APPEAL NO. 130123
FILED MARCH 11, 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 (CCH) was held on March 1, 2012, on November 28, 2012, with the record closing on December 5, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues, the hearing officer determined that the respondent (claimant) had disability from August 3, 2010, through April 3, 2012, and that "[t]here was no overpayment in the amount of $40,969.00 in [temporary income benefits (TIBs)]; and a [CCH] is not the proper forum to determine if an administrative violation with regard to Section 415.008 [of the 1989 Act] has occurred."

The appellant (carrier) appealed, contending that the claimant did not have disability and that there was an overpayment of TIBs in the amount of $40,969.00. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that the claimant's average weekly wage (AWW) is at least $1,165.00.

The claimant testified that on [date of injury], some panels shifted hitting him on the head and injuring his left shoulder. The evidence reflects that the claimant had left shoulder arthroscopy surgery on January 7, 2011, and a second left shoulder surgery to repair a labrum tear on December 2, 2011. The claimant is seeking disability from August 3, 2010, when he was taken off work until April 3, 2012, when his treating doctor returned him to work full duty.

DISABILITY

The hearing officer's determination that the claimant had disability from August 3, 2010, through April 3, 2012, is supported by sufficient evidence and is affirmed.

SECTION 415.008

We affirm that portion of the hearing officer's determination that a CCH is not the proper forum to determine if an administrative violation with regard to Section 415.008 of the 1989 Act has occurred. *See* Appeals Panel Decision (APD) 020432-s, decided April 10, 2002; and APD 93610, decided September 7, 1993.

SUSPENSION OF TIBS TO RECOUP A PREVIOUS OVERPAYMENT OF $40,969.00

It is undisputed that the claimant began a self-employment enterprise called [RGL] on May 1, 2009. The claimant is the president and the sole owner of RGL. The evidence submitted indicates that RGL had no income or earnings in 2009 or 2010 and first began generating income in 2011. Based on his $1,165.00 AWW, as noted above, the claimant began receiving maximum TIBs in the amount of $773.00 a week beginning August 3, 2010. It is undisputed, based on documents in evidence, that the claimant began receiving some income through RGL beginning in March 2011. In APD 012074-s, decided October 24, 2001, the Appeals Panel held that self-employment income qualifies as wages. 28 TEX. ADMIN. CODE § 129.4(d) (Rule 129.4(d)) provides that 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. Evidence was presented at the CCH reflecting that the claimant had unreported earnings from self-employment during some weeks that he was also paid maximum TIBs.

Section 408.103(a)(1) provides in relevant part that the amount of TIBs is equal to 70% of the amount computed "by subtracting the employee's weekly earnings after the injury from the employee's [AWW]." Rule 129.2(b) defines "[l]ost wages" as the "difference between the employee's gross [AWW] and the employee's gross [p]ost-[i]njury [e]arnings (PIE)." Rule 129.2(c) provides, in pertinent part, that PIE shall include "(1) all pecuniary wages paid to the employee after the date of injury including wages based on work performed while on modified duty. . . ." It is undisputed that the claimant received 53 weeks (August 3, 2010, through August 8, 2011), of maximum TIBs at the rate of $773.00 for a total of $40,969.00. It is also undisputed that the claimant did not report any income or earnings to the carrier.

Based on the documents and evidence (Claimant's Exhibit No. 30, pages 2 and 3), the hearing officer in the Background Information section of the decision identified that: "1. From March 22, 2011, through March 28, 2011 [the] [c]laimant's business received $500.00; 2. From May 3, 2011, through May 9, 2011 [the] [c]laimant's business received $745.00; and 3. From July 19, 2011, through July 25, 2011 [the] [c]laimant's business received $1,150.00."

Claimant's Exhibit No. 31, page 2, entitled Partial TIBs Calculations, shows net PIE of $18.17 for the month of February 2011; $491.00 for the month of March 2011; $684.00 for the month of May 2011; $356.05 for the month of June 2011, and $1,050.76 for the month of July 2011. This exhibit also admits overpayments of $155.49 for March 2011, $290.59 for May 2011, $67.09 for June 2011, and $547.32 for July 2011. The hearing officer, in the Background Information calculated that during the week of March

22, 2011, the claimant's PIE equaled $491.00, and subtracting that from the claimant's AWW of $1,165.00 equals $674.00. During the week of May 3, 2011, through May 9, 2011, the claimant's PIE equaled $684.00, and subtracting that from $1,165.00 equals $481.00. During the week of July 19, 2011, through July 25, 2011, the claimant's PIE equaled $1,050.76 and subtracting that from $1,165.00 equals $114.24.

The hearing officer, in the Background Information, comments that pursuant to Rule 129.2(a) once TIBs accrue an injured employee is entitled to TIBs to compensate the employee for lost wages due to the compensable injury during a period which the employee has disability and has not reached maximum medical improvement. The hearing officer referenced Rule 129.2(b) which provides that "lost wages" are the difference between the employee's gross AWW and the employee's gross PIE. If the employee's PIE equals or exceeds the employee's AWW the employee has no lost wages. The hearing officer goes on to comment that in determining PIE, the carrier shall base its calculations on specific wage information reported by the employer and/or the employee. Rule 129.3(d) provides that the carrier shall calculate the employee's lost wages by subtracting the PIE from the AWW (or AWW - PIE). Rule 129.3(e) provides that the amount of TIBs an employee is entitled to is based on the lost wages. If the employee's PIE equals or exceeds the employee's AWW, the employee has no lost wages and the carrier shall not pay TIBs. In this case, there is no evidence that during any of the weeks in question that the claimant's PIE equaled or exceeded the claimant's AWW.

The carrier contends that it is entitled to recoup the entire amount of $40,969.00 because the claimant had failed to report any of the PIE that he received through his company, RGL. The hearing officer correctly notes that a CCH is not the proper forum to determine fraudulent intent based upon Section 415.008. *See* APD 020432-s, *supra* and APD 93610, *supra*. However, the hearing officer failed to make findings of fact and conclusions of law regarding any overpayments based on PIE the claimant had received during the period that he was receiving full TIBs payments.

We reverse the hearing officer's determination that there was no overpayment in the amount of $40,969.00 in TIBs and we remand the issue to the hearing officer for further consideration consistent with this decision and to make findings of fact and conclusions of law regarding any overpayments that the carrier may have made to the claimant while the claimant was receiving TIBs during the period of August 3, 2010, through August 8, 2011. The hearing officer is also to make findings of fact and conclusions of law regarding whether the carrier is entitled to suspend TIBs to recoup any overpayment found.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

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

RON O. WRIGHT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Thomas A. Knapp
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge