APPEAL NO. 92197

On April 9, 1992, a benefit contested case hearing was held. The issues from the February 10, 1992, benefit review conference were whether respondent (claimant below) continues to have disability resulting from his___, compensable injury to the date of the hearing; whether he has been certified as having reached maximum medical improvement (MMI); and whether his average weekly wage (AWW) based on the wage statement of Ms. DM as a same or similar employee was correct. The hearing officer held that Mr. EM, not Ms. DM, was a similar employee who provided similar services to the employer during the 13 week period preceding the injury; that respondent's AWW should have been based on Mr. DM's combined truck and driver payments (63% of delivery charges) for the same period; that respondent has not been properly certified as having reached MMI to the date of the hearing; and that the respondent continues to have disability resulting from the injury to the date of the hearing.

Appellant, carrier below, asks that the order below be reversed to establish an AWW using only the driver's wage portion of payment, and to show MMI was reached November 25, 1991.

DECISION

We reverse and remand the decision on the issue of AWW. Finding sufficient evidence in the record to support the hearing officer's decision on the issues of MMI and disability, we affirm.

The facts of the case are as follows. Respondent had been working about two weeks as a delivery man for (employer) when he received a compensable injury to his neck, back, and knee on___. Respondent made deliveries in a truck furnished by him. Title to the truck was in the name of respondent's father-in-law, but respondent testified that he made the payments on the truck, and his father-in-law by letter told employer that respondent was to retain all of the wages made with the use of the truck. Respondent testified that employer paid him 63% of the total delivery charge for each haul. Employer broke down his payments into two separate checks, a truck check and a driver check. The payments were a percentage of the total charge for each haul; the truck check constituted 43% of the charges, and the driver check was 20% of the charges. Respondent testified that he did not know employer's rationale for the 20-43% breakdown.

Amounts of money were deducted from the checks for various items. Among those items deducted from the truck check were leasing charges, cargo insurance, liability insurance, workers' compensation insurance, and an escrow charge. Respondent testified that federal income tax and social security were deducted from his driver check. He also testified that while his workers' compensation insurance premiums were deducted from the truck check, they were based on the total gross amount.

Respondent's employment with (employer) was pursuant to written contract,

although the contract was not offered into evidence by either side. Respondent testified that he did not know whether he was identified as an employee or an independent contractor under the contract. He said the truck check showed him as an "independent driver" while the driver check showed him as an employee.

Because respondent had worked for employer fewer than 13 weeks immediately preceding the injury, the AWW for purposes of determining income benefits would be equal to the usual wage that the employer pays a similar employee for similar services. Texas Workers' Compensation Act, TEX. REV. STAT. ANN. art. 8308-4.10 (Vernon Supp 1992) (1989 Act). Respondent's AWW was based on the average weekly wages of another (employer) employee, Ms. DM. Respondent testified that Ms. DM should not have been considered a similar employee performing similar services because she was not able to perform direct hot shot (within one hour) delivery, nor weekend or after duty deliveries. Respondent testified that he did perform these types of deliveries (in addition to other deliveries), which were paid at a higher rate. He testified that the wages of Mr. EM, another (employer) employee who performed the types of deliveries similar to respondent's, should have been considered.

Respondent also disputed the use of Ms. DM's AWW because it was based only on the driver portion (20%) of Ms. DM's paycheck and not the truck portion (43%).

On appeal, appellant does not dispute the hearing officer's determination that Mr. EM be considered the similar employee for purposes of determining AWW. Appellant does, however, dispute the hearing officer's finding that AWW should have been based on Mr. EM’s combined truck and driver payments (63% of his delivery charge). In support of its position, appellant cites Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE 128.1 (TWCC Rule 128.1), which states in part that an employee's AWW shall not include payments made by an employer to reimburse the employee for the use of the employee's equipment or for paying helpers. Appellant alleges that the 43% portion is payment for employee's equipment and should not be included to calculate the driver's AWW.

The Act does not define the term "average weekly wage," although it does define "wages" as follows:

> 'Wages' includes every form of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and other advantage that can be estimated in money which the employee receives from the employer as part of the employee's remuneration. Article 8308-1.03(47).

Rule 128 further expands on the concept of AWW. That rule provides in part as follows:

(b) An employee's wage, for purposes of calculating the average weekly wage shall include every form of remuneration paid for the period of computation of average weekly wage to the employee for personal services. An employee's wage includes, but is not limited to:

(1) amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave;

(2) the market value of any other advantage provided by an employer as remuneration for the employee's services that the employer does not continue to provide, including but not limited to meals, lodging, clothing, laundry, and fuel; and

(3) health care premiums paid by the employer.

(c) An employee's wage, for the purpose of calculating the average weekly wage, shall not include:

(l) payments made by an employer to reimburse the employee for the use of the employee's equipment or for paying helpers; or

(2) the market value of any non-pecuniary advantage that the employer continues to provide after the date of injury.

The statutory definition of "wage" is virtually identical to that contained in the former law. TEX. REV. CIV. STAT. ANN. art. 8309, Section 1 (repealed) prescribed the method for calculating AWW and also contained the provision that "said wages shall include the market value of board, lodging, laundry, fuel and other advantages which can be estimated in money which the employee receives from the employer as a part of remuneration."

Rule 128.1, in addition to setting forth examples of wages, includes specific exclusions. Little Texas case law exists under the former law which addresses the concept of wages as remuneration and exclusions therefrom. An "equipment reimbursement" exclusion, however, is a concept which finds support in cases in other jurisdictions involving fact situations very similar to the one here.

In a Minnesota trucking case, for example, the court upheld an AWW which excluded payments related to use of the employee's own semi-tractor. The court noted that a truck represents a substantial capital outlay which can be justified economically only if the investment itself can be expected to generate some income. The court concluded that "wages are compensation for labor and services and include neither the income from capital investment, nor the increment in value on the business interest arising out of the workers' contribution of capital." Backaus v. Murphy Motor Freight Lines, 442 N.W.2d 326

(Minn. 1989). Other cases with basically the same conclusion include Dickerson v. McCleary, 498 So.2d 651 (Fla. Dist. Ct. App. 1986); D & C Express, Inc. v. Sperry, 450 N.W.2d 842 (Iowa 1990); and Herrin v. Georgia Cas. & Sur., 414 So.2d 1323 (La. App. 1983).

One consideration in these cases, however, was the presence of a contract or lease agreement by which the terms of the arrangement and the amount attributable to reimbursement were spelled out. As one court held, because the employer seeks to minimize AWW, he should also have the burden to adduce evidence on the reimbursement or rental value of the vehicle. Alterman Transportation Lines v. Goetzman, 430 So.2d 486 (Fla. Dist. Ct. App. 1982). In the absence of evidence on the full amount, that court excluded only those amounts which had been proven.

In this case, there was evidence in the record sufficient to raise a question as to whether a portion of respondent's pay was other than remuneration. However, insufficient evidence was introduced (including the underlying contract) to enable us to determine whether or to what extent the truck check portion of (employer's) payment represented an actual reimbursement to the employee for use of his equipment rather than wages. For that reason, we reverse the decision of the hearing officer and remand for a fuller development of evidence on this issue.

Appellant's second point disputes the hearing officer's Findings of Fact and Conclusions of Law with regard to MMI and continuing disability. The hearing officer found the following:

FINDINGS OF FACT

13. Dr. X's form TWCC-69 did not evaluate claimant's knee injury in his December 4, 1991, Report of Medical Evaluation.

15. Claimant has not earned wages from___, to the date of this hearing.

CONCLUSIONS OF LAW

5. Claimant has not been properly certified as having reached maximum medical improvement to the date of this hearing.

6. Claimant continues to have disability resulting from his__, compensable injury to the date of this hearing.

Respondent testified that, following his injury, he had originally gone to a medical clinic for treatment, but that the doctor there was not an orthopedic doctor or neurosurgeon.

Respondent was given muscle relaxants, but because he was not getting any better he started going to (Dr. K), who has been his treating physician. The only report from Dr. K contained in the record was a March 9, 1992, narrative summary, which identified cervical whiplash injury, low back injury, and injury to the left knee. Dr. K, who is not a surgeon, referred respondent to Dr. P for treatment of his knee injury. Dr. P found torn cartilage in the knee and performed knee surgery. Dr. K. also referred respondent to (Dr. G) for evaluation of respondent's lumbar spine. Dr. P's revised Report of Medical Evaluation dated January 8, 1992, found MMI as of September 23, 1991, and a whole body impairment rating of 5% (13% to lower extremity) with regard to respondent's knee. Nothing in the record showed that MMI had been certified by Dr. K or Dr. G.

At appellant's request, respondent was examined by Dr. X. His initial and subsequent reports dated November 25, and December 4, 1991, concluded that respondent had reached MMI on November 25, 1991, with a zero whole body impairment rating.

"Maximum medical improvement" is defined in the 1989 Act as the earlier of:

(a) the point after which further medical recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or

(b) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.02(32).

A doctor who is required to certify, or who determines during the course of his treatment, whether an employee has reached MMI or has an impairment must complete and file a medical evaluation report as required by Rule 130.1. The report must be on a form prescribed by the Texas Workers' Compensation Commission (Form TWCC-69), must contain certain specified information, and must be filed with the Commission, the employee, and the carrier within seven days of examination.

A doctor other than the treating doctor may certify MMI. In that event, the doctor must additionally send a copy of the TWCC-69 to the treating doctor no later than seven days after the examination if the certifying doctor is not a designated doctor selected to resolve a dispute about MMI. The treating doctor who receives the report shall mail to the Commission within seven days a statement indicating the treating doctor's agreement with the certifying doctor's certification and impairment rating, and the report required by Rule 130.1, based on the most recent examination, if the treating doctor disagrees with the finding of MMI or the impairment rating assigned by the certifying doctor. Rule 130.3.

The evidence in this case showed two separate injuries for which respondent had

been referred to other doctors for treatment by the treating doctor, Dr. K. Dr. P, who treated respondent's knee injury, issued a TWCC-69 on January 8, 1992, found respondent had reached MMI on September 23, 1991, and assigned an impairment rating. The report concluded that respondent "may return to work with regards to his knee." Nothing on this report indicates whether it was sent to Dr. K. A date stamp on the form indicates it was timely filed with the Commission.

The evidence also includes an Initial Medical Report (TWCC-61) and a TWCC-69 filed by Dr. X on November 25, 1991, and December 4, 1991, respectively. Both reports address only respondent's back injury, and both conclude he was able to go back to work at the time of examination. In addition, both reports certify MMI, with a whole body impairment rating of 0% It is not evident from Dr. X's TWCC-69 whether the report had been sent to Dr. K or to the Commission. Appellant asks that respondent be found to have reached MMI on November 25th.

The March 9, 1992, summary report written by Dr. K. stated in part as follows:

> Patient was seen by [Dr. X] on the request of (Insurance Company). Patient had x-rays of the lumbar spine. I do not have the details of them.

The same document also stated:

> Patient also sustained a left knee injury. [Dr. P] has seen this patient and an MRI and arthroscopic surgery were performed.... The patient was apparently seen by [Dr. P] on February 7, 1992. He was still having some knee pain, which was mild.... According to the conversation I had with [Dr. P], he is at 5% disability with regard to that knee. Excessive kneeling and excessive use of that knee should be avoided. Patient might require further arthroscopic surgery should his condition deteriorate.

It does not appear that the procedures for certifying MMI were fully complied with by the doctors in this case. First, it is not evident that either TWCC-69 was sent to Dr. K, as required by Rule 130.3. According to Dr. K's summary of March 9, 1992, he had not been informed of the results of either of Dr. X's examinations, which had taken place some 3 to 3-1/2 months before. The summary also refers only to a conversation with Dr. P about MMI. Whether that statement indicates that Dr. P timely served notice of his certification to Dr. K is moot, as Dr. K failed to mail to the Commission with seven days a statement agreeing with the certification or a TWCC-69 in the event of disagreement.

For these reasons MMI has not been established in this case. *See* Texas Workers' Compensation Commission Appeal Nos. 92077, decided April 13, 1992, and 92176, decided June 10, 1992. Therefore, the hearing officer's decision is affirmed on this point.

With regard to disability, there was uncontroverted testimony by respondent that he had not been able to work for employer following the date of injury, even though Dr. G had released him to light work (no excessive bending or lifting over 25 pounds), because employer could not guarantee that any load would be less than 25 pounds. In addition, he said that he was taking muscle relaxants and the U.S. Department of Transportation would not "okay" him for a drug test or a physical. He said employer had no work for him to do.

Respondent also testified that he was a newspaper distributor delivering daily papers to newsstands. He said that after the accident he was unable to perform all the work himself, and had to hire people to assist him. There was no evidence in the record concerning whether or to what extent he was able to earn wages at this job. Nothing was adduced to show he was or was not able to find other employment.

"Disability" is defined in the 1989 Act as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Art. 8308-1.03(16).

Based on all the foregoing, we find there was sufficient record evidence to support the hearing officer's finding and conclusion on the issue of disability. We thus affirm with regard to this point.

_____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge