APPEAL NO. 93235

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On February 22, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent, claimant in this case, reached maximum medical improvement (MMI) on October 12, 1992, with a 21% impairment rating. He also found her average weekly wage (AWW) to be $204.00 and that appellant (carrier in this case) had waived its ability to contest the compensability of the injury and must pay certain reasonable costs of travel for medical care. Carrier does not appeal the decision as to waiver, MMI, or impairment rating. It does contend that the method of determining AWW was incorrect and that claimant has not shown that she cannot drive so the cost for a driver is not a reasonable expense.

DECISION

Finding that the decision of the hearing officer to reimburse claimant for the cost of a driver is not consistent with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 134.6 (Rule 134.6), we reverse and render that no payment is allowed for a driver. As to AWW, the decision is sufficiently supported by the evidence and is affirmed on that point.

On the first day claimant worked in the laundry room of a motel, she hurt her neck and back but she worked a second day before she could work no more. The carrier did not appeal the hearing officer's finding that it had waived its ability to contest compensability of the injury. A designated doctor found MMI on October 12, 1992, with an impairment rating of 21%. The carrier did not appeal this part of the determination either. As a result, the injury, MMI, and impairment rating will not be discussed further.

Claimant testified that she took the job in question because it offered good overtime. She said she was told she would work nine and one-half to 10 hours five days a week, sometimes six days a week, and in deer season seven days a week. She worked 19 and one-fourth hours in her two days on the job. She further testified that the owner of the motel had only had it two weeks when she went to work. She was paid $4.25 per hour. Claimant introduced an employer's wage statement dated September 13, 1991, showing she worked from August 22, 1991 to August 24, 1991 and was paid for 19 and one-fourth hours. No other wage statements were introduced by either party. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.2(b) (Rule 128.2(b)) provides that the employer shall file a wage statement. Rule 128.2(b)(4) provides, "(i)f the employee was not employed for 13 continuous weeks before the date of injury, the employer shall identify a similar employee performing similar services, as those terms are defined in § 128.3 of this title. . .and list the wages of that similar employee for the 13 prior. . . ." Article 8308-4.10(a), (b), and (g) of the 1989 Act describe steps to be taken in figuring AWW. If the injured worker has not worked 13 consecutive weeks immediately preceding the injury, then the statute contemplates use of the wage of a similar employee of the employer or of the usual wage paid in the vicinity for similar services. If either of these methods is not reasonable because of irregularity of

the employment, then the commission may use a fair, just and reasonable method to determine the AWW.

The carrier, in attacking Finding of Fact No. 16 which said that there was no similar employee who performed similar services in the vicinity, states that the claimant offered no evidence to substantiate that there was no similar employee. The carrier argued that an AWW of $170.00 per week ($4.25 per hour multiplied by 40 hours per week) was appropriate. As shown by Rule 128.2(b)(4), the employer, not the claimant, is charged with providing information as to similar wages. Without such information provided by the employer and with testimony that the employer was only in business two weeks prior to the injury, the hearing officer did not err is using a fair, just, and reasonable method to figure AWW. In using the hours worked by claimant and factoring in five days per week (rather than seven days during deer season), the hearing officer was not unfair in view of the absence of information provided to him by the employer. *See* Texas Workers' Compensation Commission Appeal No. 92387, dated September 8, 1992, and Texas Workers' Compensation Commission Appeal No. 92073, dated April 6, 1992. The hearing officer's AWW based on $4.25 per hour multiplied by 48 hours per week is supported by sufficient evidence of record.

Carrier does not take exception to the hearing officer's finding that it was reasonably necessary for claimant to travel to have appropriate medical care. The carrier only asserts that payment of $50.00 per day for claimant's husband to drive claimant to the doctor is not reasonable because there is no evidence that claimant cannot drive. It adds that expenses should be reimbursed according to the guidelines in Rule 134.6. (Note that Rule 134.6 was amended December 1, 1992 by adding that disputes of expenses in travel would be resolved through the dispute resolution process to the Appeals Panel.) Claimant testified that she could not turn her neck sufficiently to drive safely and added that because of the condition of her left leg stemming from her lumbar injury, she cannot drive either of the vehicles she and her husband own since both have a standard transmission.

The designated doctor in October 1992 stated that claimant's impairment included "Anterior cervical fusion post-op still with symptoms 9%, range of motion cervical spine 5%." While there is no requirement in the 1989 Act that the ability of a claimant to drive a car be based on medical evidence alone, in this instance the medical evidence does not contradict claimant's testimony of her inability to turn her head adequately in driving. Claimant's husband testified that he lost $64.00 pay per day at his job (in at least 22 of the visits to the doctor) when he drove claimant to the doctor. He testified that later when he had his own business, his employees got drunk when he was absent and stole money from him.

Rule 134.6 was recently interpreted by Texas Workers' Compensation Commission Appeal No. 93264, dated May 7, 1993. That rule does not specifically list reimbursement for a driver as it does reimbursement for mileage, food and lodging. While Appeal No.

93264 considered a question of reimbursement for a rental car, it stated that Rule 134.6 did not provide that all or actual expenses of travel would be reimbursed. That opinion described Rule 134.6 as calling for reimbursement of reasonable expenses following specific guidelines. Those guidelines do not provide for paying the cost of a driver although an argument can be made that such a cost should be provided for a claimant incapable of driving. With no requirement under the 1989 Act to reimburse for actual expenses, the interpretation of Rule 134.6 found in Appeal No. 93264 is reasonable and controls the question of payment for the driver in this case. We point out that the hearing officer also ordered payment of 27.5 cents per mile for travel, plus up to $25.00 a day for food while traveling, and up to $55.00 a day for lodging while traveling, all of which are not appealed. Insofar as the decision provides payment for a driver, it is reversed and all remaining elements of the decision of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge