

APPEAL NO. 110692
FILED JULY 20, 2011

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 April 19, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the two disputed issues, the hearing officer determined that the date of maximum medical improvement (MMI) is September 5, 2007, and that the appellant/cross-respondent (carrier) "is not entitled to suspend the [respondent/cross-appellant's (claimant)] [impairment income benefits (IIBs)] to offset the previous overpayment of approximately \$5,559.30."

The carrier appealed, contending that it should be allowed to recharacterize temporary income benefits (TIBs) paid after the MMI date as IIBs. The claimant responded to the carrier's appeal, contending that the carrier has no statutory authority for recoupment of an overpayment of TIBs. The claimant also cross-appealed, contending that she received medical treatment after the September 5, 2007, the date of MMI certified by the designated doctor and therefore, she should have a later MMI date of June 10, 2009, as certified by another doctor. The carrier responded to the claimant's cross-appeal asserting the MMI date certified by the designated doctor had presumptive weight and urged affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____, that Dr. M, was the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor to determine MMI, impairment rating (IR) and ability to return to work; and that the claimant has a five percent IR as assigned by Dr. M, the designated doctor, and Dr. F, a referral doctor acting in the place of the treating doctor.

MMI DATE

The hearing officer's determination that the date of MMI is September 5, 2007, as certified by the designated doctor, Dr. M, is supported by sufficient evidence and is affirmed.

OVERPAYMENT OF TIBS

As previously noted, the parties stipulated that the claimant sustained a compensable injury on _____. The carrier alleges that it continued to pay TIBs from the date of injury through March 23, 2008. Dr. M had originally certified MMI

on September 5, 2007. The carrier now seeks to “redesignate those post-MMI TIBs [TIBs paid after the September 5, 2007, MMI date] as IIBs.”

The hearing officer in her Background Information, commented:

Appeals Panel Decision (APD) 033358-s, decided February 18, 2004, noted that prior to the effective date of 28 TEX. ADMIN. CODE [§] 128.1(e) (Rule 128.1(e)), most of the APD's concerning recoupment decided on equitable principles and acknowledged that much of the prior precedent on recoupment has been superseded. There is no contention that Rule 128.1(e)(2), which specifically provides for recoupment in situations when [average weekly wage (AWW)] is miscalculated, is applicable.

. . . Carrier has not cited any rule or persuasive authority to allow recoupment of an overpayment in this case. Carrier's argument is based on equity and is not persuasive.

APD 033358-s, *supra*, cited by the hearing officer is a situation where a self-insured sought to reduce the injured worker's IIBs to zero to recoup its overpayment of income benefits under Rule 128.1, which deals with a situation where the claimant's AWW is different than what was previously determined, and if the carrier finds that it has overpaid benefits to a claimant a recoupment of the overpayment may be made under certain conditions in Rule 128.1(e)(2)(A) through (C). As the carrier argues in this case, this is not a recoupment situation but rather a recharacterization or redesignation of TIBs already paid as IIBs.

The hearing officer, in the Background Information states that the carrier has not cited any rule or persuasive authority to allow “recoupment” of an overpayment. The carrier cites APD 94872, decided August 17, 1994, which is directly on point. In that case the Appeals Panel commented “that all income benefits paid to the claimant after he reached MMI . . . are [IIBs].” The authority for that proposition is found in Sections 408.101(a); 408.102(a); 408.121(a); and Rule 130.8(a).

Section 408.101(a) provides that an employee is entitled to TIBs if the employee has a disability and has not attained MMI. Section 408.102(a) provides that TIBs continue until the employee reaches MMI. Section 408.121(a) provides “[a]n employee's entitlement to [IIBs] begins on the day after the date the employee reaches [MMI]” Rule 130.8(a) provides that “[IIBs] accrue on the day after the injured employee reaches [MMI], regardless of whether the employee has suffered seven or more days of disability.” Applying the cited statutes and rule we hold, pursuant to Section 408.121(a), that the claimant, in this case, became entitled to IIBs on September 6, 2007, the day after the claimant reached MMI, by operation of law. Under the specific facts of this case, and the principle cited in APD 94872, *supra*, where the carrier has paid TIBs to the claimant after what is later determined to be the MMI date, the TIBs payments made after the MMI date are redesignated as IIBs, and the carrier

can take credit as IIBs those income benefits it paid to the claimant as TIBs after the MMI date, which in this case was September 5, 2007.

The issue at the CCH is inartfully worded because there will be no suspension of the claimant's IIBs to offset a previous overpayment. Rather, the parties actually litigated the issue of whether the income benefits paid after the date of MMI could be redesignated as IIBs rather than TIBs. We reverse the hearing officer's determination that the carrier is not entitled to suspend the claimant's IIBs to offset the previous overpayment of approximately \$5,559.30. We render a new decision that the carrier is entitled, under the facts of this case, to redesignate a payment of TIBs after September 5, 2007, as IIBs by operation of law.

The true corporate name of the insurance carrier is **XL SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**KIRK HOOD
1021 MAIN STREET, SUITE 1150
HOUSTON, TEXAS 77002.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge