APPEAL NO. 030257-s
FILED MARCH 19, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on December 16, 2002. The hearing officer resolved the disputed issue by determining that the appellant employer (self-insured herein) does not have the right to receive reimbursement under Section 408.003.

The self-insured appeals, contending that the hearing officer failed to properly interpret and apply Section 408.003 citing authority that it believes supports its position. The file did not contain a response from the respondent (claimant herein).

DECISION

Affirmed.

This case has two companion cases which were heard at the same time and while there are three cases, with three different claimants, three different dates of injury and different maximum medical improvement dates and impairment ratings (IR), the common thread was that all three claimants were city transit authority employees who sustained compensable injuries and were entitled to receive temporary income benefits (TIBs). In all three cases the claimants were afforded an election of receiving "Texas Workers' Compensation benefits only," which was explained to them as being 70% of their average weekly wage (AWW), or they could elect to receive the self-insured's "Supplemental Pay in addition to Texas Workers' Compensation benefits," which was explained to the claimants as being 100% of the wages for a 40 hour week (overtime was not included). The claimants all, naturally enough, elected to receive 100% of their wages. However, Section 1 of Appendix "B" of the self-insured's supplemental pay policy states:

> All supplemental pay will be considered accelerated (or "advanced") Workers' Compensation, which will be credited toward any disability payments or other awards made by the Texas Workers' Compensation Commission [Commission]. The employee can elect to refuse the advanced Workers' Compensation, in which case he/she will receive State required Workers' Compensation only.

It is undisputed that the claimants were not told that "advances" on their TIBs would be "credited" against any impairment income benefits (IIBs) that they may eventually be entitled to. All of the claimants have an IR and now the self-insured seeks recoupment for the amounts paid over 70% of the claimants' AWW out of IIBs.

The self-insured contends that it is a political subdivision under Section 504.001(3); that pursuant to Section 504.002, Section 408 applies; and that Section 408.003(a)(2) specifically provides that after an injury, an employer may:

> (2) 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.

The self-insured contends that the agreement signed by the claimants is of the type contemplated by Section 408.003(a)(2); that the agreement was entered into voluntarily; and that the self-insured is entitled to recoupment pursuant to Section 408.003(b) and Section 408.127. Section 408.003(b) provides for reimbursement by the carrier to the employer for payment made to the employer. (In this case the employer and the carrier are one and the same). Section 408.003(b) concludes by stating: "Payments that are not reimbursed or reimbursable under this section may be reimbursed under Section 408.127."

Section 408.127, entitled "Reduction of [IIBs]" provides:

> (a) 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.
>
> (b) The insurance carrier shall remit the amount of a reduction under this section to the employer who made the payments.
>
> (c) The commission shall adopt rules and forms to ensure the full reporting and the accuracy of reductions and reimbursements made under this section.

The self-insured contends that this statutory provision has been implemented in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.13(b)(3) (Rule 126.13(b)(3)), which provides:

> (3) An employer who is entitled to reimbursement under subsection (b)(1) of this section but who paid more benefits to the employee than the carrier was required to pay in income benefits is entitled to be reimbursed for the difference if the employer initiated the benefits with the agreement of the employee and the agreement authorized the reimbursement of this difference. The difference is reimbursable out of [IIBs] that the employee becomes entitled to, if any.

The hearing officer, in her Statement of the Evidence, discusses Rule 129.1, which defines salary continuation and salary supplementation. The hearing officer found that the payments made to the claimants were "a form of salary supplementation."

The hearing officer then went on to discuss Rule 129.7(b), which 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." The Appeals Panel has recognized in an earlier case the seeming conflict between Section 408.127 and Rule 129.7(b). *See* Texas Workers' Compensation Commission Appeal No. 021162-s, decided June 27, 2002. We view Rule 129.7(b) as bearing on the issue of reimbursement through post-injury earnings and not applicable to this case. *See* Preamble, Rule 129.2, 24 Tex. Reg 11426, December 17, 1999.

The hearing officer goes on to apply Section 408.003 and predicates her decision on Section 408.003(c), which provides:

> (c) The employer shall notify the commission and the insurance carrier on forms prescribed by the commission of the initiation of and amount of payments made under this section.

The hearing officer comments that "there was no evidence provided to indicate that the Commission was notified on forms prescribed by the Commission of the initiation of and amount of payments made" to the claimants and determined that the self-insured was not entitled to reimbursement under Section 408.003.

In Texas Workers' Compensation Commission Appeal No. 951249, decided September 13, 1995, the Appeals Panel discussed a situation where an employer was seeking reimbursement under Section 408.003. In that case we discussed the provisions of Section 408.003 and concluded that the carrier should reimburse the employer "if the employer demonstrates compliance with Section 408.003." We interpret this to mean compliance with all of Section 408.003, to include Section 408.003(c). The self-insured seems to dismiss the provision that the employer "shall" notify the Commission of the initiation of and amount of payments made, stating that "[t]o the extent [the self-insured] was obligated to report the same and failed to do so, this is a compliance matter that should be handled administratively by the Commission." We disagree and note that Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) has instructed that negating a statutory requirement by merely assessing an administrative violation is not an acceptable option.

Regarding the self-insured's argument that the Texas Constitution forbids loans ("lending its credit or to grant public money") unless it accomplishes a public purpose and the public purpose in this case was "by boosting employee moral and allaying employee fears of insufficient income in the event of an on-the-job injury," we note that the self-insured raises this argument for the first time on appeal and it should have been raised with the hearing officer.

We conclude that the hearing officer did not misapply the 1989 Act and Commission rules and that her decision is supported by the evidence.

The hearing officer's decision and order are affirmed.

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

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Edward Vilano
Appeals Judge

_____
Roy L. Warren
Appeals Judge