

APPEAL NO. 040425  
FILED APRIL 9, 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 January 26, 2004. The hearing officer determined that the appellant (carrier) is not entitled to reduce the respondent's (claimant) income benefits to recoup the previous overpayment. The carrier appealed, arguing that the hearing officer committed reversible error in determining that the carrier is not entitled to recoup overpayment of temporary income benefits (TIBs) from impairment income benefits (IIBs). The claimant responded, urging affirmance.

DECISION

Affirmed, as reformed.

**FACTUAL BACKGROUND**

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. At issue was whether the carrier is entitled to reduce the claimant's income benefits to recoup the previous overpayment. The background facts of this case are undisputed and complicated. The evidence reflects that the claimant's average weekly wage (AWW) was \$415.40. The carrier paid the claimant benefits at the rate of 75% of his AWW up to the 26th week, specifically \$311.55 per week, pursuant to Section 408.103(a)(2). After the 26th week, the claimant continued to receive payment at a rate of 75%, rather than 70%. It is undisputed that after the 26th week, the claimant received an overpayment in the amount of \$20.77 per week. The carrier contends that it overpaid TIBs in the amount of \$1682.37.<sup>1</sup>

At the CCH, the parties agreed that the carrier overpaid TIBs in the amount of \$1,682.37 and that the carrier recouped overpayment of TIBs in the amount of \$1,682.37 and an additional amount of \$1,503.47, for a total recoupment of \$3,185.84. The carrier acknowledged that it had recouped overpayment in an excessive amount. The carrier repaid the claimant a portion of the recouped overpayment in the amount of \$344.58, leaving the carrier with a total recoupment of \$2841.26. The carrier asserted it attempted to repay the claimant an additional \$1,158.89, for a total repayment of \$1503.47, the amount that the carrier asserts was the excessive recoupment.

**RECOUPMENT OF OVERPAYMENT OF INCOME BENEFITS**

---

<sup>1</sup> There is conflicting evidence. Carrier's Exhibit No. B explains that the claimant was overpaid TIBs for 78 weeks in the amount \$1,620.06, and that he was overpaid IIBs for an additional 3 weeks in the amount of \$62.31, for a total overpayment of \$1,682.37. Carrier's Exhibit No. A reflects that the claimant was overpaid TIBs for 83 weeks at a rate of \$20.77, for a total overpayment of \$1,723.91. The hearing officer's Finding of Fact No. 5 states that the carrier's overpayment of TIBs to the claimant totaled \$1,682.37, and this finding of fact was not appealed.

The carrier argues that prior Appeals Panel decisions held that TIBs and supplemental income benefits were income replacement benefits and that overpayments could not be recouped from them. The carrier contends that as of January 1, 2000, the 1989 Act and Texas Workers' Compensation Commission (Commission) rules provide for recoupment of overpayment of TIBs from IIBs. The carrier cites Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.7(j) (Rule 126.7(j)), effective January 1, 2000, and other Appeals Panel decisions to support its argument that a carrier is entitled to recoup overpayment of TIBs from IIBs. The claimant argues that Rule 126.7(j) is only applicable if the recoupment is an overpayment of TIBs made pursuant to an interlocutory order. The claimant contends that in this case there was no interlocutory order for overpayment of income benefits. The claimant contends that the carrier made a mistake in calculating the payments and that because the overpayment was entirely due to the carrier's own mistake, the carrier was not entitled to any recoupment. The claimant asserted that the carrier owed the claimant the entire recouped amount of \$3,185.84. The claimant has been repaid a recouped overpayment of \$344.58, and the remaining balance for repayment is \$2,841.26.

Rule 126.7(j), effective January 1, 2000, provides that:

A carrier which makes an unrecoupable overpayment pursuant to an interlocutory order may be eligible for reimbursement from the subsequent injury fund [SIF]. An unrecoupable overpayment for the purpose of reimbursement from the [SIF] only includes those benefits that were overpaid by the carrier pursuant to an interlocutory order which were not owed to the employee and which were not recoverable or convertible to IIBs.

Additionally, Rule 116.11(b) defines an unrecoupable overpayment of income benefits for the purpose of reimbursement from the SIF as including only those benefits that were overpaid by the carrier pursuant to an interlocutory order or decision and which were finally determined to be not owed and which, in the case of an overpayment of income benefits to the employee, were not recoverable or convertible from other income benefits. Rule 126.1(4) defines an unrecoupable overpayment as the amount of benefits paid by the carrier to the claimant which were not owed and which were not recoverable or convertible from other income benefits.

The evidence reflects that the Commission did not issue an interlocutory order, and therefore we agree with the claimant that Rule 126.7(j) is not applicable to the facts of this case. Although the hearing officer's Finding of Fact No. 9 is overbroad, in that it states that the 1989 Act and Commission rules do not provide for the carrier to recoup its overpayment to the claimant, it is apparent from the hearing officer's finding that she determined that Rule 126.7(j) was not applicable to the facts of this case. We therefore, reform the hearing officer's finding of fact to comply with the specific factual situation of this case as follows:

Finding of Fact No. 9: The 1989 Act and Commission rules do not provide for the carrier to recoup its overpayment to the claimant in this factual situation.

The hearing officer relied on the equitable principles outlined in Texas Workers' Compensation Commission Appeal No. 991460, decided August 25, 1999, to determine whether the carrier was entitled to recoup overpayment of TIBs from IIBs due to the carrier's mistake in calculating income benefit payments. In that case, the carrier miscalculated the claimant's AWW because of conflicting information on the Employer's Wage Statements (TWCC-3) resulting in overpayment of income benefits. The Appeals Panel affirmed the hearing officer's 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 to determine the claimant's correct AWW.

We note that Rule 128.1(e), effective May 16, 2002, provides a way for a carrier to recoup overpayment of TIBs in situations where the AWW is miscalculated. See *generally* Texas Workers' Compensation Commission Appeal No. 033358-s, decided February 18, 2004. In the instant case, the evidence reflects that Rule 128.1(e) is not applicable to the facts of this case because the carrier did not miscalculate the claimant's AWW, rather the carrier misapplied the rate of compensation to the AWW. The carrier misapplied the rate of 75%, rather than 70%, after the 26th week of TIBs due to the carrier's own mistake resulting in an overpayment of TIBs.

The hearing officer did not err in determining that the carrier is not entitled to reduce the claimant's income benefits to recoup the previous overpayment, and that the carrier should repay the claimant the sum of \$2,841.26.

We affirm, as reformed, the hearing officer's decision and order.

The true corporate name of the insurance carrier is **FEDERATED MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSS LARSEN  
860 AIRPORT FREEWAY WEST, SUITE 500  
HURST, TEXAS 75054-3286.**

---

Veronica L. Ruberto  
Appeals Judge

CONCUR:

---

Chris Cowan  
Appeals Judge

---

Robert W. Potts  
Appeals Judge