APPEAL NO. 033358-s
FILED FEBRUARY 18, 2004

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 October 16, 2003, with the record closing on November 24, 2003. The hearing officer decided that under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(e)(2)(B) (Rule 128.1(e)(2)(B)) the respondent (self-insured herein) was entitled to reduce the appellant's (claimant herein) impairment income benefits (IIBs) to zero to recoup its overpayment of income benefits. The claimant appeals, contending the hearing officer erred in permitting recoupment, or alternatively, the hearing officer erred by granting recoupment in an amount greater than 10% of the claimant's benefits. The self-insured responds that the decision of the hearing officer should be affirmed.

DECISION

Reversed and a new decision rendered.

The facts of this case are not in dispute, but the case does involve a legal question of first impression. The parties stipulated that the claimant sustained a compensable injury on _____, while working for the self-insured. The self-insured did not provide its adjusting company with an Employer's Wage Statement (TWCC-3) for the claimant but did inform the adjusting company in the Employer's First Report of injury or Illness (TWCC-1) that the claimant's hourly wage was $8.00. Based upon this, the adjusting company presumed an average weekly wage (AWW) of $320.00 ($8.00 x 40) and paid temporary income benefits (TIBs) to the claimant based upon this AWW.

The claimant was certified to be at maximum medical improvement (MMI) on February 24, 2003, with a 15% impairment rating (IR) by the designated doctor. Based upon this MMI date and IR, it was undisputed that the claimant was entitled to 45 weeks of IIBs and that the 45th week of IIBs ended on January 6, 2004. However, on May 29, 2003, the self-insured's adjusting company received a TWCC-3 from the self-insured which showed that the claimant's AWW was $247.38. The parties stipulated that the difference between the actual AWW and the AWW at which the claimant had been paid had resulted in an overpayment of $7,408.34 in TIBs and IIBs to the claimant.[1]

After receiving the TWCC-3 from the self-insured the adjusting company issued a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) terminating IIBs, which gave as the reason for termination "IIB's exhausted based on overpayment credit." On July 9, 2003, the claimant's attorney sent a letter to the adjusting company in which he stated that the claimant was entitled to IIBs through January 5, 2004, and that the self-insured had no right to stop IIBs completely to recoup overpayment of income benefits. The attorney cited to Rule 128.1(e)(2)(B) which limited recoupment to

[1] It was stipulated by the parties that $6,696.58 of the overpayment was TIBs and $711.76 was IIBs.

10% of benefits when income benefits were already being reduced to pay approved attorney fees. The letter went on to state as follows:

> The claimant's current IIBs rate is $173.16 and attorney's fees contract is 25% or $49.29 (with plenty of approved attorney's fees orders). Therefore, the claimant is supposed to receive every week a net amount of $129.87. If you apply this 10% requirement, then the claimant's net check should be reduced by no more than $17.32 to the **final net amount of $112.55.**

Apparently, there was no response to the letter, and the claimant's attorney requested a benefit review conference (BRC) to resolve the dispute. A BRC was held on August 20, 2003, and an interlocutory order was entered by the benefit review officer ordering the self-insured to pay IIBs with recoupment as provided by Rule 128.1. The case then proceeded to a CCH with the hearing officer deciding that pursuant to Rule 128.1(e)(2)(B) the self-insured was allowed to reduce the claimant's IIBs to zero to recoup overpaid benefits.

On appeal the claimant first argues that the hearing officer erred in permitting any recoupment at all. The claimant's argument in this regard is two-fold. First, it contends that by its terms Rule 128.1 only applies if certain preconditions to adjusting AWW are met and that these were not met in the present case. Rule 128.1(e) provides as follows:

> (e) If a carrier determines or is notified that the employee's AWW is different than what the carrier had previously determined (either as a result of subsection (c)(2) of this section, receipt of an updated wage statement, or by operation of other adjustments permitted/required under this title), the carrier shall adjust the AWW and begin payment of benefits based upon the adjusted AWW no later than the first payment due at least seven days following the date the carrier receives the new information regarding the AWW.
>
> (1) If, as a result of the change, the carrier owes additional benefits to a claimant for benefits previously paid at a lower AWW but the carrier is not currently paying indemnity benefits, the carrier shall make payment in this amount within seven days of the date the carrier received the new information.
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> (2) If, as a result of the change, the carrier finds that it has overpaid benefits to a claimant, the carrier may recoup the overpayment as follows:
>
> (A) If the claimant's benefits ARE NOT concurrently being reduced to pay approved attorney's fees or to recoup a commission approved advance, the carrier may recoup the overpayment under this subsection in an amount not

to exceed 25% of the benefits the claimant is entitled to based upon the new AWW.

(B) If the claimant's benefits ARE concurrently being reduced to pay approved attorney's fees or to recoup a commission approved advance, the carrier may recoup the overpayment under this subsection in an amount not to exceed 10% of the benefits the claimant is entitled to based upon the new AWW.

(C) If the carrier wishes to recoup the overpayment in an amount greater than that permitted by this subsection, the carrier may attempt to enter into a written agreement with the claimant or, if unable to do so, contact the commission. In determining whether to approve an increase in the recoupment rate, the primary factor the commission will consider is the likelihood that the entire overpayment will be recouped. The rate should be set such that it is likely that the entire overpayment can be recouped. The commission may also consider the cause of the overpayment and the financial hardship that may reasonably be created for the claimant.

The claimant argues that the language stating "(either as result of subsection (c)(2) of this section, receipt of an updated wage statement, or by operation of other adjustments permitted/required under this title)" limits the application of Rule 128.1(e) to these specific instances and that none of these three specific instances is the case here as there was no "updated" wage statement because the self-insured had not filed any TWCC-3 prior to May 29, 2003. We reject this argument on a number of grounds. First, we do not find that the parenthetical phrase was an attempt to limit the application of Rule 128.1(e), but merely an attempt to give examples of circumstances when it does apply. We also would interpret updated wage statement to include a TWCC-3 filed after the AWW is first determined, and finally we believe that the current situation is encompassed by the language "by operation of other adjustments permitted/required under this title."

The second reason given by the claimant that the hearing officer erred in granting any recoupment was that doing so is contrary to Appeals Panel precedent and the claimant cites specifically to Texas Workers' Compensation Commission Appeal No. 021400, decided July 24, 2002. The claimant argues that, by affirming the hearing officer's decision to not permit recoupment when the overpayment resulted from the carrier's miscalculation of AWW the Appeals Panel implicitly held Rule 128.1(e) does not apply to cases where the carrier (or in this case the self-insured) was responsible for the overpayment. The claimant argues that in the present case, the self-insured was clearly responsible for the overpayment by its failure to produce a TWCC-3 for over two years after the date of the injury. We simply do not find Appeal No. 021400, *supra*,

controlling here. We note that in Appeal No. 021400 we did not discuss Rule 128.1(e) as the decision we were reviewing was from a CCH that was conducted prior to the effective date of the Rule 128.1(e).[2] Thus, in determining whether or not the hearing officer erred in Appeal No. 021400 we looked to principles of Appeals Panel case law that had been developed prior to the adoption of Rule 128.1(e). We note that prior to Rule 128.1(e) most of the Appeals Panel decisions concerning recoupment were decided on equitable principles as there was no guidance in the 1989 Act or in the Texas Workers' Compensation Commission (Commission) rules concerning recoupment. With the advent of Rule 128.1(e) much of our prior precedent concerning recoupment has been superceded by the rule. In the present case Rule 128.1(e) clearly applies and provides the basis for recoupment by the self-insured. We thus reject the claimant's contention that the self-insured is not entitled to recoupment in the present case.

However, we do find merit in the claimant's argument that the hearing officer has misconstrued and misapplied Rule 128.1(e)(2)(B) in determining the rate of recoupment. Rule 128.1(e)(2)(B) clearly in its terms limits recoupment to "amount not to exceed 10% of the benefits the claimant is entitled to based upon the new AWW." Rather than limiting recoupment to a rate of 10%, the hearing officer has granted a 100% rate of recoupment. The hearing officer has fallen into error by accepting the argument made by the self-insured at the CCH, and on appeal, that the claimant cannot be entitled to anymore than a predetermined amount of benefits computed solely by multiplying the income benefit rate (as determined by the AWW) and the number of weeks of eligibility. The fallacy of this argument is that how recoupment is computed is also a variable in determining the total dollar amount of benefits to which the claimant is legally entitled. That is to say that the amount of recoupment will be a factor in determining in the end the total amount of benefits the claimant receives rather than the amount of recoupment being determined by a predetermined dollar amount of total benefits. The self-insured's interpretation of Rule 128.1(e)(2)(B) would in fact render the rule nonsensical (as shown by the resulting calculus of 10% equaling 100%), but would in fact deny the claimant benefits to which he is legally entitled.

We also find singularly unpersuasive the self-insured's argument that its inability to recoup the full amount of the overpayment is inequitable. First and foremost, as pointed out earlier, in light of the amendment to Rule 128.1, it is now Rule 128.1(e), rather than principles of equity, that control the rate of recoupment.[3] Secondly, were equitable principles to apply, as we applied them in Appeal No. 021400, *supra*, the self-insured, and not the claimant, would bear the consequences of the self-insured's delay in not timely filing a TWCC-3.

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[2] The CCH under review in Appeal No. 021400 took place on May 9, 2002, while 128.1(e) became effective on May 16, 2002.

[3] We note that Rule 128.1(e)(2)(C) provides a means for a carrier (or self-insured) to recoup overpayment at a rate greater than 10% and provides for some balancing of the equities when there as been overpayment. However, the self-insured admitted at the CCH that it failed to take advantage of Rule 128.1(e)(2)(C) by failing to negotiate a rate of recoupment with the claimant or requesting the Commission to set a rate of recoupment higher than 10%. The self-insured instead chose to unilaterally suspend income benefits to recoup the overpayment.

We reverse the decision of the hearing officer and render a new decision that self-insured is entitled to recoupment in an amount of 10% of the benefits the claimant is entitled to based upon the new AWW, which computes to an amount of $17.32 per week, from the time the TWCC-3 was filed with the adjusting company on May 29, 2003. Taking into account this recoupment, the self-insured is ordered to pay all unpaid accrued benefits with interest.

The self-insured states that the true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge