

APPEAL NO. 92296

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. Arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On May 5, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the average weekly wage for the appellant was properly calculated considering only the wages paid by her employer, the (employer), for the care of (Ms. G), and not those wages paid to her by another employer, (Ms. A), the daughter of Ms. G, for the additional time spent with Ms. G. In a previous decision of this appeals panel, Texas Workers' Compensation Commission Appeal No. 91074 (Docket No. redacted) decided December 30, 1991, we determined that the appellant had two employers. In that previous decision, we found that an injury that the appellant claimed while working for Ms. A was not compensable as an injury incurred while working for the employer, although the appeals panel agreed that a morning injury incurred while working for employer would be covered as within the course and scope of the employer's employment.

Appellant seeks to have wages from both employments used to calculate her average weekly wage, and asks that the hearing officer's determination be reversed. Appellant argues that because employer had knowledge of her second employment, and had to approve such employment, that it should be liable for benefits calculated on the entire amount of wages received for caring for Ms. G. She also argues that she was harmed because the hearing officer did not allow her to present her witnesses.

DECISION

After reviewing the record of the case, we affirm the decision of the hearing officer.

At the outset, we would note that, although the decision recites that the issue related to calculation of average weekly wage for "income benefits," the issue reported as unresolved from the benefit review conference, recited on the record and agreed to by the parties, related to calculation of average weekly wage for temporary income benefits (TIBS) only.

The decision in Appeal No. 91074, cited above, describes the working arrangements that appellant had with the employer and Ms. A. Little has been added in this hearing to those facts, although the appellant emphasized in this record that she could not have worked as a sitter for Ms. A without the approval of her supervisor for employer, (Ms. W), and that she was hired by Ms. W for a total of six hours per day with the understanding that additional hours worked would be paid for by Ms. A. She stated that Ms. A never personally hired her, although she paid her directly for hours worked in excess of 16.5 per week.

The written contract for hire with employer states authorization for only 16.5 hours per week, and states further that "I also understand and agree that I am only working as a (employer) employee during the hours scheduled by my supervisor." There is no evidence of any special rider to employer's insurance contract which would extend coverage to employees in their "off duty" hours working for the same families served through employer.

At the time she was injured, the appellant had been employed for less than 13 weeks, so the employer used the wages of a same or similar employee on its wage statement to the respondent.

Ms. W testified that the 16.5 hours per week on appellant's contract was the number of hours of Ms. G's need for services as assessed by a caseworker for the (TDHR). Employer was a service provider reimbursed by the TDHR for providing these authorized personal care services to elderly and disabled persons.¹ In this case, Ms. W stated that TDHR would have reimbursed employer for the hours it paid appellant, but not for additional hours. She stated that arrangements for employment such as appellant had with Mrs. A were not irregular nor prohibited.

Ms. W indicated that it would be possible for an employee to work up to 40 hours if so authorized by the TDHR. The wage statement put into evidence by the respondent characterizes the appellant as a "part-time" worker.

The appeals panel has previously determined that Article 8308-4.10 of the 1989 Act allows only consideration of wages paid by the employer in whose service a compensable injury is sustained in Texas Workers' Compensation Commission Appeal No. 91059 (Docket No. redacted) decided December 6, 1991². The appeals panel held that this is true even when the concurrent employments are similar. That case involved only calculation of average weekly wage for purposes of computing TIBS; the adjustment to a full-time wage that is appropriate for certain part-time workers under Article 8308-4.10(c) and Rule 128.4 applies to income benefits other than TIBS, as the Appeals Panel also noted in Decision No. 91059.

The hearing officer, noting that he did not find good cause to subpoena all of appellant's requested witnesses, stated that if it became apparent that their testimony would be required to decide the issue, he would reconvene the hearing. One of the requested witnesses was Ms. W, who appeared. It is clear that the issue was primarily a legal one that would not have been furthered by additional witnesses, and that the hearing officer did not abuse his discretion.

¹We note that the Human Resources Code requires a client "co-payment" for services based upon ability of the client to pay. V.T.C.A. Human Resources Code §35.007 (1990). A client is responsible for paying this, but, in addition, is responsible for paying for hours *in excess* of those authorized by the Department. See Human Resources Code 35.009. While a standard "co-payment" situation would not appear to constitute dual employment, employment for additional hours above those authorized and reimbursed by TDHR, which we infer is the case here, would give rise to dual employment.

² Subject, of course, to application of provisions involving the computation of average weekly wage for employees employed for less than 13 weeks at the time of the injury.

Because it appears that the hearing officer in this case correctly applied the law to these particular facts for calculation of appellant's average weekly wage for purposes of payment of her TIBS, we affirm his decision.

Susan M. Kelley
Appeals Panel

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Panel

Joe Sebesta
Appeals Panel