

## APPEAL NO. 992700

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 8, 1999, a hearing was held. He (hearing officer) determined that appellant (carrier) should not be allowed to reduce death benefits to certain beneficiaries to recoup an overpayment to those beneficiaries made by the carrier. Carrier asserts that there is no evidence, or insufficient evidence, to support Findings of Fact Nos. 10, 11, and 12 and that there is insufficient evidence to support Finding of Fact No. 15, stating that there is no provision in the 1989 Act prohibiting recoupment of overpayments and that Appeals Panel decisions are inconsistent. Respondent (claimant) replied asking that the decision be upheld, with documents attached. Carrier replied to the reply.

### DECISION

We affirm the decision and order with one finding of fact reversed.

Claimant's reply included documents not offered at the hearing. While claimant asks that those documents be considered, there is no showing that they were not in being at the time of the hearing and could not have been provided at the hearing if due diligence were used. No documents not in evidence were considered in this decision on appeal.

The hearing included many stipulations, which effectively narrowed the dispute from three issues to one. Issues concerning whether the claimant is a beneficiary and average weekly wage (AWW) were addressed by stipulations that the claimant was not the lawful spouse of deceased on \_\_\_\_\_, the date of injury and death, and that the AWW was \$420.74.

The parties also stipulated that six children are eligible beneficiaries: ARM, AM, ASM, and AMM, plus BH and CL. The question arises because a payment was made to the children on July 20, 1999, in the amount of \$5,680.08 for accrued benefits from day after injury date, to July 22, 1999; on July 26, 1999, payment then began to BH and CL and included the period of July 22 to July 29, 1999. Carrier seeks recoupment in the total amount of \$1,893.24 in overpayments made to the children since their payments from March to July 21, 1999, were based on four beneficiaries instead of six. There was a stipulation that BH and CL are owed death benefits from day after injury date, forward.

The hearing officer stated at the inception of the hearing that the burden of proof for this issue was on the carrier, and there was no objection to or discussion of that assertion.

There was no evidence presented by the carrier indicating that any misrepresentation had been made by any claimant or alleged claimant which caused it to pay \$5,680.08 to four claimants on July 20, 1999 (as shown by a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21)) when it then agreed on July 26, 1999, that there were a total of six claimants (as shown by a subsequent TWCC-

21). See Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, which denied recoupment when carrier made a mistake in payment; it pointed out the several instances in the 1989 Act in which recoupment was allowed, but observed that no recoupment was set forth in a situation in which a carrier made a mistake which was not based on fraud or any misrepresentation of claimant. Appeal No. 92291 also pointed out that the 1989 Act did not prohibit all unjust enrichment by a claimant by providing for payment to carriers from a subsequent injury fund, not from recoupment from a claimant, when a Texas Workers' Compensation Commission (Commission) decision awarding benefits was overturned subsequently in the dispute resolution process. Also see Texas Workers' Compensation Commission Appeal No. 990853, decided June 7, 1999, which allowed no recoupment for an overpayment of interest, pointing out the rationale not to reduce the amount of an income benefit "replacing lost wages" when overpayment was based on a mistake by carrier and not on fraud by the claimant. We believe that death benefits are provided to replace lost wages as opposed to benefits such as impairment income benefits which do not replace lost wages and are related to impairment as defined by the 1989 Act.

Carrier addresses Findings of Fact Nos. 10, 11, 12, and 15 on appeal. Those findings say that carrier was aware that BH and CL were "very probably beneficiaries" on July 20, 1999; that on that day carrier unilaterally decided to pay "all accrued death benefits" to the four children; that on July 26, 1999, carrier accepted BH and CL as beneficiaries; and that carrier made a mistake, without being misled and with no Commission determination, in paying only the four children accrued death benefits resulting in an overpayment.

The first finding of fact dealing with awareness of probable beneficiaries is not based on evidence of record. This subject was addressed only in argument of counsel and a recommendation by the benefit review officer. Finding of Fact No. 10 is reversed based on insufficient evidence to support that determination. The other findings of fact are sufficiently supported by two TWCC-21s in evidence, reasonable inferences that may be made from those two forms and from the stipulations entered into, from the stipulations themselves, and from the absence of any evidence of fraud or misrepresentation in the record; carrier had the burden of proof. Finding of Fact No. 15 which addressed carrier's unilateral mistake was sufficiently supported by the evidence, stipulations and other findings of fact without Finding of Fact No. 10, which is reversed. The evidence, stipulations, and affirmed findings of fact sufficiently support the conclusion of law which states that carrier is not allowed to recoup its overpayment of \$1,893.24.

While carrier states that there is no provision in the 1989 Act prohibiting recoupment, Appeal No. 92291, *supra*, points out that the 1989 Act does list instances in which recoupment may be made and it does not list a mistaken overpayment by carrier. In addition, recoupment has not generally been allowed when it would reduce the amount of an income benefit which replaced lost wages.

Finding that the decision and order, with one finding of fact reversed, are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge