APPEAL NO. 070271
FILED APRIL 3, 2007

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 4, 2007. The disputed issue was: "Is the self-insured entitled to suspend the claimant's income benefits to recoup the previous overpayment of $2091.18?" The hearing officer resolved the disputed issue by deciding that the respondent (self-insured) may recoup its overpayment of indemnity benefits at a rate of 100% for the final four weeks of impairment income benefits (IIBs). The appellant (claimant) appealed, disputing the recoupment determination. The self-insured responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. The evidence reflects that the claimant elected to take accrued sick and annual leave for time lost from work due to the compensable injury before receiving workers' compensation benefits pursuant to Section 501.044. The self-insured argued at the CCH that there was an overpayment due to two different factors. First, the self-insured contends that it was not aware that the claimant elected to use her sick and annual leave and for a period of time the claimant was paid leave from her employer and receiving temporary income benefits (TIBs) from the self-insured at the same time. Second, the self-insured contends that it was misinformed as to whether or not the claimant was provided health insurance by her employer sometime after the date of injury and as a result, the self-insured paid TIBs "at a higher rate," resulting in an overpayment.

Section 501.044(a), applicable to state employees, provides that if an employee elects to use sick leave, the employee is not entitled to income benefits until the employee has exhausted the employee's accrued sick leave. Section 501.044(b) provides in part that if an employee elects to use annual leave, the employee is not entitled to income benefits until the elected number of weeks of leave have been exhausted. The claimant acknowledged that she received pay from her employer at the same time she received TIBs from the self-insured. However, the claimant testified that when she returned to work her pay was reduced by her employer because the employer stated she was mistakenly paid for hours of leave she did not have. The claimant's paychecks for January and June of 2006 are in evidence and reflect the claimant's pay was docked for a substantial number of hours. The claimant testified that her docked pay for these months represented the hours mistakenly paid by her employer for leave she did not have. The record is not clear regarding whether or not the claimant actually received pay for leave she did have at the same time she received TIBs. A Benefit Review Conference (BRC) agreement regarding some of the dates of the claimant's

disability was entered into evidence at the CCH, however, it was not included in the appeal file. The dates of disability not addressed by the BRC agreement were not stipulated to by the parties nor did the hearing officer make a finding of fact regarding these time periods. The hearing officer noted in his discussion that the parties do not dispute the amounts due and the amounts paid. However, the claimant contended that the employer docked her pay for the leave she did not have and therefore no overpayment of TIBs was made. The claimant argues in her appeal that "[a]s it stands, [she] has had both her salary and her IIBs reduced to recoup the accrued leave her employer paid to her." The evidence indicates that the claimant was certified to have reached maximum medical improvement (MMI) on February 6, 2006, by her treating doctor, with a 1% impairment rating (IR). Further, the evidence indicates that the claimant was subsequently examined by a designated doctor who certified MMI on May 23, 2006, with a 3% IR. It was undisputed that the self-insured had paid IIBs based on the 1% rating and subsequently paid a portion of the IIBs represented by the 3% IR assessed by the designated doctor. The hearing officer noted in his discussion that the self-insured paid two weeks of IIBs and suspended the payment of the remaining four weeks of IIBs based on an audit that showed the claimant had been overpaid.

We note that 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* Appeals Panel Decision (APD) 060318, decided April 12, 2006); Section 408.003, concerning reimbursement of benefit payments either initiated or supplemented by an employer, versus a self-insured; and Section 410.209, which allows reimbursement to the self-insured 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 this theory of recoupment advanced by the self-insured.

APD 033358-s, decided February 18, 2004, noted that prior to the effective date of TEX. ADMIN. CODE §128.1(e) (Rule 128.1(e)), most of the APD's 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 self-insured's first theory of recoupment argued by the self-insured in the instant case. Rule 128.1(e) will be discussed below regarding the second theory of recoupment advanced by the self-insured. 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 based on the fact the self-insured may have mistakenly paid income benefits during the time period the employer was paying the claimant for accrued leave, nor have we found one. Therefore, recoupment is not authorized for such mistakenly paid income benefits.

The second theory advanced by the self-insured for recoupment is that the self-insured was misinformed by the employer that it no longer provided the claimant with health insurance and therefore paid TIBs in an amount greater than that owed. The self-insured contends that it overpaid TIBs but that the overpayment was not due to a miscalculation of the AWW. We disagree. Whether or not the AWW was incorrectly calculated due to the inclusion or exclusion of health insurance premiums paid by the employer would affect the amount of the AWW not the rate at which TIBs are calculated. *See* APD 060272-s, decided April 6, 2006.

Rule 128.1(e) provides in part that if a carrier determines or is notified that the employee's AWW is different than what the carrier had previously determined, the self-insured shall adjust the AWW. Rule 128.1(e)(2)(A) provides that if as a result of the change in the AWW, the carrier has overpaid benefits to the claimant, and the claimant's benefits are not concurrently being reduced to pay approved attorney's fees, the self-insured may recoup the overpayment in an amount not to exceed 25% of the benefits the claimant is entitled to based upon the new AWW. Rule 128.1(e)(2)(B) provides that if as a result of the change in the AWW, the carrier has overpaid benefits to the claimant and the claimant's benefits are concurrently being reduced to pay approved attorney's fees, the self-insured may recoup the overpayment in an amount not to exceed 10% of the benefits the claimant is entitled to based upon the new AWW. Rule 128.1(e)(2)(C) provides that the self-insured may request to recoup the overpayment in an amount greater than provided by Rule 128.1(e) and discusses the factors to be considered if such a request is approved. The hearing officer noted in his discussion that any rate lesser than 100% would result in a lower likelihood of the overpayment being recouped and that the 100% rate of recoupment would not be a financial hardship on the claimant.

We reverse the hearing officer's decision that the self-insured may recoup its overpayment of indemnity benefits at a rate of 100% and remand back to the hearing officer. On remand the hearing officer should: (1) include the BRC agreement admitted into evidence as part of the record; (2) determine whether TIBs were overpaid due to a miscalculation of AWW based on the employer's contribution for health insurance premiums; (3) determine the amount of overpayment due to the miscalculation of the AWW, if any; and (4) determine the rate of recoupment, if an overpayment is found, under Rule 128.1(e)(2).

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 Texas Department of Insurance, Division of Workers' Compensation, 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. *See* APD 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
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For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Veronica L. Ruberto
Appeals Judge