quarter (the award of the quarter was subsequently reversed on appeal) against future SIBS quarters, stating that determining where any economic hardship from an overpayment for SIBS should fall when neither party is at fault is believed to be in favor of the injured worker, with respect to benefits intended as income replacement.

In Texas Workers' Compensation Commission Appeal No. 960303, decided March 22, 1996, the Appeals Panel held that a carrier could not recoup an overpayment (not the fault of either party) of TIBS from future SIBS. The Appeals Panel noted that the purpose of income benefits was to prevent an injured worker from having no income while still unable to earn income and that recoupment under those circumstances is not permitted. However, the Appeals Panel goes on to note that recoupment has been allowed in situations where it involved "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." That is somewhat analogous to the situation here where, during the actual SIBS period in issue (January 1999), the claimant was paid amounts that were effectively SIBS but paid as IIBS because the SIBS period had not yet been established at that time.

More closely related to the factual scenario in the case under review, the Appeals Panel held in Texas Workers' Compensation Commission Appeal No. 941277, decided November 4, 1994, citing Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992, that a carrier could take a credit against future SIBS amounts for IIBS that were actually paid in months in which only SIBS benefits were applicable. In

the case under review, during the period of the actual second quarter of SIBS in issue (January 1999), the carrier paid a lump sum as IIBS based on the earlier 29% IR (finally determined to be 16%) and as ordered by the Commission. The situation here could also be likened to the situation found in Texas Workers' Compensation Commission Appeal No. 990704, decided May 19, 1999, where the Appeals Panel upheld the carrier's reduction of claimant's future SIBS to recoup an advance on IIBS. While the lump sum of IIBS here was not an advancement but rather a lump sum based on a changed IR and a Commission order, we believed the end result is similar and warrants the same action. Under these circumstances, with the claimant receiving the overpayment of IIBS in a lump sum during the SIBS quarter in issue, we agree with the hearing officer that the carrier is entitled to a credit to recoup overpayment against the SIBS benefits.

For the reasons stated, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge