APPEAL NO. 062235
FILED DECEMBER 14, 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 October 5, 2006. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain disability from November 30, 2000, through February 13, 2001; that the claimant's impairment rating (IR) is 30% as certified by the treating doctor; and that the respondent (carrier) is entitled to recoup an overpayment from claimant's temporary income benefits (TIBs) and impairment income benefits (IIBs). The claimant appealed, disputing the determinations of disability, IR and recoupment. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on August 3, 1999; that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. S as the designated doctor; that the claimant reached maximum medical improvement (MMI) on February 13, 2001, as certified by both the designated doctor and the treating doctor; and that the claimant's average weekly wage (AWW) is $591.26. The claimant testified that he was exposed to a toxic chemical while in the course and scope of his employment as a truck driver. The claimant sustained an inhalation and chemical exposure injury.

DISABILITY

There is sufficient evidence to support the hearing officer's determination regarding disability.

IR

Three certifications of IR were in evidence. The treating doctor in a Report of Medical Evaluation (DWC-69) and narrative dated February 13, 2001, assessed a 30% IR using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), placing the claimant in Class 3, respiratory impairment under Table 8, page 117. There were two certifications of IR from the designated doctor, Dr. S. The initial certification by Dr. S was a 50% IR.

A review of the record reflects that neither the DWC-69 nor the accompanying narrative report which certified the 50% IR were signed by Dr. S. The reporting requirements of 28 TEX. ADMIN. CODE § 130.1(d)(1) (Rule 130.1(d)(1)) provide that certification of MMI and assigning IR for the current compensable injury requires

"completion, signing and submission of the [DWC-69] and a narrative report." Rule 130.1(d)(1)(A) states that the DWC-69 "must be signed by the certifying doctor." That rule goes on to state the signature may be "a rubber stamp signature or an electronic facsimile signature." *See* Appeals Panel Decision (APD) 042044-s, decided October 8, 2004, APD 061017, decided July 14, 2006, and APD 931106, decided January 11, 1994. Further, Dr. S noted in his narrative that the assignment of a 50% IR was pending a more recent pulmonary test showing valid reliable effort.

Dr. S provided an amended certification dated March 3, 2003, certifying the claimant's IR is 25%. However, there is evidence in the record that Dr. S was taken off of the approved designated doctor list on February 25, 2002, and therefore was no longer qualified as a designated doctor at the time he amended the IR to 25%.

For CCH's which are held on or after September 1, 2005, Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.6(i) provides that the designated doctor's response to a Division request for clarification is considered to have presumptive weight as it is part of the doctor's opinion.

The treating doctor certified that the claimant reached MMI on February 13, 2001, with a 30% IR. There is sufficient evidence to support the hearing officer's determination that the claimant's IR is 30%.

RECOUPMENT

The hearing officer determined that the carrier is entitled to recoup an overpayment from claimant's TIBs and IIBs. The carrier, in its response, contends the claimant did not appeal the specific finding of fact or conclusion of law regarding recoupment, but acknowledged the claimant "seems to address the issue in his appeal." The claimant in his appeal contends the carrier is not entitled to recoupment. This is sufficient to appeal the recoupment issue. Based on the carrier's position regarding the periods of disability the claimant was entitled to and IIBs based on an IR of 30%, the carrier contended it overpaid the claimant both TIBs and IIBs in the amount of $16,154.51. The hearing officer noted that there was no interlocutory order for payment of benefits or dispute concerning the claimant's AWW, or contribution.

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 benefit CCH under Chapter 410 of the 1989 Act is not the proper forum to determine an administrative violation, *see* APD 060318, decided April 12, 2006); 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.

APD 033358-s, decided February 18, 2004, noted that prior to the effective date of 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 AWW 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 recoup an overpayment from claimant's TIBs and IIBs is reversed and a new decision rendered that the carrier is not entitled to recoup an overpayment from claimant's TIBs and IIBs.

We affirm the hearing officer's determinations that the claimant did not sustain disability from November 30, 2000, through February 13, 2001; and that the claimant's IR is 30% as certified by the treating doctor.

We reverse the hearing officer's determination that the carrier is entitled to recoup an overpayment from claimant's TIBs and IIBs and render a new decision that the carrier is not entitled to recoup an overpayment from claimant's TIBs and IIBs.

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

RUSSELL RAY OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723-1098.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Veronica L. Ruberto
Appeals Judge