

APPEAL NO. 991460

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 June 17, 1999. With respect to the sole issue before him, the hearing officer determined that the appellant (carrier) is not entitled to suspend the respondent's (claimant) income benefits in order to recoup a previous overpayment of \$9,031.98. The carrier appeals, urging it is entitled to recoup overpaid temporary income benefits (TIBS) from impairment income benefits (IIBS) and that this case is factually similar to Texas Workers' Compensation Commission Appeal No. 94134, decided March 16, 1994, which allowed recoupment despite a carrier mistake. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The parties agree that the facts of this case are not in dispute and that this case involves a question of law. The claimant sustained a compensable right knee injury on April 1, 1997. He was initially paid TIBS at a rate of \$412.65 per week based upon his last paycheck as set forth in the Employer's First Report of Injury or Illness (TWCC-1). The carrier received an Employer's Wage Statement (TWCC-3) on April 28, 1997, but it was on the old form, so the carrier requested another TWCC-3 from the employer. On April 29, 1997, the carrier received two TWCC-3s, both on the new form, which contained conflicting information concerning whether fringe benefits were being paid. On October 6, 1997, the carrier contacted the employer asking for page three to be redone because it was "invalid." On February 27, 1999, 16 months later, the carrier again contacted the employer requesting a corrected TWCC-3. The carrier received a TWCC-3 on April 9, 1999, and another on May 20, 1999. The first four TWCC-3s reflect an average weekly wage (AWW) of \$359.66 based on wages paid from December 22, 1996, through March 22, 1997. The TWCC-3 of May 20, 1999, reflects an AWW of \$366.39 based on wages paid from December 29, 1996, through March 29, 1997.

The parties stipulated at the CCH that the claimant's AWW is \$366.39. The carrier paid the claimant 68 weeks of TIBS in the amount of \$412.65 per week. Based on the correct AWW, the carrier should have paid the claimant 68 weeks of TIBS in the amount of \$256.47 per week. This resulted in an overpayment of at least \$9,031.98. On April 9, 1999, the carrier completed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) suspending the claimant's IIBS because of an overpayment. A benefit review conference was held on May 21, 1999, and an interlocutory order was issued for the carrier to resume IIBS based on an AWW of \$366.39.

No testimony was provided at the CCH; however, the hearing officer did question the claimant. The claimant stated that he has a torn meniscus which was repaired, but he cannot bend his leg. According to the claimant, he has not returned to work since the

injury, he cannot return to the type of work he was doing when he was injured, he does not know anything about supplemental income benefits (SIBS), and he has not filed an application for SIBS. The claimant has a 16% impairment rating and IIBS expired on June 22, 1999, five days after the CCH. The record reflects that the issue litigated by the parties was limited to whether the carrier is entitled to suspend the claimant's IIBS in order to recoup a previous overpayment, and potential recoupment from SIBS was not an issue.

The hearing officer made findings that the overpayment resulted from the carrier's failure to adjust the claim in a proper and timely manner; that the carrier failed to exercise reasonable diligence in completing their wage investigation and clearly miscalculated the claimant's AWW and resulting compensation rate; and that the carrier did not take proper or appropriate steps between October 6, 1997, and February 27, 1999, to determine the claimant's correct AWW. The hearing officer considered Appeal No. 94134 in reaching his decision. In his Statement of the Evidence, the hearing officer states:

APD 94134 is not factually similar to the present case. In 94134 the Claimant had returned to work and apparently was not experiencing any continuing effects of the injury. In the present case, the Claimant has not returned to work, is experiencing significant continuing effects from the injury which in all probability will cause a reduction in his future earnings. If APD 92556 [Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992] is controlling then this Decision and Order should probably be reversed and rendered.

At the CCH, the carrier also relied upon Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, which declined to allow recoupment, out of future TIBS, of TIBS overpaid by the carrier due to its own mistake. That decision, however, was distinguished in Appeal No. 94134, *supra*, and Texas Workers' Compensation Commission Appeal No. 94135, decided March 16, 1994. Both involved claimants whose self-insured employers were aware they had returned to full-time work but who continued to receive TIBS through the self-insureds' administrators. Both decisions reversed the hearing officer and rendered decisions that the self-insured was entitled to set off, or recoup, overpaid TIBS against the claimants' IIBS entitlement. In so holding, the panel in Appeal No. 94134, *supra*, wrote as follows:

The key consideration in Appeal No. 92291 [*supra*] was that the carrier attempted to recover previous overpayments from benefits still owed and being paid to the claimant while he continued to suffer disability. The fact that the carrier's mistake resulted in a windfall recovery for the claimant was considered secondary to principles of statutory construction and a desire by the Appeals Panel to ensure that ongoing entitlements were not reduced to the degree that it might leave an injured worker significantly uncompensated, a result that the 1989 Act clearly intended to avoid.

In Texas Workers' Compensation Commission Appeal No. 952164, decided February 5, 1996, the Appeals Panel affirmed a hearing officer's decision that the carrier was entitled to reduce the claimant's IBS due to an overpayment of TIBS during a period when the claimant was working, and stated:

Regardless of claimant's testimony that she fully informed the carrier of the circumstances of her new employment, or the fact that the carrier's own negligence resulted in the overpayment, the cases cited above [Appeal Nos. 94134 and 94135, *supra*,] make clear that these are not the controlling considerations.

In Texas Workers' Compensation Commission Appeal No. 961132, decided July 29, 1996, the Appeals Panel reversed the hearing officer and rendered a decision that the carrier was entitled to recoup overpaid TIBS from IBS. In that case, through mistake or inadvertence, the carrier had paid TIBS at a higher rate than determined from the TWCC-3. The hearing officer's Statement of the Evidence in the Decision and Order indicated that the claimant had returned to work. The Appeals Panel found the case analogous to Appeal Nos. 94134 and 94135, *supra*.

The hearing officer references Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992, in which a carrier continued paying TIBS during a period of time in which the claimant's date of maximum medical improvement (MMI) was in dispute. By the time that issue had been resolved, the carrier had paid an additional 19 weeks of TIBS after the date on which MMI ultimately was determined to have been reached. 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 (Section 408.121), the payments the carrier made after the date of MMI became IBS entitlements. The panel distinguished Appeal No. 92291, *supra*, because there was no mistake or issue as to the amount of payments, nor any effort by the carrier to recoup or take back payments already made to the claimant or to reduce the claimant's ongoing income benefits.

In summary, recoupment of overpaid TIBS from IBS, TIBS overpaid due the carrier's own mistake, is allowed in situations where a claimant has returned to work at preinjury wages but continues to receive TIBS. What distinguishes the facts of this case from those cited above, is that in this case the claimant has not returned to work and is experiencing continuing effects from the injury. We find the evidence sufficient to support the hearing officer's determinations. The order of the hearing officer states that the carrier is ordered to pay benefits "in accordance with this decision," but the decision section only states "The Benefit Review Officer's Interlocutory Order dated May 21, 1999, is affirmed." From the conclusion of the law that the carrier is not entitled to suspend the claimant's income benefits in order to recoup the previous overpayment, we infer a decision that the carrier is not entitled to suspend the claimant's income benefits in order to recoup the previous overpayment and enter such a decision.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge