APPEAL NO. 010607-S

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 29, 2001, in _____, Texas, the (hearing officer), resolved the disputed issues by determining that the long-term disability (LTD) payments paid by the appellant (self-insured employer) to the respondent (claimant) did not reduce the self-insured employer's liability to the claimant for temporary income benefits (TIBs) and that the self-insured employer is not entitled to reduce the claimant's future income benefits to recoup certain LTD payments. The self-insured employer appeals, claiming it should be allowed to take a credit for overpayment or, alternatively, pay the remaining impairment income benefit (IIBs) payments due the claimant to the self-insured employer's LTD plan. The claimant's response urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

On _____, the claimant sustained a compensable injury. The employer provided workers' compensation coverage through self-insurance. The claimant testified that he filed claims for workers' compensation benefits and that he also received benefits from the self-insured employer's LTD plan, which he elected to pay for when he commenced employment in March 1994. Ms. G, who testified for the self-insured employer, stated that its self-insured workers' compensation was administered by third party administrator (TPA 1) and that the LTD plan was administered by the self-insured employer until January 1, 1999, when the administration was transferred to (TPA 2). The claimant testified that the LTD plan was a benefits program in which he elected to participate and that he was required to contribute to the plan through payroll deductions. A letter in evidence from the self-insured employer reflects that the claimant paid 56.6% of the premium for the LTD plan while the self-insured employer paid the remaining 43.4%.

The hearing officer determined that from June 18, 1998, until January 31, 2000, the claimant was receiving LTD benefits at the same time he was receiving TIBs and that he received IIBs from January 4, 2000, through June 7, 2000. The hearing officer held that the LTD payments did not reduce the self-insured employer's liability to the claimant for TIBs from June 18, 1998, through January 31, 2000, and that the self-insured employer is likewise not entitled to reduce the claimant's future income benefits to recoup LTD overpayments during that period.

The self-insured employer asserts on appeal that the LTD plan was a "salary continuation plan," as the hearing officer found; that the LTD overpayments "should be characterized as the self-insured employer's workers compensation overpayments and the workers compensation plan should take the offset and therefore reduce future IIBs";

and that, on the other hand, since the contract between the claimant and the LTD plan requires the LTD payments to be reduced by workers' compensation benefits, "one could say that the employer is owed the overpayment . . . ." The self-insured employer further states as follows:

> The LTD and workers compensation plans, both employer funded, are administered by different individuals and currently by different companies.
>
> This case constitutes either a non reimbursable employer payment and thus equates to a self insured workers compensation plan overpayment such that the workers compensation side takes the offset against IIBS [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.7(a)] Rule 129.7(a) **OR** a case where it is a reimbursable employer overpayment and the amounts due in IIBS are due to the employer LTD plan under Rule 129.7(b). In no case can it be held that the claimant should benefit from his refusal to inform the LTD policy administrator of the moneys he received.
>
> Very simply put, the Carrier requests this appeal to first clarify what it is that the Hearing Officer found; second, reverse and render allowing it to either take a credit for the overpayment or make the payments to the employer [LTD] plan for the IIBS pending.

The hearing officer found (Finding of Fact No. 6) that the LTD benefits received by the claimant while receiving TIBs and IIBs "was a salary continuation plan and did not constitute wages." With regard to Finding of Fact No. 6, however, the self-insured employer's "Disability Plans for Salaried Employees" specifies the short-term disability benefits (STD) plan as salary continuation but does not so describe the LTD plan. Further, under Rule 129.2(c)(6), any monies paid to the employee by the employer as salary continuation are included in post-injury earnings (PIE). Accordingly, we reverse Finding of Fact No. 6 for being factually and legally incorrect.

With respect to the LTD benefits paid to the claimant between June 18, 1998, and December 25, 1999, the latter date being the day before the effective date of the current Rule 129.2, we have been cited to no statutory authority nor rule of the Texas Workers' Compensation Commission (Commission) which authorized disability insurance carriers or self-insured employers to recoup from or take a credit against workers' compensation income benefits for excess disability insurance payments. Prior to the effective date of Rule 129.2, the Commission rules did not provide a remedy for an alleged breach of a disability insurance contract by a claimant in failing to give notice to the disability carrier or the self-insured employer of the receipt of Social Security disability benefits or workers' compensation benefits. As for those LTD overpayments made after December 26, 1999, we look to the rules governing PIE. Rule 129.2(d)(5) provides that PIE does <u>not</u> include "any monies paid to an employee under an indemnity disability program paid for by the employee separate from workers' compensation." As

noted, the evidence reflects that the claimant paid 54% of the premiums for LTD coverage. Accordingly, that rule provides the basis for affirming the challenged determinations relative to the recoupment of excess LTD payments made after December 26, 1999.

In Texas Workers' Compensation Commission Appeal No. 010144, decided February 21, 2001, the Appeals Panel reformed the hearing officer's decision to allow the carrier to take a credit for STD payments made after the effective date of Rule 129.2 to the extent the disability program was funded by the employer. In that case, the Appeals Panel stated that any STD benefits paid prior to the effective date of Rule 129.2 would be considered collateral income and not subject to recoupment. That case is distinguishable from the case we here consider because the evidence indicated that the employer paid for all of the employee's STD coverage.

The hearing officer determined in Conclusion of Law No. 6 that the "[s]elf-insured must reimburse Employer for the amount of [LTD] payments made by Employer to Claimant during the period [TIBs] and [IIBs] were due if Employer can show that Employer has requested reimbursement pursuant to TEX. LABOR CODE ANN. § 408.003." There was no disputed issue at the CCH concerning the self-insured employer's reimbursement of the "Employer" pursuant to Section 408.003. Accordingly, Conclusion of Law No. 6 is surplusage and is disregarded.

Finding neither legal error nor factual insufficiency (Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)), we affirm the hearing officer's conclusions that the self-insured employer is not entitled to reduce the claimant's future income benefits to recoup LTD payments made between June 18, 1998, and January 31, 2000, and that such payments did not reduce the self-insured's liability to the claimant for TIBs during that period.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge