

APPEAL NO. 052882-s  
FILED FEBRUARY 27, 2006

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 October 31, 2005. The hearing officer resolved the disputed issues by deciding that there was an overpayment of temporary income benefits (TIBs) from October 22, 2004, through March 17, 2005, in the amount of \$5,487.39; and that the appellant (carrier) is not entitled to reduce the respondent's (claimant) TIBs and impairment income benefits (IIBs) to recoup a previous overpayment. The carrier appealed, arguing that the hearing officer's determination that the carrier could not recoup the TIBs overpayment was error. The carrier also appealed the amount of overpayment determined by the hearing officer and asked that the finding that the claimant sustained a compensable repetitive trauma injury on \_\_\_\_, be stricken as unnecessary to the hearing officer's decision and beyond the issues certified. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The issues of compensable injury and disability had been determined at a prior CCH. The hearing officer in the prior CCH determined that the claimant sustained a compensable injury on \_\_\_\_, and had disability from May 11 to May 13, 2004; June 1 to June 3, 2004; August 26 to November 17, 2004; and December 16, 2004, to February 14, 2005 (the date of that CCH). The hearing officer's determination was appealed but the hearing officer's decision became final. Both parties represented that these issues are currently pending in district court. Due to the pending district court action, the carrier declined to stipulate at the CCH that the claimant sustained a compensable injury. The carrier requests on appeal that the hearing officer's finding that the claimant sustained a compensable repetitive trauma injury on \_\_\_\_, be stricken as unnecessary or beyond the issues certified. Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of judicial review. The hearing officer did not err by making a finding that the claimant sustained a compensable injury.

Section 408.103(a) provides that subject to the maximum and minimum weekly benefit amounts, TIBs are equal to 70% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage (AWW). We note that the parties did not stipulate regarding the AWW, nor was any evidence presented regarding the amount of the AWW. The hearing officer noted in her discussion that the carrier calculated the claimant's TIBs to be \$420.65 based on the AWW rate of \$600.93. Further, the hearing officer noted that there was no contention or evidence that the computation of the AWW was erroneous. The hearing officer used the TIBs rate of \$420.65 and the AWW of \$600.93 in her calculations of an overpayment. There is no contention on appeal that the rates applied were incorrect.

The evidence reflected that the claimant quit working for the employer on August 26, 2004. 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, or any offers of employment. Evidence was presented at the CCH that reflected the claimant had earnings from other employers from October 23, 2004, through March 17, 2005. There was some evidence that the claimant's earnings extended beyond March 17, 2005, but those time periods were not at issue at the CCH. There is sufficient evidence to support the determination that an overpayment of TIBs was made during the time period at issue. During argument at the CCH, the carrier alleged that the overpayment of TIBs from October 22, 2004, through March 17, 2005, was \$5,487.39. However, no specific calculations were presented at the CCH except for the representation at the CCH by the carrier's attorney that the carrier paid a total of \$7,140.00 during the period in dispute when only \$1,652.61 should have been paid, resulting in an overpayment of \$5,487.39. This representation by the carrier differs from the amount in evidence. Correspondence dated June 1, 2005, indicates that the carrier paid \$7,090.94 for the time period at issue. The hearing officer examined the evidence and calculated whether or not an overpayment had been made for each week the claimant was shown to have earnings during the period in dispute. The hearing officer calculated the overpayment of TIBs to be \$5,714.32, but found the amount of the overpayment to be \$5,487.39 stating she deferred to the carrier's requested amount of overpayment. On appeal, the carrier argues the amount of overpayment should be that calculated by the hearing officer since it has been held that strict pleading requirements do not apply to these proceedings, citing Appeals Panel Decision (APD) 91123, decided February 7, 1992. We agree with the carrier's contention that strict pleading requirements do not apply. However, the hearing officer's calculations considered 4 weeks in which the claimant had earnings but for which disability was not found as a result of the prior CCH. During these weeks, TIBs should not have been paid at all and the evidence reflects that for 4 weeks during the period at issue, the carrier did not pay TIBs. It was error for the hearing officer to consider these weeks in determining the amount of overpayment. The actual amount of overpayment excluding the 4 weeks in which there was no disability and TIBs were not paid, is \$4,795.14. This calculation is based on 10 weeks in the disputed period in which the claimant's earnings exceeded the amount of the AWW, therefore causing the overpayment to be the entire TIBs rate of \$420.65 (the weeks of 10/30/04; 12/18/04; 01/21/05; 01/28/05; 02/04/05; 02/11/05; 02/18/05; 02/26/05; 03/04/05; and 03/11/05). Additionally there are 3 weeks in which the carrier overpaid TIBs because it was not aware of the claimant's post-injury earnings (\$303.83 for the week of 10/23/04; \$60.84 for the week of 11/06/04; and \$223.98 for the week of 11/13/04). We reverse the hearing officer's determination that the amount of the overpayment is \$5,487.39 and render a determination that the amount of the overpayment is \$4,795.14.

The carrier additionally appeals the determination that it is not entitled to reduce the claimant's TIBs and IIBs to recoup a previous overpayment. The carrier cites Section 415.008 for statutory authority which allows recoupment under the facts presented. Section 415.008(a) provides that a person commits a violation if the person

to obtain or deny a payment of a workers' compensation benefit or the provision of a benefit for the person or another, knowingly or intentionally makes a false or misleading statement; misrepresents or conceals a material fact; fabricates, alters, conceals or destroys a document; or conspires to commit one of these acts. Section 415.008(c) provides that a person who has obtained an excess payment in violation of this section is liable for full repayment plus interest, and that if the person is an employee or person claiming death benefits, the repayment may be redeemed from future income or death benefits to which the person is otherwise entitled. Section 415.008(b) provides that a violation under this section is a Class B administrative violation. Section 415.031 provides for the initiation of administrative violation proceedings; Section 415.032 provides for the investigation of the violation and notice of the charge and right to request a hearing; and Section 415.034 provides that the hearing shall be conducted in the manner provided for a contested case under the Administrative Procedure Act (APA). The APA does not apply to CCHs with the exception of the enforcement of subpoena provision. Section 410.153, Rule 142.1. Consequently, a CCH is not the proper forum to determine an administrative violation. See APD 93610, decided September 7, 1993, and APD 031781, decided August 26, 2003.

The carrier contends that it was not requesting that the hearing officer determine the claimant committed an administrative violation but was only requesting that the hearing officer determine the carrier is allowed to adjust the claimant's benefits due to the overpayment. The carrier argues that the hearing officer has authority to make any findings of facts necessary to a determination of the amount of benefits a claimant may be due. The carrier cites APD 040425, decided April 9, 2004, as a case that recognizes "equitable" recoupment. However, in that case the Appeals Panel affirmed the hearing officer's decision that the carrier is not entitled to reduce the claimant's income benefits to recoup the previous overpayment. In that case the overpayment was a result of the carrier's misapplication of the TIBs rate, using 75% rather than 70%. The carrier additionally cites APD 050523-s, decided April 11, 2005, in which the Appeals Panel recognized the right of the carrier to recoup an overpayment of benefits from contribution against supplemental income benefits (SIBs). Section 408.084(a) specifically provides that IIBs and SIBs may be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries. Section 408.084(a) specifically authorizes the recoupment provided for in APD 050523-s, *supra*. The carrier also referenced APD 94134, decided March 16, 1994. In APD 94134 the Claimant had returned to work and apparently was not experiencing any continuing effects of the injury. There is also a line of cases that did not allow recoupment when the claimant still had continuing disability. It was not clear in the present case whether or not the claimant had continuing disability although it was clear that during the specific time period in dispute, the claimant had returned to work for different employers and had earnings which were not taken into consideration in the calculation of TIBs for the corresponding period.

The hearing officer correctly noted that APD 033358-s, decided February 18, 2004, stated that much of the prior precedent on recoupment has been superceded by Rule 128.1(e)(2). There is no contention that Rule 128.1(e)(2) which specifically

provides for recoupment in situations when the AWW is miscalculated is applicable to the instant case. Although the carrier states it is not asking for a determination of an administrative violation, Section 415.008 is the only statutory authority under which it is entitled to recoupment under the facts at issue. As previously noted, Section 415.008 specifically addresses when an administrative violation occurs. No other statutory provision or rule is cited by the carrier, nor have we found any, which provides for recoupment under the facts as presented in this case. The carrier does have a remedy to seek repayment through another forum as previously discussed. The hearing officer's determination that the carrier is not entitled to reduce the claimant's TIBs and IIBs to recoup a previous overpayment is affirmed.

We affirm the determination that there was an overpayment of TIBs from October 22, 2004, through March 17, 2005. We reverse the determination that the amount of the overpayment was \$5,487.39 and render a determination that the amount of the overpayment was \$4,795.14. We affirm the determination that the carrier is not entitled to reduce the claimant's TIBs and IIBs to recoup a previous overpayment.

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

**MR. RUSSELL RAY OLIVER, PRESIDENT  
6210 HIGHWAY 290 EAST  
AUSTIN, TEXAS 78723.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge