APPEAL NO. 94872

On May 27, 1994, a contested case hearing was held in (City), Texas, with (hearing officer)r presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the hearing were: (1) maximum medical improvement (MMI); (2) impairment rating (IR); and (3) whether the appellant (carrier) is entitled to reduce the respondent's (claimant's) income benefits due to a previous overpayment of $1,200.00. Based on the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission), the hearing officer concluded that the claimant reached MMI on December 27, 1993, with an 11% IR. Although the hearing officer further concluded that all income benefits paid to the claimant after the date of MMI are impairment income benefits (IIBS), she nevertheless also concluded that the carrier is not entitled to reduce the claimant's remaining income benefits due to any previous overpayment. The hearing officer decided that the claimant is entitled to 33 weeks of IIBS based on the 11% IR. The carrier contends that the hearing officer erred in concluding that it is not entitled to reduce the claimant's remaining income benefits due to any previous overpayment, and the carrier requests clarification of the hearing officer's decision. No response has been received from the claimant.

DECISION

Affirmed in part; reversed and rendered in part.

According to medical records, the claimant injured his back on _____, while working as a truck driver for the employer. The initial treating doctor, (Dr. K), diagnosed degenerative osteoarthritis and degenerative disc disease with pre-existing diabetes mellitus. At the request of the carrier, the claimant was examined by (Dr. E) on May 26, 1993, and in a Report of Medical Evaluation (TWCC-69) dated June 1, 1993, Dr. E reported that the claimant would reach MMI on December 27, 1993, and that he had a 14% IR. In a letter dated August 30, 1993, Dr. K stated that he "more or less" agreed with Dr. E, but indicated that the claimant had a 10.5% IR. On February 4, 1994, the Commission selected (Dr. A) as the designated doctor to determine MMI and IR. On February 22, 1994, Dr. A examined the claimant and in a TWCC-69 dated February 24, 1994, reported that the claimant reached MMI on December 27, 1993, with an 11% IR. The claimant said he changed treating doctors to (Dr. N) in February 1994, and in a narrative report dated April 22, 1994, Dr. N reported that the claimant reached MMI on April 22, 1994, with a 21% IR. Neither party has appealed the hearing officer's findings, conclusions, or decision that the claimant reached MMI on December 27, 1993, with an 11% IR as reported by Dr. A, the designated doctor.

In regard to the issue of whether the carrier is "entitled to reduce the claimant's income benefits due to a previous overpayment of $1200.00," at some point after the

injury, Dr. K, the initial treating doctor, released the claimant to light duty work and the claimant worked for the employer as a gatekeeper; however, it is unclear from the record as to the length of time he worked in that position. The claimant said that while working light duty he was paid about $330.00 a week in temporary income benefits (TIBS). Apparently, his gatekeeper wages were less than his truck driver wages. On some unspecified date, the claimant ceased light duty work and was off work. The claimant said that from December 13, 1993, through an unspecified date in February 1994, he received $456.00 in weekly income benefits. He said that after the carrier received the report of the designated doctor, the carrier "changed" the amount he was being paid. He didn't say what the changed amount was.

The hearing officer took official notice that the maximum rate for TIBS for an injury occurring on _____, is $456.00, and the maximum rate for IIBS for an injury occurring on _____, is $319.00. Although there was no evidence or stipulation on the matter, apparently the claimant's average weekly wage (AWW) as a truck driver equaled or exceeded the state AWW in that the carrier was, for some period of time, paying the maximum weekly TIBS rate. In a Notice of Refused or Disputed Claim form (TWCC-21) dated March 4, 1994, the carrier advised the Commission and the claimant that after MMI was reached, it had overpaid 8 and 6/7 weeks of TIBS for a total amount of $1213.42, and that it would take credit "at the end of IIBS."

The carrier's position at the hearing and on appeal is that is should be allowed to "redesignate" TIBS it paid after the December 27, 1993, MMI date determined by the designated doctor on February 24, 1994, to IIBS. The claimant's position was basically that a reduction of IIBS for an overpayment of TIBS should not be allowed because he was not informed of the overpayment until March 4, 1994, the date of the carrier's TWCC-21.

The hearing officer made the following conclusions of law:

CONCLUSIONS OF LAW

2.Claimant reached [MMI] on December 27, 1993, and all income benefits paid to Claimant thereafter are [IIBS].

3.Claimant's correct [IR] is 11%.

4.Carrier is not entitled to reduce Claimant's remaining income benefits due to any previous overpayment.

The hearing officer decided that the claimant reached MMI on December 27, 1993; that the claimant's correct IR is 11%; that the claimant is entitled to 33 weeks of IIBS beginning on December 28, 1993; that IIBS accrued but not paid are to be paid with

interest in a lump sum; that the carrier is not entitled to reduce the claimant's remaining income benefits due to any previous overpayment; and that the carrier is to pay medical and income benefits in accordance with the hearing officer's decision, the 1989 Act, and rules of the Commission.

The carrier disagrees with Conclusion of Law No. 4. It contends that the hearing officer erred in "refusing to allow the carrier to redesignate [TIBS] paid after the date of MMI as [IIBS]." The carrier also contends that the decision of the hearing officer is vague with regard to the obligation of the carrier and asks for clarification. The carrier cites Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992, as authority for its position. In Appeal No. 92556, *supra*, one doctor reported that the claimant reached MMI on December 31, 1991, the treating doctor reported that the claimant reached MMI on May 12, 1992, and the Commission-selected designated doctor reported on June 9, 1992, that the claimant had reached MMI on December 31, 1991, with a five percent IR. The hearing officer determined that the claimant reached MMI on December 31, 1991, with a five percent IR as reported by the designated doctor. The carrier had paid income benefits for 19 weeks beyond the date of MMI determined by the hearing officer. One issue at the hearing was "is the Carrier entitled to apply or take credit for the overpayment of [TIBS] against the [IIBS] due to the claimant?" The hearing officer held that "recoupment was not available to the carrier." The carrier appealed. Citing Articles 8308-4.23(b) and 8308-4.26(c) [now Sections 408.102(a) and 408.121(a)], and Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.8(a) (Rule 130.8(a)), we reversed the hearing officer's decision and held that "income benefits paid after MMI was reached constituted [IIBS]." *See also* Texas Workers' Compensation Commission Appeal No. 94134, decided March 16, 1994, and Texas Workers' Compensation Commission Appeal No. 94135, decided March 16, 1994, wherein the Appeals Panel held that the carrier could set off against IIBS entitlement, previously paid TIBS to which the claimant was not entitled.

In the instant case, it is apparent that the hearing officer followed our decision in Appeal No. 92556, *supra*, in concluding in Conclusion of Law No. 2 that all income benefits paid to the claimant after he reached MMI on December 27, 1993, are [IIBS]. However, Conclusion of Law No. 4 appears to intend to place a limit on the amount of credit or offset the carrier will be allowed to take for TIBS it paid after the date of MMI. In the discussion portion of the decision, the hearing officer explains that:

> In this case, while any payments which had been designated [TIBS] may be re-designated as [IIBS] after the date of [MMI], the Claimant should not be unjustly penalized for a miscalculation that was made by the Carrier through no fault of the Claimant. Therefore, while all weekly income benefits paid to Claimant after December 27, 1993, may be regarded [IIBS], Carrier should not be allowed to make any further recovery from Claimant's benefits.

What we believe the hearing officer intended to accomplish in Conclusion of Law No. 4 is to prevent the carrier from taking credit for the difference between the maximum weekly TIBS rate (at 100% of the state AWW) and the maximum weekly IIBS rate (at 70% of the state AWW), for the period after the claimant reached MMI. In other words, for about nine weeks after the claimant reached MMI, the carrier paid him $456.00 a week, whereas the maximum IIBS rate was $319.00. The hearing officer apparently attributes the difference between those two amounts to a miscalculation of the carrier and concludes that it should not be allowed to reduce future IIBS payments for the overpaid weekly income benefit. We cannot conclude that the payment to the claimant at the maximum TIBS rate was due to any miscalculation of the carrier under the circumstances presented in this case. The carrier was simply paying TIBS until the MMI issue was resolved by the appointment of a designated doctor. The designated doctor determined that the claimant had reached MMI about two months before his examination of the claimant. This situation is directly analogous to the facts of Appeal No. 92556, *supra*, and in that case we held that the income benefits paid after MMI was reached constituted IIBS, and we placed no limit on the amount of the weekly income benefit which could be considered as IIBS.

The fact that the amount of the weekly income benefit payment for approximately the first nine weeks after the claimant reached MMI exceeded the weekly IIBS payment that was actually due, would not prevent the carrier from being allowed to receive credit for those payments under our holding in Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993. In Appeal No. 93531, *supra*, the claimant reached MMI with a 25% IR; however, the parties agreed that one-third of the impairment was due to a prior compensable injury. The carrier paid out the IIBS over a 50 week period instead of a 75 week period (IIBS are paid at the rate of 3 weeks for each percentage point of impairment). We affirmed the hearing officer's decision that the carrier was entitled to receive credit for the IIBS previously paid. We stated:

> In the instant case, there has been no overpayment and the carrier is not seeking recoupment. The carrier owed, and claimant was entitled to $15,000.00 which should have been paid over 75 weeks at $200.00 a week. Claimant actually received $15,000.00 paid over 50 weeks at $300.00 a week. Carrier is not seeking to obtain any payments back; but is only seeking to avoid payment of an additional sum to which claimant is not under any theory entitled to receive.

Having reviewed the record in light of the points raised on appeal, we affirm the hearing officer's decision that the claimant reached MMI on December 27, 1993, with an 11% IR, that the claimant is entitled to 33 weeks of IIBS beginning on December 28, 1993, and that all income benefits paid to the claimant after he reached MMI constituted IIBS. We reverse the hearing officer's conclusion and that part of her decision which provide that the carrier is not entitled to reduce the claimant's remaining income benefits due to any

previous overpayment, and we render a decision that the carrier is entitled to take credit as IIBS the income benefits it paid to the claimant during the 8 and 6/7 weeks after the claimant reached MMI.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge