APPEAL NO. 021162-s
FILED JUNE 27, 2002

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 April 8, 2002, the hearing officer resolved the first disputed issue by finding that the appellant (claimant) requested and was paid salary supplementation, as defined in the 1989 Act, during his period of entitlement to temporary income benefits (TIBs) and concluded that "[t]he Employer is entitled to reimbursement of salary supplementation payments, to wit [sic] the money paid Claimant during his period of entitlement to [TIBs] in addition to the [TIBs] owed, from the Claimant's impairment income benefits [IIBs]." The hearing officer resolved the second disputed issue by finding that the claimant later received a 12% impairment rating (IR) for his compensable injury of _____, and concluding that the respondent ((self-insured) employer) is not entitled to a reduction of the claimant's IIBs based on contribution from an earlier compensable injury. The claimant has appealed the employer reimbursement issue, contending that the hearing officer's determination of this issue is against the great weight of the evidence. The (self-insured) employer has filed a response, urging that the hearing officer has correctly resolved this issue. The hearing officer's determination of the contribution issue has not been appealed and thus has become final. Section 410.169.

DECISION

Reversed and remanded.

The facts pertinent to the resolution of the appealed issue are, for the most part, not in dispute and the resolution of this appeal centers on the hearing officer's application of certain statutory provisions and rules of the Texas Workers' Compensation Commission (Commission). The claimant, a police officer employed by the (self-insured) employer, testified that his back was injured on _____, in a "slight tussle" while making an arrest; that on February 21, 2000, his supervisor asked him if he wanted to continue to receive his paycheck and he responded affirmatively; and that he signed the form presented to him by the supervisor without reading it. He said no mention was made of his IIBs being reduced as a consequence of his signing the form and that he did not know he had the option of using sick leave instead of requesting the (self-insured) employer's "salary continuation" plan. In his answers to the (self-insured) employer's interrogatories, the claimant stated that "it is [his] position that he did not make an election"; that he "was paid his salary under a contractual obligation between the employer and employee, specifically a written agreement or policy and not from a 'collective bargaining agreement,' as stated in the benefit review officer's report"; and that the (self-insured) employer "is not entitled to reimbursement from the [IIBs]."

The parties stipulated that "[o]n _____, the claimant was employed by the [(self-insured) employer], which had workers' compensation insurance through self-

insurance." In evidence is the (self-insured) employer's "Administrative Directive 3-53, Subject: Salary Continuation Plan [the Plan]," which states that its "Purpose" is "to establish a policy of supplementing state mandated Workers' Compensation weekly indemnity payments with permanent employees who are found to have been injured in the course and scope of employment" and that "[t]he purpose of salary continuation is to ensure workers who sustain bonafide [sic] on-the-job injuries receive approximately the same take-home pay subject to the procedures and limitations described." The Plan provides in Paragraph 5.3, in part, that "[a]n injured employee who is approved for weekly compensation payments if the disability continued for a period of more than 7 full calendar days may receive salary continuation payments, if eligible, separate and distinct from and in addition to the weekly workers compensation payments." The Plan contains an Exhibit B-1 entitled "Initiation of Salary Continuation," which restates that the Plan supplements workers' compensation weekly indemnity payments and that the purpose is to ensure that employees with compensable injuries receive approximately the same take-home pay. Exhibit B-1 states the following in bold faced, underlined capital letters: "**NOTE: THE CITY WILL RECEIVE CREDIT FOR ALL SALARY CONTINUATION PAYMENTS WHEN IMPAIRMENT BENEFITS ARE DETERMINED."**

Below this statement are lines for the employee to check whether he or she elects or does not elect to receive salary continuation. In evidence is a copy of this exhibit signed by the claimant and his supervisor on February 21, 2000, stating that the claimant "elect[s] to receive salary continuation." The claimant testified that he received payments from the Plan following a compensable low back injury in October 1995 and that the (self-insured) employer did not take reimbursement from his IIBs.

In evidence is a June 27, 2001, Notification Regarding Maximum Medical Improvement [MMI] and/or [IR] (TWCC-28) to the claimant from Ward North America, Inc., referred to by the parties as the "insurance carrier." Given that the parties stipulated that the employer is (self-insured), we assume that this entity is the (self-insured) employer's third-party administrator. This document advises the claimant that Dr. B determined that the claimant had reached MMI with an IR of 13% and that unless he disputes this determination, he will receive 39 weeks of IIBs at the rate of $372.00. The following is handwritten on this notice: "Less Credit For WSP [wage supplementation paid] and TIBs overpayment." Also in evidence are a Notice of IIBs Payment Due and a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), dated June 27 and 28, 2001, respectively. These documents reflect that the total amount of IIBs due the claimant is $14,508.00, less "WSP in the amount of $14,606.16, less overpayment of TIBs in the amount of $840.00, leaving a negative IIBs balance of minus $938.16." The evidence reflects that the IR was reduced to 12% based on the report of a designated doctor. Also in evidence are numerous Employer's Report for Reimbursement of Voluntary Payment (TWCC-2) forms, completed weekly, stating, in part, that "This Payment: . . . Supplements Injured Employee's Income." Ms. T, employed in the (self-insured) employer's risk management/workers' compensation department, testified that the Plan, despite its title, is one of "wage supplementation," not "wage continuation."

Section 408.105 contains provisions for salary continuation by the employer "[i]n lieu of payment of [TIBs]," which does not appear applicable here. Section 408.003(a) provides, in part, that after an injury, an employer may initiate benefit payments or, on the written request of the employee, supplement income benefits paid by the insurance carrier. Section 408.003(b) provides that "[i]f 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" and that "[p]ayments that are not reimbursed or reimbursable under this section may be reimbursed under Section 408.127." Section 408.127(a) provides that "[a]n 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." Section 408.127(b) provides that "[t]he insurance carrier shall remit the amount of a reduction under this section to the employer who made the payments."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.1 (Rule 129.1) defines "salary continuation" as monies paid by the employer to compensate the injured employee for wages lost as a result of a compensable injury and "salary supplementation" as monies paid by the employer to supplement the amount of income benefits an insurance carrier pays to an injured employee. This rule's title qualifies these definitions by the phrase "unless the context clearly indicates otherwise." Rule 129.7(a), Non-Reimbursable Employer Payments, provides that an employer "who pays an injured [worker] salary continuation is not entitled to and shall not seek reimbursement from the employee or the insurance carrier" and Rule 129.7(b) provides that an employer "who pays an employee salary supplementation to supplement income benefits paid by the carrier is not entitled to and shall not seek reimbursement from the employee or the carrier."

In construing these statutes and rules, the hearing officer determined that the (self-insured) employer's payments to the claimant were "salary supplementation" and reimbursable from IIBs under Section 408.127. Addressing what the hearing officer perceived as an apparent conflict between Section 408.127 and Rule 129.7(b), the hearing officer posits that these apparently conflicting provisions can be reconciled if Rule 129.7 is understood to be referencing reimbursement from TIBs since the employer is not entitled to reimbursement of salary supplementation from TIBs.

We find that the hearing officer has committed legal error in failing to consider and apply certain other statutory provisions. In Texas Workers' Compensation Commission Appeal No. 931084, decided January 12, 1994, a case involving a work-related injury to a fireman employed by another city, the hearing officer determined that the (self-insured) city had not proven a basis for reducing the fireman's IIBs for any amount by which it had supplemented his TIBs and that the fireman had not requested a salary supplement nor entered into an agreement to authorize a reduction of his IIBs. In affirming this determination, however, the Appeals Panel noted that the (self-insured) city did not even mention the statute directly applicable, namely, Section 504.001 *et seq*., relating to (self-insured) political subdivisions; and that, notwithstanding that

Section 504.002 incorporates Sections 408.003 and 408.127, Section 504.051(a)(1)(A) provides as follows:

> 504.051. OFFSET AGAINST PAYMENTS FOR INCAPACITY.
>
> (a) Benefits provided under this chapter shall be offset:
>
> (1) to the extent applicable, by any amount for incapacity received as provided by:
>
> (A) Chapter 143, Local Government Code . . .

V. T. C. A., Local Government Code, Section 143.073 provides, in part, as follows:

> A municipality shall provide to a fire fighter or police officer a leave of absence for an illness or injury related to the person's line of duty. The leave is with full pay for a period commensurate with the nature of the line of duty illness or injury. If necessary, the leave shall continue for at least one year.

Our decision in Appeal No. 931084 stated the following:

> In short, the legislature expressly noted its awareness of special provisions relating to police officers and fire fighters, and expressly directed how offsets and credits, if any, would be handled in such a situation. We believe these specific provisions prevail over any general and inconsistent provisions in [Section] 408.003. There is certainly no reason to imply a purpose contrary to express language in Sections 408.003 and 408.127 that allows for IIBs reduction only if there is a written agreement or request from the employee to supplement.
>
> Section 504.051(a)(1)(A) makes clear, in our opinion, that the two classes of employees injured in the line of duty who are entitled to paid leave under Section 143.073 of the Local Government Code may not "double dip" and receive full pay plus full workers' compensation income benefits for the period of leave. Whatever is paid out of the municipality's accounts for both civil service leave and workers' compensation income benefits may not exceed the pre-injury weekly wage, and it is the amount paid under Chapter 143 of the Local Government Code which is reduced, not the workers' compensation benefits. *See* Angelina County v. Modisette, 667 S.W.2d 881 (Tex. App.-Beaumont 1984, no writ). The offset provision in the workers' compensation law applicable to political subdivisions was added in 1975, as Section 5(a) to TEX. REV. CIV. STAT. ANN. Article 8309(h), and changed what had been previously the law, that payment

could be received under both the workers' compensation laws and civil service laws with no offset against either. *Note* City of Corpus Christi v. Herschbach, 536 S.W.2d 653, 657 (Tex. Civ. App.-Corpus Christi 1976, writ ref'd n.r.e.) [giving prospective effect only to offset provision of Article 8309(h)]. We find no authorization in the statutes cited above, as a whole, for the carrier to obtain a double offset by reducing the amount of IIBs paid after the leave period ends. To allow this would go beyond the offset expressly authorized by Section 504.051, and could effectively read the full leave pay accorded to police officers and fire fighters in Section 143.073 of the Local Government Code out of existence.

Section 143.073(a) of the Local Government Code was considered in Texas Attorney General Opinion No. JC-0144, dated November 16, 1999 (the Opinion), in the context of a dispute between a certain Texas city and a member of its police force injured in the line of duty, who was off duty for nine weeks and who received both his regular paycheck and, though not his fault, a workers' compensation income benefits check to which he was not entitled and which he returned. The city's view was that if the payment of the officer's salary could be construed as, in some measure, nontaxable workers' compensation benefits, it could save the tax on that portion of the payment and it sought to recoup such tax benefits from the police officer. The Opinion, commenting that the city has misconstrued the statutory framework involved, stated that "[t]he statutes which must be read together to resolve the issue in this case are not sections 143.073(a) of the Local Government Code and 408.003(a)(2) of the Labor Code, but rather section 143.073(a) and section 504.051(a)(1)(A) of the Labor Code." The Opinion also stated the following:

> We note first that any such construction of the payments, even could it have been effective, would have required the consent of the officer, as the supplemental benefits provision requires "the written request or agreement of the employee." *Id*. § 408.003(a)(2). However, we do not believe such a construction is possible, because any workers' compensation payments to which the officer might have been entitled would already have been offset by section 504.051 of the Labor Code, which provides in relevant part that:
>
> (a) Benefits provided under this chapter shall be offset:
>
> (1) to the extent applicable, by any amount for incapacity received as provided by:
>
> *(A) Chapter 143, Local Government Code; . . .*
>
> *. . . ; and*
>
> *(2) by any amount paid under Article III, Section 52e, of the Texas Constitution, as added in 1967.*

> *Id*. § 504.051 (emphasis added). Chapter 143, and specifically section 143.073(a), governs payments to municipal fire and police employees injured in the line of duty. Article III, section 52e "as added in 1967"-–a phrase intended to distinguish this section from another so designated which concerns the issuance of road bonds by Dallas County—provides that any county or precinct law enforcement official who is injured in the line of duty is to be paid "his maximum salary" while hospitalized or incapacitated. TEX. CONST. art. III, § 52e. The section is thus parallel to section 143.073 of the Local Government Code.

See also, OP. Atty. Gen. 1999, No. JC-0040 regarding use of annual leave by state employees receiving workers' compensation benefits and Tex. Atty. Gen. LO-93-62 discussing adoption of offset provision now codified as Section 504.051(a)(2).

The decision and order of the hearing officer are reversed and the case is remanded for further consideration and for such additional factual findings and legal conclusions as may be appropriate and consistent with this decision.

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 Commission's Division of Hearings, 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* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

SA
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge