

APPEAL NO. 050523-s  
FILED APRIL 11, 2005

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 24, 2005. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter, November 22, 2003, through February 20, 2004; that the claimant is not entitled to SIBs for the second quarter, February 21 through May 21, 2004; and that effective upon approval of contribution by the Texas Workers' Compensation Commission (Commission), the respondent (self-insured) was entitled to recoup prior overpayment of impairment income benefits (IIBs) based on contribution in an amount equal to 100% of unpaid IIBs and SIBs until the entire amount of the overpayment is recovered by the self-insured. The claimant appealed, disputing the determination of nonentitlement for second quarter SIBs and the determination that effective upon approval by the Commission, the self-insured was entitled to recoup prior overpayment of IIBs based on contribution in an amount equal to 100% of unpaid IIBs and SIBs until the entire amount of the overpayment is recovered by the self-insured. The self-insured responded, urging affirmance of the disputed determinations. The hearing officer's determination that the claimant is entitled to SIBs for the first quarter was not appealed and has become final pursuant to Section 410.169.

DECISION

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

The parties made several stipulations at the CCH, including the following: that the claimant sustained a compensable injury on \_\_\_\_\_; that the claimant has an 18% impairment rating (IR); that the qualifying period for the second quarter was from November 9, 2003, through February 7, 2004; that the claimant reached maximum medical improvement (MMI) on November 8, 2002; and that the claimant's average weekly wage is \$364.19.

**SECOND QUARTER SIBs**

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in dispute is whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the second quarter. The claimant contended that during the qualifying period for the second quarter, she had returned to work in a position relatively equal to her ability to work, contending that she was restricted to work no more than 10 hours per week.

Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. Whether the claimant met the requirements of Rule 130.102(d)(1) to show a good faith effort was a fact question for the hearing officer to determine from the evidence presented. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's determinations that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the second quarter and that she is not entitled to SIBs for the second quarter are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

## **RECOUPMENT**

Section 408.084(a) provides that at the request of the insurance carrier (self-insured in this case), the Commission may order that IIBs and SIBs be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries. It was undisputed that the Commission approved a request for reduction of income benefits due to contribution in the amount of 28% on October 7, 2003. The claimant did not dispute that an overpayment was made due to the contribution award. However, the amount of the overpayment, the rate of recoupment, and the time period for which the recoupment could begin were all in dispute.

The evidence reflects that the self-insured filed two separate Carrier's Requests for Reduction of Income Benefits Due to Contribution (TWCC-33). The first TWCC-33 was dated May 16, 2003. A Commission order denying the request for reduction of income benefits due to contribution was dated May 20, 2003. A second TWCC-33 dated September 18, 2003, was in evidence. It contains a date stamp from the (City) field office showing that the request was received on September 23, 2003. A Commission order, dated October 7, 2003, approving the request to reduce IIBs and SIBs by 28% for the effects of contribution was at the bottom of the TWCC-33.

The hearing officer's conclusion that the self-insured was entitled to recoup prior overpayment of IIBs and SIBs based on contribution effective upon approval of contribution by the Commission is in error. We have held that contribution does not apply to income benefit payments which accrue prior to the filing of a request for contribution. See Texas Workers' Compensation Commission Appeal No. 031606, decided July 30, 2003, and Texas Workers' Compensation Commission Appeal No. 002211-s, decided November 6, 2000. In the instant case, the self-insured filed two such requests. However, after the first request was denied by the Commission, the self-insured did not proceed through the dispute resolution system but chose to file a second request approximately four months later, which was subsequently approved. The self-

insured is entitled to recoup an overpayment based on the approval of its second request for contribution. Under these circumstances, the date upon which the self-insured could apply contribution is the date of the filing of the second request approved by the Commission. We reverse the hearing officer's determination that effective upon approval of contribution by the Commission, carrier was entitled to recoup prior overpayment of IIBs based on contribution and render a new determination that the self-insured may only recoup overpayments of income benefits that accrued on or after September 23, 2003.

The hearing officer erred in finding that based on the self-insured's entitlement to contribution, it overpaid IIBs in the amount of \$3,854.52. The parties stipulated that the claimant's AWW is \$364.19. Section 408.126 provides that subject to Sections 408.061 and 408.062, an impairment income benefit is equal to 70% of the employee's AWW. (70% of \$364.19 is \$254.93) Section 408.121(a) provides that an employee's entitlement to IIBs begins on the day after the date the employee reaches MMI and ends on the earlier of: the date of expiration of a period computed at the rate of three weeks for each percentage point of impairment; or the date of the employee's death. The parties stipulated that the claimant had an IR of 18%. In evidence is a Report of Medical Evaluation (TWCC-69) from the Commission-selected designated doctor, which certified the claimant reached statutory MMI on November 8, 2002, with an 18% IR. The parties stipulated that the claimant reached MMI on November 8, 2002. Although the hearing officer did not discuss the calculations he considered to determine the overpayment by the self-insured was \$3,854.52, it appears that he reduced the entire amount of IIBs by 28%. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) is in evidence which reflects that for the time period of November 9, 2002, to November 25, 2003, a period of 54 weeks, the total amount of compensation paid is identified as \$13,766.22. The hearing officer's finding that the self-insured overpaid IIBs in the amount of \$3,854.52 is reversed. The Appeals Panel has held that the self-insured may only recoup overpayments on IIBs and SIBs that accrue on or after the date the self-insured files a request for contribution with the Commission. See Appeal No. 002211-s, *supra*. The case is remanded back to the hearing officer to determine the amount of overpayment on IIBs and SIBs that accrued on or after September 23, 2003.

In determining the amount to be withheld from the subsequent income benefits, the hearing officer shall determine a reasonable rate at which such benefits are to be withheld to recoup the overpayment. See Appeal No. 002211-s and Appeal No. 031606, *supra*. A reasonable rate of recoupment has been determined, in prior cases, by considering the amount overpaid, the claimant's monthly IIBs and SIBs rate after contribution, and the claimant's financial resources. See *Id.* The amount of overpayment considered by the hearing officer was in error. We note that while Rule 128.1 does not specifically apply to the facts of this case, see Texas Workers' Compensation Commission Appeal No. 040425, decided April 9, 2004, Rule 128.1(e)(2)(C) can be looked to for guidance as to the factors to be considered in determining a reasonable rate of recoupment. Accordingly, we reverse the hearing officer's determination that the self-insured was entitled to recoup prior overpayment of

IIBs based on contribution in an amount equal to 100% of unpaid IIBs and SIBs until the entire amount of overpayment is recovered by the self-insured and remand back to the hearing officer for further consideration consistent with this decision. The hearing officer specifically found and it is undisputed that the self-insured's overpayment of IIBs was based on its entitlement to contribution, not on an adjustment of the claimant's AWW. The hearing officer correctly pointed out in the Background Information portion of the decision and order that Rule 128.1(e)(2) is not applicable to this case because that rule applies by its terms to overpayments based on an incorrect AWW. See Appeal No. 040425, *supra*.

We affirm the hearing officer's determination that the claimant is not entitled to second quarter SIBs; we reverse the hearing officer's determination that effective upon approval of contribution by the Commission, the self-insured was entitled to recoup prior overpayment of IIBs based on contribution and render a determination that the self-insured may only recoup overpayments of income benefits that accrued on or after September 23, 2003; we reverse the hearing officer's finding that the carrier overpaid IIBs in the amount of \$3,854.52 and we reverse the hearing officer's determination that the self-insured was entitled to recoup prior overpayment of IIBs based on contribution in an amount equal to 100% of unpaid IIBs and SIBs until the entire amount of the overpayment is recovered by the self-insured and remand to the hearing officer for further consideration consistent with this decision.

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, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

According to the information provided by the carrier, the true corporate name of the insurance carrier is **TEXAS COUNCIL RISK MANAGEMENT** and the name and address of its registered agent for service of process is

**FRANCIS FEY  
JI SPECIALTY  
10535 BOYER BOULEVARD, SUITE 100  
AUSTIN, TEXAS 78758.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge