

APPEAL NO. 991082

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 4, 1999. The issue at the CCH was what was the respondent's (claimant herein) average weekly wage (AWW). The hearing officer determined that the claimant's AWW for determining temporary income benefits (TIBS) is \$165.00 and that her AWW for determining impairment income benefits (IIBS), supplemental income benefits (SIBS), lifetime income benefits (LIBS) and death benefits is \$277.49. The appellant (self-insured herein) files a request for review contending that the hearing officer erred in considering over its objection whether the claimant was a full-time or part-time employee as a regular course of conduct as this was not an issue brought forward from the benefit review conference (BRC). The self-insured also argues that finding an AWW based upon the theory that the claimant was a full-time employee in the regular course of conduct was contrary to the hearing officer's own findings and to the great weight and preponderance of the evidence. The claimant responds that the determination of the issue of AWW of a part-time employee necessarily involved a determination of whether the employee was a part-time employee as a regular course of conduct or not. The claimant also argues that there was sufficient evidence to support the hearing officer's resolution of the AWW issue.

DECISION

Reversed and remanded.

The facts of this case are not in serious dispute. The parties stipulated that on _____, the claimant was an employee of the self-insured; that the claimant sustained a compensable injury on _____; that there was no same or similar employee for purposes of calculating AWW; that the claimant's AWW was \$165.00, if she were a part-time employee; and that the claimant's AWW was \$277.49 if she were a full-time employee. The claimant testified that she went to work as a housekeeper for the self-insured on April 16, 1996. The claimant testified that she started working for the employer 30 hours a week at \$5.50 per hour with the understanding that she would go to 40 hours per week in October and would get medical benefits at that time. The claimant testified that, prior to going to work for the self-insured, she worked full-time for a convenience store and in addition cleaned houses. In evidence was a copy of the Employer's Wage Statement (TWCC-3) reflecting the claimant's wages while employed for the self-insured and a copy of the claimant's 1995 income tax return.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

2. Claimant was a part-time employee for the [self-insured].
3. Claimant never worked more than 30 hours a week for the [self-insured] prior to her injury.

4. The regular course of conduct for this Claimant was as a part-time employee working no more than the part-time hours allotted her of 30 hours per week.

CONCLUSION OF LAW

3. Claimant's AWW for determining [TIBS] is \$165.00 and Claimant's AWW for determining [IIBS], [SIBS], [LIBS], and death benefits is \$277.49.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.4 (Rule 128.4) specifically provides for the calculation of AWW for part-time employees. Rule 128.4(a) provides that the same method will be used in calculating the AWW used to determine TIBS benefits as is used to calculate the wages of full-time employees. Rule 128.4(b) provides that for purposes of calculating AWW for all other income benefits and death benefits that there will be two different methods of calculation depending upon whether the employee worked part-time as a regular course of conduct or did not. Rule 128.4(b) states that a regular course of conduct for part-time work shall be determined by reviewing the work history of the employee for the 12-month period preceding the injury. The method of calculation for part-time employees who worked as part-time employees as a regular course of conduct is proscribed in Rule 128.4(c). The method of calculation of an employee who did not work part-time as a regular course of conduct is prescribed in Rule 128.4(d).

The self-insured argues that the hearing officer erred by considering whether or not the claimant was a part-time employee in the regular course of conduct as this was not an issue specifically reported out of the BRC and was not properly added as a separate issue at the CCH. We reject this argument. Clearly, the issue reported out of the BRC was the claimant's AWW. It was also clear from the BRC report and the position of the self-insured that the claimant was a part-time employee. The fact that the Texas Workers' Compensation Commission's (Commission) benefit dispute resolution system is issue-driven was not intended to separate the applicable law from the facts of the case. In dealing with determining the AWW of a part-time employee, the hearing officer must necessarily determine the effect of Rule 128.4. There was evidence that the claimant had worked full-time during the 12-month period preceding the injury. The hearing officer would have been remiss to ignore this evidence and its bearing on determining AWW under Rule 128.4.

We are, however, more than troubled by the conflict between the hearing officer's Finding of Fact No. 4 and Conclusion of Law No. 3. Nor do we find sufficient rationale in the hearing officer's discussion of the case in his decision to reconcile the factual findings and the legal conclusions. We, therefore, reverse the decision of the hearing officer and remand the case for him to make factual findings and legal conclusions that are consistent. Doing this does not require an additional hearing or the taking of further evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party 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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge