

APPEAL NO. 060318
FILED APRIL 12, 2006

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 11, 2006. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) had good cause for failing to submit to the designated doctor's examination on April 15, 2002, entitling him to temporary income benefits (TIBs) from April 15 through May 8, 2002; and that the respondent (carrier) is entitled to offset claimant's entitlement to TIBs to recoup the previous overpayment of impairment income benefits (IIBs). The claimant appealed, arguing that the evidence supporting the recoupment determination is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. The claimant additionally argues that the hearing officer applied the wrong standard to this case. The carrier responded, urging affirmance of the recoupment determination. The carrier additionally states its disagreement that "there was overwhelming evidence of good cause for the claimant to miss the designated doctor's appointment." We note to the extent that this could be construed as an appeal of the good cause determination that the carrier's response was timely as a response but untimely as an appeal. The good cause determination has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on ____; that he was scheduled to be examined by the designated doctor on April 15, 2002, but did not attend; and that the claimant was rescheduled to be examined by the designated doctor on May 9, 2002, which he did attend. The hearing officer determined that the claimant had good cause for failing to attend the examination on April 15, 2002, entitling the claimant to income benefits from April 16 through May 9, 2002. The hearing officer's determination of good cause was not timely appealed and has become final.

The hearing officer noted in her discussion in the Background Information that there was evidence that an overpayment had been made by the carrier in the amount of \$9,000.00. The hearing officer then stated that "[I]t is difficult to overlook that claimant has been paid more than he is owed in income benefits." It was undisputed that an overpayment had been made by the carrier. It appears the carrier paid IIBs based on a 20% impairment rating (IR) based on an amended report from the designated doctor. The claimant's IR was subsequently determined to be 12% in a CCH based on the initial assessment of the designated doctor. The carrier acknowledges that it did not pay IIBs for the 20% IR pursuant to an interlocutory order or from a decision and order of the Texas Department of Insurance, Division of Workers' Compensation (Division). The evidence reflects that the carrier suspended TIBs for the time period of April 16 to May 8, 2002.

Section 408.121(b) provides that the carrier shall begin to pay IIBs not later than the fifth day after the date on which the carrier receives the doctor's report certifying maximum medical improvement. IIBs shall be paid for a period based on the IR, unless that rating is disputed under subsection (c). Section 408.121(c) provides that if the carrier disputes the IR used under subsection (a), the carrier shall pay the employee IIBs for a period based on the carrier's reasonable assessment of the correct rating. The 1989 Act contains specific provisions that allow for recoupment or reimbursement which include the following: Section 415.008, concerning fraudulently obtaining or denying benefits (although a CCH is not the proper forum to determine an administrative violation); Section 408.003, concerning reimbursement of benefit payments either initiated or supplemented by an employer, versus a carrier; and Section 410.209, which allows reimbursement to the carrier of benefit payments, via the subsequent injury fund, made pursuant to a Division order which is reversed or modified. None of the aforementioned sections are applicable to the facts of this case.

The carrier contends in its response that the hearing officer made a decision based on equity and fairness. Appeals Panel Decision 033358-s, decided February 18, 2004, noted that prior to the effective date of 28 TEX. ADMIN. CODE § 128.1(e) (Rule 128.1(e)) that most of the Appeals Panel decisions concerning recoupment were decided on equitable principles and acknowledged that much of the prior precedent on recoupment has been superceded. There is no contention that Rule 128.1(e)(2) which specifically provides for recoupment in situations when the average weekly wage is miscalculated is applicable to the instant case. The legislature has in certain sections described the circumstances under which some types of recoupment, reimbursement, or reduction of future benefits can be made. When the legislature has carefully employed a term in one section of a statute, and has excluded it in another, it should not be implied where excluded. See Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980). No statutory provision or rule was cited as authority for recoupment under the facts as presented in this case, nor have we found one. The hearing officer's determination that the carrier is entitled to offset claimant's entitlement to TIBs to recoup the previous overpayment of IIBs is reversed and a new decision rendered that the carrier is not entitled to offset claimant's entitlement to TIBs to recoup the previous overpayment of IIBs.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY, A DIVISION OF ZURICH NORTH AMERICA** and the name and address of its registered agent for service of process is

**LEO MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge