

—,	§	BEFORE THE STATE OFFICE
<i>Petitioner</i>	§	
	§	
V.	§	OF
	§	
TEXAS WORKERS'	§	
COMPENSATION COMMISSION,	§	
<i>Respondent</i>	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

___ (Petitioner) contests a Notice of Administrative Violation issued by the Texas Workers' Compensation Commission (TWCC or Commission). The Notice charged him with knowingly or intentionally concealing a material fact for the purpose of obtaining workers' compensation benefits, in violation of the Texas Workers' Compensation Act (Act), TEX. LAB. CODE 415.008(a). Specifically, the Commission charges that Mr. ___ knowingly or intentionally failed to notify his workers' compensation carrier that he had returned to work for a new employer while collecting temporary income benefits. The Commission seeks an order requiring Mr. ___ to reimburse his workers' compensation carrier \$1,015.63 and to pay an administrative penalty of \$500.00. Mr. ___ denies the charges and contends that when he injured himself while working part-time for United Parcel Service (UPS), he was already working a second job for Secure Source, the alleged new employer. Therefore, he did not understand that he had to report his earnings from Secure Source to his workers' compensation carrier. The ALJ finds that Mr. ___ did not knowingly or intentionally conceal a material fact for the purpose of obtaining workers' compensation benefits. Therefore, the ALJ will not order him to repay the benefits or to pay an administrative fine.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

On May 4, 2005, Administrative Law Judge (ALJ) Thomas H. Walston held a hearing in this matter at the State Office of Administrative Hearings (SOAH) in Austin, Texas. Mr. ___ appeared and represented himself. Assistant General Counsel E. Renee Crenshaw represented the Commission. The hearing concluded and the record closed the same day.

The Commission has jurisdiction to consider this matter pursuant to the Act, ch. 415. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing, including the authority to issue a decision and order, pursuant to the Act ' 415.034 and TEX. GOV'T. CODE ANN. ch. 2003.

II. DISCUSSION

1. Overview

On ___, Mr. ___ suffered a work-related injury while working part-time for United Parcel Service (UPS). The treating doctor originally diagnosed his injury as a sprained ankle, so Mr. ___ was placed on light duty. Later, it was determined that Mr. ___ had a broken bone in his foot, but he nonetheless continued to work light duty and did not draw workers' compensation benefits. However, in mid-April 2004, UPS informed Mr. ___ that he had exhausted the available light-duty

work and had to stop working until he obtained a full-duty medical release. Consequently, from mid-April through July 2004, Mr. ___ stopped working for UPS and received temporary workers' compensation income benefits totaling \$1,246.70. In July 2004, he returned to work at UPS with a full-duty release and his temporary income benefits ceased. Mr. ___ continues to work for UPS at the present time.

In addition to working part-time for UPS, Mr. ___ concurrently worked off-and-on for a company called Secure Source. According to Mr. ___, he resumed working for Secure Source as a self-employed independent contractor around June 2003. By early 2004, his work at Secure Source had increased to 32 hours per week, which qualified as full-time. Mr. ___'s wife then encouraged him to become a Secure Source employee (instead of a self-employed contractor) in order to receive sick leave, paid vacation, etc. Secure Source agreed and Mr. ___ officially became an employee of Secure Source effective May 1, 2004. Secure Source utilized Administaff Inc. to handle its human resources, payroll, and benefits. Therefore, pursuant to contractual agreements, Mr. ___ was also co-employed by Administaff effective May 1, 2004. Administaff reported this new employment to the Texas Workforce Commission, which, in turn, reported it to TWCC. Mr. ___ also continues to work for Secure Source at the present time.

When TWCC received this employment information from Administaff, it thought Mr. ___ had begun new employment while receiving workers' compensation temporary income benefits. Under the Commission's rules, an injured employee who is no longer employed by the employer where he sustained his injury must notify the workers' compensation insurance carrier about the existence of any new earnings or offers of employment. 28 TEX. ADMIN. CODE (TAC) § 129.4(d). Then, depending on the amount of income earned, the employee's temporary income benefits may be reduced or terminated.¹ Because Mr. ___ had not reported his change in employment status with Secure Source, Commission Staff concluded that he had intentionally concealed it in order to continue receiving temporary income benefits. Therefore, Staff initiated this enforcement proceeding.

¹ An employee is entitled to temporary income benefits if the employee has a disability and has not attained maximum medical improvement. Act § 408.101(a). A disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Act § 401.011(16). Thus, when an employee returns to work at equivalent wages, he no longer has a disability that entitles him to receive temporary income benefits. TWCC Rules, 28 TAC §§ 129.1-129.6.

B. Staff's Evidence and Arguments

Staff introduced several exhibits into evidence and called Mr. ___ and Ms. Mary Chin as witnesses. The exhibits included a Texas Workforce Commission New Hire form, which showed Mr. ___ began employment with Administaff on May 1, 2004, and an Administaff Individual Wage Statement, which showed Mr. ___ received earnings from Administaff of approximately \$666.00 per week, beginning May 3, 2004. The wage statement also showed that Administaff paid wages to Mr. ___ for the period March 1 through May 20, 2001.² Staff's exhibits also included Mr. ___'s 2001 and 2004 co-employment contracts with Administaff and Secure Source.³ The 2004 contract was signed March 15, 2004 (before Mr. ___ began drawing workers' compensation temporary income benefits) and showed a projected employment date of May 1, 2004.

Staff's exhibits contained additional documentation showing that Mr. ___ received temporary income benefits totaling \$1,015.63 for the period May 1 through July 11, 2004,⁴ and a Notification of First Payment dated April 30, 2004, which instructed Mr. ___ as follows:

If you are receiving income benefits and you no longer work at the business where you were injured, you must tell the insurance company when:

- \$ you start earning any income
- \$ your income increases or decreases or
- \$ you have an offer of employment.⁵

Ms. Mary Chin testified for Staff. She has been employed by TWCC for four years and currently works as a Senior Investigator. In this position, she investigates various types of fraud by carriers, providers, claimants, and others. Ms. Chin testified that Mr. ___ committed fraud by failing to report his starting a new job while receiving workers' compensation temporary income benefits. She stated that the Texas Workforce Commission routinely sends a new hire report to TWCC to compare with the TWCC list of claimants drawing benefits. *Ms. Chin also explained that an employee who worked two jobs at the time of his injury could continue receiving income from the non-injury employer without reporting that income to the workers' compensation carrier and without a reduction in temporary income benefits.*

Ms. Chin testified that TWCC received notice of Mr. ___'s new employment from the Texas Workforce Commission. TWCC then checked its claimant records and discovered that Mr. ___ was receiving Temporary Income benefits. These benefits totaled \$1,015.63 for the period May 3 - July 11, 2004. In Ms. Chin's opinion, Mr. ___ should be required to repay these benefits and pay a \$500.00 fine for fraudulently collecting the income benefits.

² Exs. 4 and 5.

³ Exs. 6 and 7.

⁴ Ex. 8 and 9. The exhibits show that Mr. ___ received an additional \$231.07 for the period April 19-30, 2004, but Staff does not seek repayment for this amount because it was paid before Mr. ___'s new employment began.

⁵ Ex. 10.

Staff also called Mr. ___ as an adverse witness. He testified that he injured his foot at work in ___ but continued working light duty at UPS until April 2004. He worked part-time for UPS, both before and after the injury, and earned approximately \$171.00 per week. When the light duty work at UPS ended, Mr. ___ began receiving workers' compensation temporary income benefits, and he acknowledged receiving these benefits at the same time he worked for Secure Source during May through July 2004. Mr. ___ stated that he worked full time at Secure Source and earned approximately \$600.00 per week. He stressed that he considered himself to be a Secure Source employee only and not an Administaff employee. Mr. ___ also stated that he worked continuously for Secure Source as a self-employed contractor from the time of his injury in January 2004 until he became an employee, effective May 1, 2004. He agreed that he did not inform the workers' compensation carrier of his income from Secure Source, or of his change of status from contractor to employee, because he was already receiving this income even before his injury.

In argument, Staff emphasizes that Mr. ___ failed to inform his workers' compensation carrier of the income he earned from Secure Source / Aministaff while receiving temporary income benefits despite being instructed to do so by the Notification of First Payment dated April 30, 2004. Although Mr. ___ claims he did not understand this requirement to apply to his non-UPS work, Staff points out that Mr. ___ never called TWCC or the carrier ask for clarification of his responsibilities. Under these circumstances, Staff argues that Mr. ___ should be required to reimburse the carrier for the temporary income benefits he received after his May 1, 2004 employment by Secure Source / Administaff and to pay a \$500.00 administrative penalty.

C. Mr. ___'s Evidence and Arguments

Mr. ___ gave brief additional testimony in his own behalf. He noted that the Notice of Violation stated that he had returned to work in May 2004.⁶ He thought that returned to work referred to returning to work at UPS, and he assumed TWCC simply made a mistake because he did not return to work at UPS until August 2004. Also, the Notification of First Payment dated April 30, 2004, said to notify the carrier of any new income if you no longer work at the business where you were injured.⁷ But Mr. ___ said he was not terminated or released by UPS; instead, he simply exhausted the available light duty work and was simply waiting on full medical release. Therefore, he did not think the requirement applied to him. Further, since he was already working for Secure Source as an independent contractor before he started drawing temporary income benefits, he did not realize he had to report to the carrier merely because his status changed from contractor to employee. In Mr. ___'s view, his work at Secure Source had nothing to do with his work at UPS or his workers' compensation claim. He denied any intent to defraud the workers' compensation system, and he stated that his income from Secure Source did not replace his UPS income but was simply a continuation of income he was already receiving from Secure Source at the time of his injury.

⁶ Ex. 1.

⁷ Ex. 10.

D. ALJ's Analysis and Decision

The ALJ finds that Mr. ___ did not knowingly or intentionally conceal a material fact in order to obtain a workers' compensation benefit. Therefore, the ALJ will not order him to repay the benefits or pay an administrative fine. Although Mr. ___ did not inform his workers' compensation carrier of his work at Secure Source, it is not clear that he had an obligation to do so, and he did not knowingly or intentionally fail to disclose this information in order to obtain a workers' compensation benefit. The Commission bases its claim on the Act at § 415.008, which provides:

(a) A person commits a violation if the person, to obtain or deny payment of a workers' compensation benefit or the provision of a benefit for the person or another, *knowingly or intentionally*:

- (1) makes a false or misleading statement;
- (2) misrepresents or *conceals a material fact*;
- (3) fabricates, alters, conceals, or destroys a document; or
- (4) conspires to commit an act described by Subdivision (1), (2), or (3).

...

(c) A person who has obtained an excess payment in violation of this section is liable for full repayment plus interest computed at the rate prescribed by Section 401.023. .

To hold Mr. ___ liable under this section, the Commission argues that he knowingly or intentionally concealed his employment with Secure Source in order to obtain a workers' compensation benefit. The obligation to disclose that fact is contained in the Commission's rules at 28 TAC ' 129.4, which provides:

(a) The insurance carrier shall adjust the weekly amount of temporary income benefits paid to the injured employee as necessary to match the fluctuations in the employee's weekly earnings after the injury.

...

(c) If the injured employee is still employed by the employer at the time of injury, the employer is responsible for informing the carrier of changes in the employee's weekly earnings after an injury . . . within 10 days after the end of each pay period. . .

.

(d) If the employee is no longer employed by the employer, the employee is responsible to provide information to the insurance carrier about the existence or amount of any earnings, or any offers of employment. . . .

To inform Mr. ___ of this obligation, the Notification of First Payment stated:

If you are receiving income benefits and you no longer work at the business where you were injured, you must tell the insurance company when:

- \$ you start earning any income
- \$ your income increases or decreases or
- \$ you have an offer of employment.⁸

⁸ Ex. 10.

In this case however, Mr. ___ did not start earning any new income; rather, he was already earning money at Secure Source as an independent contractor when his injury occurred. Also, there was no increase in Mr. ___'s income and he did not have a new offer of employment. Instead, he simply continued the work with Secure Source that he already had when his injury occurred. One purpose of the rules and statute is to reduce temporary income benefits when an injured worker obtains new employment or increases his income while receiving the benefits. But here, Mr. ___ did not obtain new employment or increase his income. And even the Commission's own witness, Ms. Chin, testified that an employee who worked two jobs at the time of his injury could continue receiving income from the non-injury employer without reporting that income to the workers' compensation carrier and without a reduction in temporary income benefits. That is the situation that occurred with Mr. ___ in this case.

The decision in this case rests in large part on Mr. ___'s credibility. The ALJ has some concern that Mr. ___ provided no documentary evidence about his self-employed work at Secure Source or to show that he had no increase in income when he became a Secure Source employee. Nevertheless, Mr. ___ seemed to testify in an honest and forthright manner and the ALJ believes he was a credible witness. Further, the Act requires repayment of income benefits and payment of a penalty when an employee knowingly or intentionally concealed a material fact for the purposes of obtaining workers' compensation benefits. Act § 415.008(a). Mr. ___'s change from a contractor to an employee presented a confusing situation in applying the Act and rules and Mr. ___ denied any intent to defraud the workers' compensation system. Under these circumstances, the ALJ also finds that Mr. ___ did not intentionally or knowingly conceal a fact to obtain benefits. Therefore, the ALJ concludes that Mr. ___ is not required to pay an administrative penalty or to repay the temporary workers' compensation income benefits he received.

III. FINDINGS OF FACT

1. On ___, Mr. ___ suffered a work-related injury during the course of his part-time employment with United Parcel Service (UPS).
2. At the time of Mr. ___'s injury, UPS carried workers' compensation insurance through Liberty Mutual Insurance Company.
3. At the time of Mr. ___'s injury at UPS, he also worked as a self-employed independent contractor for Secure Source.
4. Mr. ___ continued working at UPS on light duty until mid-April 2004 when he exhausted all available light-duty work.
5. From mid-April through July 2004, Mr. ___ received temporary workers' compensation income benefits totaling \$1,246.70.

6. Effective May 1, 2004, Mr. ___'s work status at Secure Source changed from self-employed contractor to employee. Because Secure Source used Administaff for its payroll and human resource services, Mr. ___ was also considered a co-employee of Administaff. However, Mr. ___ did not increase his income during the period May 1, 2004, through July 2004.
7. Mr. ___ did not report his Secure Source income to the Texas Workers' Compensation Commission (TWCC) or to Liberty Mutual.
8. Administaff reported Mr. ___'s employment effective May 1, 2004, to the Texas Workforce Commission. The Texas Workforce Commission reported this employment to TWCC.
9. Based on the information received from the Texas Workforce Commission, the TWCC staff believed that Mr. ___ began new employment effective May 1, 2004, and issued Mr. ___ a Notice of Administrative Violation. TWCC Staff ordered Mr. ___ to repay \$1,015.63 if the temporary income benefits he received and to pay a \$500.00 administrative penalty.
10. Mr. ___ did not begin new employment with Secure Source or Administaff on May 1, 2004, as he was already working for Secure Source as a self-employed contractor at the time of his injury.
11. Mr. ___ did not knowingly or intentionally conceal a material fact in order to obtain workers' compensation benefits by failing to disclose his work with Secure Source.
12. Mr. ___ timely requested a hearing on the Notice of Administrative Violation, and TWCC issued a notice of the hearing on December 16, 2004.
13. On May 4, 2005, a hearing was held on the Notice of Violation at the State Office of Administrative Hearings in Austin, Texas. Mr. ___ appeared and represented himself. Assistant General Counsel E. Renee Crenshaw represented TWCC. Both parties presented evidence and arguments concerning their positions. The hearing concluded and the record closed the same day.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction of this case pursuant to ' 415.021 of the Texas Workers' Compensation Act (Act), TEX LABOR CODE ANN. ch. 401, *et seq.*
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 415.034 of the Act and TEX. GOV'T. CODE ANN. ch. 2003.
3. A person who, to obtain a payment of a workers' compensation benefit, knowingly or intentionally conceals a material fact commits a Class B administrative violation, punishable by an administrative penalty not to exceed \$5,000.00, pursuant to " 415.008(a) and 415.022 of the Act.

4. A person who has obtained an excess payment in violation of § 415.008 of the Act is liable for full repayment plus interest computed at the rate prescribed by § 401.023 of the Act.
5. Based on the Findings of Fact, Mr. ___ did not violate the Act or commit an administrative violation and is not liable for repayment to Liberty Mutual of the temporary income benefits paid to him.
6. Mr. ___ is not liable for an administrative penalty under the Act.

ORDER

IT IS, THEREFORE, ORDERED that Mr. ___ is not required to repay to Liberty Mutual Insurance Company the temporary income benefits he received from May 1, 2004, through July 2004, and he is not required to pay an administrative penalty under §§ 415.008(b) and 415.0022 of the Act.

SIGNED July 1, 2005.

**THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**