CAN AN INSURANCE COMPANY RECOUP OVERPAID TEXAS WORKERS' COMPENSATION BENEFITS FROM AN INJURED WORKER

One of the hot topics of dispute resolution before the Division of Workers' Compensation in Texas these days is recoupment. Recoupment is an attempt by an insurance carrier to recover overpaid benefits from a Texas injured worker by reducing the claimant's future benefits by a set percentage until all of the overpaid benefits have been recovered. For years, it was a matter of fairness, and the Division made decisions with respect to recoupment on the basis of equity. The carrier's ability to recoup overpaid benefits has been significantly reduced, and when it can, how much it may reduce benefits may not be based on anything to do with fairness or equity.

THAT'S NOT FAIR!

Recoupment is now governed by Rule 128.1(e). That rule went into effect on May 16, 2002. Claimants made no immediate rush to embrace the windfalls allowed under the rule, and it wasn't until nearly two years later that the rule began to be included with any prominence in the recoupment discussions of the Appeals Panel. This is in part due to the lack of cases that were brought up on the issue. Even since 2004, when the Appeals Panel issued a "significant" decision on the matter, claimants have not aggressively pursued the use of the rule to their benefit. That rule, and the decisions addressing its interpretation, are now becoming widely known, and cases involving recoupment are becoming more common.

Rule 128.1(e) significantly limits a carrier's ability to recoup overpaid benefits. It has been interpreted to limit recoupment only to those situations where the overpayment is the result of a miscalculation in or change of average weekly wage (APDs 033358-S and 060318). The general rule is that in order to recoup overpaid benefits, there must be a statutory provision that allows such recoupment. In APD 060318, the panel noted provisions such as Texas Labor Code §415.008 (concerning fraudulently obtaining benefits), §408.003 (concerning reimbursement of benefit payments made by an employer), and §410.209 (allows reimbursement from the subsequent injury fund for payments made under a Division order which is reversed or modified), as statutory provisions that could allow a recoupment of benefits. But these instances are rare.

The results of Rule 128.1(e) can be rather harsh and unfair, and may certainly be without any consideration of equity. The only "significant" decision on this matter is Appeals Panel Decision (APD) 033358-S. The overpayment in this case resulted from a change made to the average weekly wage when the carrier received the DWC-3 wage statement. It was not received until the claim had progressed halfway through the payment of impairment income benefits (IIBs) based on a fifteen percent impairment rating. The carrier then suspended IIBs to recoup its overpayment on the notion that based on the number of weeks temporary income benefits were owed (TIBs) and the number of weeks IIBs would be owed, and multiplying that number of weeks by the benefit rate due, the amount of benefits the claimant was entitled to receive had already been paid. The panel found that logic to be "nonsensical."

The argument that an injured worker will be paid a certain amount of benefits based on the benefit rate and the number of weeks owed is highly logical. For instance, a claimant with a TIBs rate of $250.00 who misses ten weeks of work and has a five percent impairment rating should receive a total of $6,250.00 ($2,500.00 in TIBs + $3,750.00 in IIBs) in workers'

compensation indemnity benefits. That makes sense and is easy to calculate. But what if a change in average weekly wage results in a benefit rate of $200.00 and ten weeks of IIBs have already been paid? This means that the carrier has paid a total of $5,000.00 under the prior rate, and the claimant should only receive a total of $5,000.00 in indemnity, and yet there are five weeks of IIBs left to pay. The panel determined that the claimant is legally entitled to the remaining weeks of IIBs, holding that, "the amount of recoupment is a factor in determining the amount of benefits that will be paid to a claimant rather than the amount of recoupment being determined by a predetermined amount of total benefits." This means that a claimant can receive more in indemnity benefits than the calculation of benefit rate times weeks owed would yield because the claimant is legally entitled to benefits for a certain time period based on the impairment rating. If the claimant has a five percent impairment rating, he is owed fifteen weeks of benefits from the date of maximum medical improvement. Any adjustment made to the benefits owed calculation that precludes an income benefit for that legally entitled period runs afoul of the first part of Rule 128.1(e).

This does not mean that an adjustment is not made to allow the carrier to recoup an overpayment resulting from a change in average weekly wage from future benefits. Rule 128.1(e)(2) determines the amount of recoupment that will be allowed. If the claimant's benefits are being reduced to pay attorney fees or to recoup a Division approved advance of benefits, then the carrier is allowed to recoup the overpayment at a rate of ten percent. If the claimant's benefits are not being reduced to pay attorney fees or an advance, then the carrier is allowed to recoup at a rate of twenty-five percent.

In APD033358-S discussed above, the carrier determined that it had paid all of the benefits it owed pursuant to the calculation of benefit rate times weeks owed. It then suspended benefits to recoup the overpayment. In essence, it determined on its own to recoup at the rate of one hundred percent. The Appeals Panel determined that this was inconsistent with the rule. The rule only allows either a ten percent reduction in benefits or a twenty-five percent reduction in benefits, depending upon the circumstances. The rule does not allow a one hundred percent reduction in benefits. That panel ordered a ten percent reduction in benefits because the claimant's benefits were being reduced to pay attorney fees.

OR IS IT?

The problem with the result in APD 033358-S is that the carrier did not avail itself of the protections offered in Rule 128.1(e)(2)(c). The last section of the rule is a return to equity analysis. It allows for recoupment at a rate greater than that allowed in Rule 128.1(e)(2)(A) or (B) if the carrier enters into a written agreement with the claimant, or if unable to do so, by asking the Division to approve a higher recoupment rate. The rule specifically states that the primary factor that the Division should use in determining the rate of recoupment is the likelihood that the entire overpayment will be recouped! It provides that "the rate should be set such that it is likely that the entire overpayment can be recouped." The rule further states that the Division is to also consider the cause of the overpayment and the financial hardship that may be created for the claimant. This is equity analysis.

The bottom line here is that if the overpayment is due to a change in the average weekly wage, that overpayment can be recouped at any rate that the carrier can get the Division to approve, but it must ask for a rate to be set by the Division rather than setting the rate itself.

Failure to request a rate from the Division will result in the default recoupment rates of Rule 128.1(e)(2)(A) and (B).

There are procedural questions that remain unanswered by the rule and by the Appeals Panel. How does a carrier request a rate of recoupment greater than the default rates? A quick review of the Division's website shows that there is no form that can be filed for such a purpose. Does the timing of the request matter? Do the default rates control until the date the carrier requests a change in the recoupment rate from the Division similar to a contribution case? Who makes the decision at the Division as to the amount of recoupment allowed prior to a benefit review conference or contested case hearing? Does the carrier have to provide evidence that it sought an agreement from the claimant as a condition precedent to the Division approving a change in the recoupment rate?

There are no answers to these questions, which will surely be litigated in time. It appears that the carrier must attempt to reach an agreement with the claimant before requesting a change in recoupment rates from the Division. There must, then, be a request made to the Division to approve a recoupment rate based on the equities of Rule 128.1(e)(2)(C). At that point, the carrier would be protected by the Rule and in any subsequent dispute resolution proceeding, it would be able to ask for a rate of recoupment greater than the default rates based on equity and fairness.

CONCLUSION

The carrier's ability to recoup an overpayment of indemnity benefits from future indemnity benefits has been limited to a large degree by Rule 128.1(e). The Appeals Panel has determined that in order for a carrier to recoup overpaid benefits, there must be a statutory provision allowing for that recoupment. Rule 128.1(e) only allows for recoupment when the overpayment results from a change in average weekly wage. When this occurs, the default recoupment rates are ten percent or twenty-five percent, depending on the circumstances. If the carrier wants to recoup the overpayment at a rate greater than the default rates, it must request that the claimant agree to a greater rate. If the claimant will not agree to a greater rate of recoupment, the carrier must request that the Division approve a greater rate based on the equities of Rule 128.1(e)(2)(C). If the carrier fails to make this request of the Division, then it will be limited to the default rates of Rule 128.1(e)(2)(A) and (B).

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