APPEAL NO. 92705

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On September 21, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined respondent's (claimant herein) average weekly wage to be $639.13, that maximum medical improvement (MMI) was reached on August 31, 1992, and that the designated doctor should be requested to give an impairment rating without consideration of a prior injury.

Appellant (carrier herein) contends that the hearing officer erred, as a matter of law, in computing the average weekly wage (AWW), computing temporary income benefits (TIBS) using claimant's annual earnings, and determining carrier had not made an overpayment of TIBS. The claimant also filed a timely appeal contesting the amount of TIBS to be paid the claimant and disputing the lack of impairment rating. Claimant also filed a timely response to carrier's appeal in which he agrees with all the hearing officer's findings and conclusions and states "I agree completely with the Decision and Order governing (this case) and . . . appellant's relief should not be granted."

DECISION

Determining the hearing officer erred in the computation of the AWW, and consequently in the amount of TIBS to be paid, and determining the issue of impairment has not been resolved, we reverse and the case is remanded for the development of appropriate evidence, and reconsideration not inconsistent with this opinion.

The issues framed at the benefit review conference (BRC) and agreed upon at the contested case hearing (CCH) were:

1.What is the Claimant's average weekly wage?

2.Has the Claimant reached maximum medical improvement?

3.Assuming the Claimant has reached maximum medical improvement, what is his impairment rating?

As sub issues, the parties agreed to consider: Under issue 1, whether the Carrier had made an overpayment to the Claimant? Under issue 3, whether Claimant's impairment rating, if it is greater than 0, should be reduced because of a prior injury?

It is undisputed that claimant was a used car salesman for (employer) and worked on a strictly commission basis. On (date of injury) claimant fell down a flight of stairs hitting his head and neck on a snack vending machine. He was taken to a nearby clinic where he was seen by (Dr. G) on an emergency basis. Subsequently, claimant saw (Dr. D) and went to a chiropractor on his own. Claimant also went to a pain clinic and then requested a

change of doctors to see (Dr. De) as his second choice. Claimant was also seen by (Dr. B), who is the carrier's doctor.

At some point, (Dr. A) was appointed as the Texas Workers' Compensation Commission (Commission) designated doctor, presumably for determining MMI and an impairment rating. The designated doctor submitted a TWCC-69, Report of Medical Evaluation, giving an MMI of 8/31/92 with a five percent whole body impairment rating. In an attached narrative and on the TWCC-69 under the heading of "Document Objective Laboratory or Clinical Findings of Impairment," the designated doctor notes claimant's " . . . PPI is 5% of the whole person based on the spondylosis that was pre-existing." Claimant admits he was in an automobile accident in 1988 or 1989 but there is no evidence how, or if, claimant was injured in that accident.

The principal portion of this case, and the gist of carrier's appeal, concerns the computation of the AWW. Claimant, as a used car salesman whose income was based solely on commissions, had widely ranging income based on the number of sales he made. It is undisputed that in the year prior to his injury, claimant's highest monthly income was $8,516.37 (March 91) and lowest was $756 (September 90). Claimant testified Christmas time was slow and summer time was good for sales. Claimant was paid once a month, apparently in the first week of the month, based on commissions earned the previous month. The claimant's position throughout has been that because of the irregularity of his monthly income the AWW should be computed using claimant's earnings for the 12 months preceding the injury as being "fair, just, and reasonable" in a accordance with Article 8308-4.10(g). Carrier's position is that a plain reading of the Act requires the AWW to be ". . . the sum of the wages paid in the 13 consecutive weeks immediately preceding the injury divided by 13" as set out in Article 8308-4.10(a). Carrier, after the injury, for whatever reason, began paying claimant $428.00 a week, the maximum amount of TIBS. In October 1991, claimant returned to work on a part-time basis with a limited work schedule. In November 1991, TIBS were temporarily suspended, either because claimant was working part-time or because the carrier felt claimant had been overpaid. TIBS were resumed on a reduced basis of $258.42 a week on November 24, 1991. The issue of overpayment of TIBS was also raised at the CCH.

The hearing officer made the following pertinent findings of fact and conclusions of law:

Findings of Fact

4. That Claimant's earnings are reported on a monthly basis and that for the period beginning May 4, 1991, and ending August 3, 1991, Claimant earned a total of $6,758.75.

5. That the period May 4 through August 3, 1991, equals ninety-one (sic) days, or thirteen weeks, and that the average pay per week equals $519.90.

6. That Claimant was not a seasonal worker but had a full-time job, normally working in excess of 50 hours per week, working entirely on commission with sales and income varying from one month to another.

7. That Claimant's income from August, 1990 through July, 1991 was $33,234.71 for an average weekly wage of $639.13 per week.

8. That the Carrier determined the Claimant's weekly wage was $512.03 per week which multiplied times 4.3 equaled $2,201.73 per month, which would equal temporary income benefits at the rate of $358.42 per week based on seventy percent of the average weekly wage.

9. For the period August 18, 1992, through November 23, 1991, Claimant was paid temporary income benefits at the rate of $428.00 per week, which thereafter were reduced for the purpose of recouping an alleged overpayment by the Carrier.

10. That Claimant's temporary income benefits at the rate of $639.13 per week times seventy percent equals $447.39 per week, with the maximum allowable being $428.00 per week.

11. That during the period of (date) (Claimant's injury was (date of injury)) through June 1992, Claimant earned $9,175.62, for an average weekly wage of $201.66.

12. That the pre-injury average weekly wage of $639.13, less the average weekly wage of $201.66 following his injury, leaves $437.47 as the basis for determining Claimant's temporary income benefits during the period (date) through June, 1992.

13. That the total amount paid by the Carrier to the Claimant in benefits is not in excess of that which the Carrier was obligated to pay.

15. That the designated doctor gave the Claimant a whole body impairment rating of five percent and that this rating was based on a preexisting condition.

16. That Claimant's prior injury was not a compensable injury and he did not receive compensation for the injury.

17. That Claimant's prior injury should not be considered in making a determination of Claimants's (sic) impairment rating.

Conclusions of Law

3.That Claimant's average weekly wage is to be based upon a fair, just and reasonable basis considering the entire year, which is $639.13 per week.

4.That the Claimant is entitled to have his temporary income benefits computed on the basis of his yearly earnings and to be paid any income benefits earned but not paid with interest in a lump sum.

5.That the designated doctor's determination that Claimant reached maximum medical improvement on August 31, 1992, must be adopted because the great weight of the other medical evidence is not to the contrary.

6.That the designated doctor's impairment rating is not entitled to presumptive weight as there is no entitlement to a reduction in the impairment rating because of a prior injury to the Claimant.

7.That the designated doctor should be requested to make a determination of Claimant's impairment rating without consideration of a prior injury.

The carrier specifically disputes Findings of Fact Nos. 12 and 13, Conclusion of Law No. 4, and generally disputes any finding or conclusion which uses as its basis claimant's annual earnings. Claimant, in his cross-appeal, disputes the computation of TIBS and requests "a different doctor to be designated by TWCC or use (Dr. D) impairment rating of 12%."

The principal, although not the only, issue of appeal is computation of the AWW. Claimant, a car salesman, had been employed by the employer for over one year and was paid monthly, based solely on the commissions earned the preceding month. Article 8308-4.10(a) provides:

(a) Except as otherwise provided by this section, if the employee has worked for the employer for at least 13 consecutive weeks immediately preceding the injury, the average weekly wage of an employee shall be computed as of the date of the injury and equals the sum of the wages paid in the 13 consecutive weeks immediately preceding the injury divided by 13.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(d) (TWCC Rule 128.3(d)) states:

(d) If an employee has worked for 13 weeks or more prior to the date of injury, or if the wage at time of injury has not been fixed or cannot be determined, the wages paid to the employee for 13 weeks immediately preceding the injury are added together and divided by 13. The quotient is the average weekly

wage for that employee.

This provision specifically addresses the issue of how to compute claimant's AWW. Article 8308-4.10(b) addresses the situation, not applicable here, when an employee has worked for the employer for fewer than 13 weeks. The hearing officer, in making his determination, apparently erroneously utilized the provisions of Article 8308-4.10(g) which states:

(g) If the methods adopted under Subsections (a) and (b) of this section cannot be applied reasonably due to the irregularity of the employment or if the employee has lost time from work during said 13-week period due to illness, weather, or other cause beyond the control of the employee, the commission may determine the employee's average weekly wage by any method that it considers fair, just, and reasonable to all parties and consistent with the methods established under this section. (Emphasis added.)

We would point out that subsection 4.10(g) prefaces that subsection by saying it should be used only "if the methods adopted under Subsections (a) and (b) of this section cannot be applied. . ."

Claimant was regularly employed by the employer for the 13-week period prior to the injury and using Rule 128.3, quoted previously, claimant's AWW could easily be computed. Texas case law has addressed this issue in Aetna Casualty & Surety Co. v. Weaver, 803 S.W.2d 850 (Tex. App.-Corpus Christi 1991, no writ history) by suggesting that the AWW be computed under "Step 1" (of the former law, Article 8309 §1 which was repealed and replaced with section 4.10) before other methods are used. There appears to be no reason why subsection 4.10(a) was not used and the hearing officer gave no reasoning or rationale in his decision for using subsection 4.10(g) instead of 4.10(a). The evidence was clear that claimant's employment was regular, even if his salary was not. There was some testimony that claimant had missed a day periodically because of illness and on occasion had been sent home due to lack of business, but this was apparently in the due course of business, and other than the occasional illness did not cause any loss of earnings. The hearing officer made no findings, nor did his statement of the evidence reveal, why subsection 4.10(a) could not have reasonably been applied to establish the AWW. Consequently, we determine the hearing officer was in error in failing to use subsection 4.10(a) and Rule 128.3 in determining claimant's AWW.

It appears undisputed that claimant earned $6,758.75 for the months of May, June and July 1991. Claimant, in his Exhibit No. 6 simply divides this amount by 13 weeks to arrive at an AWW of $519.90 multiplied by 70 percent to arrive at TIBS of $363.93 a week. Carrier, on a copy of a tape register on the last page of Claimant's Exhibit No. 7, starts with the same $6,758.75 figure, but then divides by 13.2 to obtain an AWW of $512.03 which is multiplied by 70 percent to arrive at TIBS of $358.42, which carrier then uses as a "formula" basis in Carrier's Exhibit M. We fail to understand why carrier divides $6,758.75 by 13.2 instead of 13. We would note that the months of May, June and July contain a total of 92

days, rather than 91 days (as found by the hearing officer) which would be exactly 13 weeks. In that this case is being remanded, the hearing officer may wish to explore carrier's reasoning behind its computation.

Carrier in its appeal alleges that as a consequence of not computing the AWW in accordance with subsection 4.10(a), the hearing officer erred in finding that the carrier had not overpaid TIBS. Claimant argues that TIBS had not been overpaid. The hearing officer in his Statement of Evidence states the carrier's contention to be that claimant has been paid by the carrier a total of $12,834.96 (Carrier's Exhibit M). "The Carrier contends that this payment should have been $9,685.87 and the result has been an overpayment of $3,149.09. Allowing for $4,500 in impairment benefits, it is contended that a refund is due the Carrier in the amount of $1,350.91." This is error and should say, under the figures the hearing officer is citing, that claimant is entitled to an additional $1,350.91 in impairment benefits. Claimant is entitled to TIBS while claimant has disability,as defined by the 1989 Act, in accordance with Article 8308-4.23(a)(b) and (c). The hearing officer found, and is supported by the designated doctor's opinion, that MMI was reached on August 31, 1992. The MMI date is not appealed. Claimant is entitled to TIBS for the period of (date) (the day after the injury) to August 31, 1992. During the period that claimant was able to work part-time TIBS were payable at the rate of 70 percent of the difference between claimant's AWW (as computed under subsection 4.10(a)) and claimant's weekly earnings after the injury, not to exceed the maximum weekly benefit in accordance with subsection 4.23(c). We agree that computation of AWW was incorrect and the hearing officer's determination that the total amount paid by carrier "is not in excess of that which carrier was obligated to pay" may also be erroneous. However, this determination should not be construed as an endorsement of the hearing officer's recitation of carrier's contention that "a refund is due the carrier." Carrier in its appeal to us argues only that the hearing officer's determination that the amount paid by carrier "is not in excess" was wrong. If it is determined that carrier has made an overpayment of TIBS, how that "overpayment" can be handled is discussed in Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992 and Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992.

Finally, the hearing officer found that the designated doctor gave claimant a whole body impairment rating of five percent "based on a preexisting condition" and that claimant's prior injury should not be considered in determining claimant's impairment rating. The hearing officer then concluded (Conclusion of Law No. 7 quoted earlier) that the designated doctor should be requested to make a determination without consideration of claimant's prior injury. Claimant in his cross-appeal filed within the time provided for an appeal, asserts he ". . . would like to use a different doctor to be designated by TWCC or use (Dr. D's) (the treating doctor) impairment rating of 12%." We agree with the hearing officer's conclusion that the designated doctor should clarify his report and indicate whether the whole body impairment rating is based on an aggravation of the preexisting spondylosis. The impairment rating from the designated doctor shall then have presumptive weight in accordance with Article 8308-4.26(g), unless the great weight of other medical evidence is to the contrary. While an impairment rating must be based on the "compensable injury,"

we have held an aggravation of a preexisting condition is a "compensable injury." *See* Texas Workers' Compensation Commission Appeal No. 92010, decided March 5, 1992; Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992; and INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist] 1988, no writ).

Consequently, we reverse and remand for the development of appropriate evidence, if any, for the following: 1) recomputation of claimant's AWW in accordance with Article 8308-4.10(a); 2) recomputation of TIBS due from (date) through August 31, 1992 and a determination if "overpayments" have been made; and, 3) a request to the designated doctor for a redetermination of whole body impairment, if any, based on the compensable injury alone as discussed above.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitates the issuance of a new decision and order by the hearing officer, a party, including claimant who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge