APPEAL NO. 011405-S
FILED AUGUST 15, 2001

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 30, 2001. The hearing officer determined that the appellant (carrier) is not entitled to recoup temporary income benefits (TIBs) that were paid from November 12, 1999, through April 9, 2000, from the respondent's (claimant) future income benefits based upon a district court default judgment that the claimant was not entitled to TIBs for that period. The carrier has appealed; no response was submitted by the claimant.

DECISION

Reversed and rendered in part; reversed and remanded in part.

The issue of whether the claimant had disability for the period of November 12, 1999, through April 9, 2000, was decided in favor of the claimant at a CCH held on May 25, 2000, and was affirmed in Texas Workers' Compensation Commission Appeal No. 001437, decided August 11, 2000. The carrier sought judicial review of the Appeals Panel decision, pursuant to Section 410.251. On January 4, 2001, a default judgment was entered in the District Court, Texas, in favor of the carrier. The District Court held that the claimant did not have disability for the contested time period and was not entitled to TIBs for that period. The District Court went on to reverse, set aside, and hold for naught the findings, conclusions, and determinations of our previous decision. In view of the District Court judgment, the carrier requested a benefit review conference (BRC) regarding recoupment of TIBs that were paid pursuant to our decision. At the BRC, the parties were unsuccessful in resolving the issue, and a CCH was held. The hearing officer made the following relevant findings of fact:

3. The Default Judgment (cause No. 87924-A) of the 47th Judicial District of __________ County, Texas, dated January 4, 2001, is in conflict with TEXAS LABOR CODE, Section 410.257[(e)] which states that a judgment under this section based on default or on an agreement of the parties does not constitute a modification or reversal of an Appeals Panel decision awarding benefits for the purpose of Section 410.205 [relevant provision has been moved to Section 410.209] and a judgment that on its face does not comply with this section is void.

4. Carrier did not file the proposed default judgment with the executive director of the Commission [Texas Workers' Compensation Commission] not later that the 30th day before the date on which the court [was] scheduled to enter the judgment as required by TEXAS LABOR CODE, Section 410.258[(a)].

5. Carrier is not entitled to recoupment of [TIBs] paid to the Claimant because the Default Judgment that is the basis of Carrier['s] cause of action is void as per TEXAS LABOR CODE, Section 410.257(f) and 410.258(f).

The hearing officer followed with this conclusion of law:

2. The Carrier is not entitled to recoup [TIBs] that were paid from November 12, 1999, through April 9, 2000, from Claimant's future income benefits based on a District Court default judgment that the Claimant was not entitled to benefits for that period.

The carrier had the burden of proof on the issue before the hearing officer. In argument, the carrier represented to the hearing officer that the District Court had the same evidence before it as was presented by the carrier at the CCH, specifically, Carrier's Exhibits A through [F]. (The carrier's attorney said "A through G" in argument, but G was not in existence when the petition was filed.) We note that the carrier's appeal contains several items of documentation that were not offered or admitted at the CCH, including the Plaintiff's Original Petition to the District Court, a copy of the prior CCH Decision and Order, the carrier's Request for Review by the Appeals Panel (of the Decision and Order from the prior CCH), a copy of Appeal No. 001437, a draft copy of what is now Carrier's Exhibit H (the judgment signed by the District Court Judge), and documentation showing compliance with Section 410.258 concerning notice to the Executive Director of the Commission.

In Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993, we stated as follows, with regard to evidence offered for the first time on appeal:

> As a general rule the Appeals Panel considers only the record developed at the [CCH], the request for review and the response thereto. Article 8308-6.42(a) (1989 Act) [Section 410.203]; Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992; Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Thus we have refused to consider new evidence on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We have held that in determining whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether is was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). *See* Texas Workers' Compensation Commission Appeal No.

93463, decided July 19, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 93530, decided August 10, 1993.

With the exception of our prior decision in this case, which we may always consider, we decline to consider these matters now, as each of the items appear to have been in existence and available to the carrier prior to the CCH.

Even though we are not considering the documents which could have been presented to the hearing officer, we reverse a portion of the decision in this case and render a new decision, because it is apparent that the hearing officer has misread Section 410.257(e). As stated in Finding of Fact No. 3 above, the hearing officer found the default judgment to be in conflict with Section 410.257[(e)]. That section reads as follows:

> (e) A judgment under this section based on default or on an agreement of the parties does not constitute a modification or reversal of an appeals panel decision awarding benefits for the purpose of Section 410.205.

The hearing officer reads the cited section as prohibiting a default judgment from constituting a modification or reversal of an Appeals Panel decision awarding benefits. We believe that the correct reading of the entirety of Section 410.257(e) is that a default judgment does not constitute a modification or reversal of an Appeals Panel decision awarding benefits for the purpose of Section [410.209],[1] relating to the reimbursement of a carrier by the subsequent injury fund (SIF) when a decision is reversed or modified by final arbitration, order, or decision of the Commission or a court. The reason for having such a provision was spelled out in the commentary which preceded adoption of an amendment to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.11 (Rule 147.11), discussing the old Section 410.205(c):

> Section 410.205 of the [1989] Act allows an insurance carrier to recover reimbursement from the [SIF] if a court of last resort finally modifies or reverses an Appeals Panel decision awarding benefits. Prior to the 1997 amendments, insurance carriers often appealed cases to court solely for the purpose of seeking reimbursement from the [SIF]. The parties would then settle the lawsuit

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[1] Section 410.257(e) refers to Section 410.205. We believe this is an incorrect citation, due to an oversight in conforming Section 410.257(e) to reflect that Section 410.205(c) was deleted by House Bill 2512, 76th Legislature, effective September 1, 1999, and replaced by Section 410.209. Section 410.205 was entitled **EFFECT OF DECISION; REIMBURSEMENT OF OVERPAYMENT**. It is now entitled **EFFECT OF DECISION**. The old Section 410.205(c) provided as follows:

> If the court of last resort in the case finally modifies or reverses an appeals panel decision awarding benefits, the insurance carrier who has paid benefits as required by this section may recover reimbursement of any benefit overpayments from the [SIF]. (V.A.C.S. Arts. 8308-6.42(d), (e).)

Section 410.209 bears the title **REIMBURSEMENT FOR OVERPAYMENT** and provides as follows:

> The [SIF] shall reimburse an insurance carrier for any overpayments of benefits made under an interlocutory order or decision if that order or decision is reversed or modified by final arbitration, order, or decision of the commission or a court. The commission shall adopt rules to provide for a periodic reimbursement schedule, providing for reimbursement at least annually.

> or agree to a judgment or the carrier would obtain a default judgment. The 1997 legislation clarified the existing practice and statutory interpretation of the Commission that allowed reimbursement from the [SIF] only if a court held a trial on the merits that modified or reversed an Appeals Panel decision. This excluded reimbursement based on settlement agreements, default judgments, and agreed judgments.

With that background, we hold that Finding of Fact No. 3 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust (Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)), and that the hearing officer has erred in finding the default judgment to be in conflict with Section 410.257[(e)]. The evidence shows nothing about the default judgment "that on its face does not comply with" Section 410.257[(e)], and there was no objection to its admission as Carrier's Exhibit H at the CCH, nor did the carrier attack the validity of the judgment. The carrier had the burden of proof and satisfied its burden by establishing the existence of a default judgment that was ostensibly valid on its face. Finding of Fact No. 3 is reversed and a new finding is rendered that the default judgment is valid on its face.

As to the hearing officer's Finding of Fact No. 4, we note that there was no discussion or development of any evidence at all relating to filing the proposed default judgment with the Executive Director of the Commission under Section 410.258(a). In addition, the claimant interposed no objection to the admission of Carrier's Exhibit H. Under these circumstances, we hold that the hearing officer erred in finding that there was procedural noncompliance with Section 410.258, such as would make the default judgment void under subsection (f). Finding of Fact No. 4 is reversed, as unsupported by any evidence.

The hearing officer's Finding of Fact No. 5 was based upon his erroneous decision concerning the validity of the default judgment. We reverse that finding and remand this case to the hearing officer to make a determination on whether the carrier is entitled to recoup TIBs that were paid for the period from November 12, 1999, through April 9, 2000, from the claimant's future income benefits, based on the District Court judgment that the claimant was not entitled to benefits for that period.

In reaching a decision on recoupment, the hearing officer may want to at least consider the following: Rule 116.11(b), effective date March 13, 2000, which discusses the SIF; Rule 126.1(4), effective date December 26, 1999, which defines "unrecoupable overpayment"; Rule 126.4(e), on repayment of advances; Rule 126.7(j), on unrecoupable overpayments pursuant to an interlocutory order; and the preambles which relate to Rules 116.11, 126.4, and 126.7(j), as well as our decision in Texas Workers' Compensation Commission Appeal No. 002211-S, decided November 6, 2000.

We offer as guidance that this case does not appear to have any component of erroneous overpayment or voluntary overpayment by the carrier, which has resulted in denial

of recoupment in past cases. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 960611, decided May 2, 1996. In this case, the carrier has always disputed the claimant's entitlement to TIBs for the period at issue. The carrier lost its dispute at the CCH level and before the Appeals Panel. On judicial review, the carrier prevailed in district court with a default judgment, but cannot get reimbursement from the SIF because of the enactment of Sections 410.257(e) and 410.209, which together preclude reimbursement from the SIF where the reversal of the Appeals Panel decision is the result of a default judgment.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Michael B. McShane
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. First, I believe that the hearing officer's decision is correct for the reason stated and based on the evidence that he had before him, which did not include documentation concerning notice to the Executive Director of the Commission. Further, I believe that it was the original intent of the legislature in enacting Section 410.257(e) that in default judgments which result in "overpayments" the carrier's remedy is against the subsequent injury fund (SIF) referring to Section 410.205(c). As the majority points out, 1997 legislation changed that provision with the commentary to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.11 (Rule 147.11) providing the rationale as being:

> Section 410.205 of the [1989] Act allows an insurance carrier to recover reimbursement from the [SIF] if a court of last resort finally modifies or reverses

> an Appeals Panel decision awarding benefits. Prior to the 1997 amendments, insurance carriers often appealed cases to court solely for the purpose of seeking reimbursement from the [SIF]. The parties would then settle the lawsuit or agree to a judgment or the carrier would obtain a default judgment. The 1997 legislation clarified the existing practice and statutory interpretation of the Commission that allowed reimbursement from the [SIF] only if a court held a trial on the merits that modified or reversed an Appeals Panel decision. This excluded reimbursement based on settlement agreements, default judgments, and agreed judgments.

Since reimbursement from the SIF is only allowed in cases where a trial is held on the merits as opposed to default judgments, I do not see that as creating new authority to obtain reimbursement from the claimant based on a default judgment. I certainly do not think it was the legislative (as opposed to regulatory) intent that carriers could only obtain reimbursement from the SIF after a trial on the merits but could get reimbursement for overpayments created by a default judgment against claimants, most of whom are unrepresented and without wherewithal to defend themselves in district court. Further, I note that if there is reimbursement (recoupment) from the claimant that it must be done at "a reasonable rate." *See* Texas Workers' Compensation Commission Appeal No. 002211-S, decided November 6, 2000, cited by the majority.

I would have affirmed the hearing officer's decision and order.

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Thomas A. Knapp
Appeals Judge