

APPEAL NO. 070871-s  
FILED JULY 2, 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 March 26, 2007. The amount of the appellant's (claimant) average weekly wage (AWW) was the disputed issue reported out of the benefit review conference, but the parties resolved the AWW by stipulation at the CCH. The parties agreed and the hearing officer found good cause to add the following issue: "[i]s the [respondent/(self-insured)] allowed to reduce/suspend [impairment income benefits (IIBs) or supplemental income benefits (SIBs)] for salary continuance/supplementation paid by the Employer?"

The hearing officer resolved this disputed issue by deciding that the self-insured is allowed to reduce IIBs for salary supplementation paid by the employer but that the self-insured is not allowed to reduce SIBs for salary supplementation paid by the employer. The claimant appealed the determination that the self-insured is allowed to reduce IIBs for salary supplementation paid by the employer, arguing that the employer did not properly comply with the statutory notice requirements; that the amount paid by the employer for salary supplementation exceeds the amount allowed by statute; and that the hearing officer misapplied Section 408.127. The self-insured responded, urging affirmance. The self-insured contends that under a strict statutory interpretation the hearing officer made the correct determination. The self-insured argues that the plain language of Section 408.127 supports the hearing officer's determination. The hearing officer's determination that the self-insured is not allowed to reduce SIBs for salary supplementation paid by the employer was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on \_\_\_\_\_; (2) the claimant's AWW is \$752.62; and (3) the claimant's "net-pay" AWW is \$510.16. Section 408.103(a) provides that subject to the maximum and minimum weekly benefit amounts, temporary income benefits (TIBs) are equal to 70% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's AWW. Therefore, the claimant's weekly TIBs amount is \$526.83 (70% of the stipulated AWW). Section 408.061(a) provides that a weekly temporary income benefit may not exceed 100% of the state AWW under Section 408.047 rounded to the nearest whole dollar. Section 408.047 in effect for claims for workers' compensation benefits based on a compensable injury that occurs before September 1, 2005, provides in part that the state AWW for the fiscal year beginning September 1, 2004, and ending August 31, 2005, is \$539. The claimant's TIBs rate does not exceed the maximum weekly benefit provided by statute.

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 preinjury wages. In evidence was a document signed by the claimant on \_\_\_\_\_, which documented the claimant's election to receive "salary continuation." The written election stated "salary continuation supplements the state mandated workers' compensation weekly indemnity payments for all City of (City 1) permanent employees who are found to have been injured in the course and scope of employment as established in Chapter 34, Personnel Rules, City of (City 1), Section 34-43." The election further stated the purpose of salary continuation is to ensure workers who sustain "bonafide on-the-job injuries" receive approximately the same take home pay. The election specifically noted that the city will receive credit for all salary continuation payments when impairment benefits are determined. The self-insured paid the claimant his weekly TIBs payment and also a supplemental payment.

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 claimant was not "entitled to" payments which exceeded the TIBs owed. Therefore, the employer is not entitled to reimbursement under the provisions of Section 408.003. However, as stated above, payments that are not reimbursed or reimbursable under Section 408.003 may be reimbursed under Section 408.127.

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 all of the supplemented payment exceeded the maximum provided in Section 408.003(a)(2). According to the stipulations entered into by the parties, the claimant's weekly TIBs rate is \$526.83 and is more than the claimant's "net pay" AWW, which was stipulated by the parties to be \$510.16. Thus, when the TIBs payment is subtracted from the claimant's net preinjury wage, under Section 408.003(a)(2), there is nothing for the employer to supplement because the TIBs payment exceeded the net preinjury wage. To be a payment "made under Section 408.003" the payment must meet the criteria of Section 408.003. Appeals Panel Decision (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. APD 94756, *supra*.

Section 408.003(c) provides that the employer shall notify the Division and the insurance carrier on forms prescribed by the commissioner of the initiation of and amount of payments made under this section. The hearing officer noted in the discussion portion of the decision and order that there was no evidence presented that the employer notified the Division and the self-insured of the initiation and amounts of

the payments made. The employer's failure to provide the required notification is another reason it failed to meet the criteria of Section 408.003. APD 030257-s, decided March 19, 2003.

The hearing officer's determination that the self-insured is allowed to reduce IIBs for salary supplementation paid by the employer is in error because the employer did not make payments under the criteria of Section 408.003 because it did not give the required notice and all of the payments made exceeded the maximum provided by Section 408.003(a)(2). We reverse the hearing officer's determination that the self-insured is allowed to reduce IIBs for salary supplementation paid by the employer and render a new determination that the self-insured is not allowed to reduce IIBs for salary supplementation paid by the employer.

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

**CITY SECRETARY  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge