

APPEAL NO. 130318
FILED MARCH 18, 2013

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 18, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) had disability from October 13 through November 8, 2011, but not from November 9 through November 16, 2011, and that the employer is entitled to reimbursement of wage supplementation made to the claimant pursuant to Section 408.003.

The claimant appealed the hearing officer's reimbursement determination. The respondent (self-insured) responded, urging affirmance. The hearing officer's determination that the claimant had disability from October 13 through November 8, 2011, but not from November 9 through November 16, 2011, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

Section 408.003(a)(2) provides that after an injury, an employer may, on the written request or agreement of the employee, supplement income benefits paid by the insurance carrier by an amount that does not exceed the amount computed by subtracting the amount of the income benefit payments from the employee's net pre-injury wages.

Section 408.003(b) provides that if an injury is found to be compensable and an insurance carrier initiates compensation, the insurance carrier shall reimburse the employer for the amount of benefits paid by the employer to which the employee was entitled under this subtitle. Payments that are not reimbursed or reimbursable under this section may be reimbursed under Section 408.127.

The issue before the hearing officer as certified out of the benefit review conference and agreed to by the parties was worded as "[i]s the employer entitled to reimbursement of wage supplementation made to the claimant pursuant to [Section] 408.003?" In the Background Information section of the decision, the hearing officer stated:

At the hearing, the [self-insured] asserted that, pursuant to Section 408.003, the employer was entitled to reimbursement of wage supplementation made to the claimant.

The [self-insured], however, presented no evidence that the wage supplementation was provided to by the [claimant], on the written request or agreement of the [claimant]. Because the [self-insured] failed to do so, the employer may not be reimbursed solely under Section 408.003.

The hearing officer is correct; the record contains no written request or evidence of an agreement of the claimant regarding wage supplementation. In order to establish entitlement to reimbursement, all of the provisions in Section 408.003 must be complied with fully. See Appeals Panel Decision (APD) 030257-s, decided March 19, 2003; APD 030258-s, decided March 19, 2003; APD 030259-s, decided March 19, 2003; and APD 070871-s, decided July 2, 2007.

However, the hearing officer also stated:

. . . Section 408.003 does reference Section 408.127 as an “alternate” way for the employer to be reimbursed for any wage supplementation. In other words, Section 408.003 incorporates Section 408.127 by reference.

Because the Section 408.003 incorporates Section 408.127, the employer is entitled to reimbursement of wage supplementation made to the claimant pursuant to Section 408.003.

In Finding of Fact No. 7, appealed by the claimant, the hearing officer stated:

[Section] 408.003 incorporates Section 408.127 by reference. As a result, a carrier must reduce the claimant’s impairment income benefits [IIBs] by an amount equal to any wage supplementation that was paid by the employer. Those monies must then be used to reimburse the employer for the wage supplementation that was paid to the claimant.

Section 408.127(a) provides that an insurance carrier shall reduce IIBs to an employee by an amount equal to employer payments made under Section 408.003 that are not reimbursed or reimbursable under that section. The supplemental payment made by the self-insured in this case was not made under Section 408.003 because there was no evidence that the payments made by the employer were made at the written request or agreement of the claimant. To be a payment “made under Section 408.003” the payment must meet the criteria of Section 408.003. See APD 070871-s, *supra*, citing APD 94756, decided July 26, 1994. When payment was not made under Section 408.003, no requirement to reduce a claimant’s IIBs under Section 408.127 exists. See APD 94756, *supra*. We reverse Finding of Fact No. 7 as being legally incorrect, and we reverse the hearing officer’s determination that the employer is entitled to reimbursement of wage supplementation made to the claimant pursuant to Section 408.003, and render a new decision that the employer is not entitled to reimbursement of wage supplementation made to the claimant pursuant to Section 408.003 because there was no evidence that payments were made at the written request or agreement of the claimant.

The true corporate name of the insurance carrier is **[a self-insured governmental entity]** and the name and address of its registered agent for service of process is

**[NAME]
[ADDRESS]
[CITY, TEXAS ZIP].**

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge