

APPEAL NO. 000602

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 10, 2000. The hearing officer determined that the respondent-s (claimant) average weekly wage (AWW) is \$493.85. The appellant (carrier) appealed, urged that the hearing officer erred by considering the claimant-s wages from two employers, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant-s AWW is \$300.88. The claimant responded, urged that the hearing officer did not err in determining his AWW, and requested that the decision of the hearing officer be affirmed.

DECISION

We reverse and remand.

The parties stipulated that the claimant sustained a compensable injury on _____, while in the course and scope of his employment with (employer), a temporary staffing agency. The claimant testified and had admitted into evidence seven exhibits. The carrier cross-examined the claimant. It did not offer any exhibits. The claimant testified that he completed the first grade in Mexico, reads a little Spanish, and does not read English; that he worked for Mr. KK as a carpenter; that he would go to (address); that Mr. KK and Mr. JK would send him to jobs where remodeling was done; that he worked for the same employers, but sometimes they changed employees; that he received checks from two companies; that he was never told that he worked for two companies and did not know why he received two checks; that he did not know if there was another company at (address); and that he never worked for another company.

A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated June 10, 1999, states that a wage statement was requested and that temporary income benefits would be paid at the rate of \$456.97. The record contains two Employer-s Wage Statement forms (TWCC-3) that indicate that the employer is(KK), which furnished employees to KKC; that the employer-s address is in Tampa, Florida; that the claimant was hired on September 8, 1996; and that the claimant worked less than 40 hours in each of the 13 weeks immediately preceding the injury. The last TWCC-3 indicates that the claimant worked as few as 6.23 hours and as many as 33.57 hours a week. In a letter dated November 11, 1999, Mr. KK wrote:

[KKC] uses [employer] for its employee leasing, which also employees (sic) [claimant].

[KBC] is a separate Texas corporation and is owned by SW, [KBC]. [KBC] has never used [employer] for employee leasing to my knowledge.

Documents from KBC show the claimant's earnings from January 22, 1999, through July 22, 1999, and indicate his weekly earnings during the 13 weeks immediately preceding the injury. Other documents that appear to be from a branch of the employer in (city), Texas, indicate the amounts earned by the claimant during that 13-week period. For example, the records show that on March 26, 1999, the claimant was paid for 32 regular hours and 5.5 hours by the employer and for 8 regular hours and 1 overtime hour by KBC.

The evidence in the record is rather limited. In the statement of the evidence in her Decision and Order, the hearing officer stated that the Employer's First Report of Injury or Illness (TWCC-1) states that the claimant worked 40 hours a week and that the TWCC-1 supports her conclusion that the claimant's AWW is \$493.85. Section 409.005 concerns Employer Report of Injury. Subsection (f) provides:

A report required under this section may not be considered to be an admission by or evidence against an employer or an insurance carrier in a proceeding before the commission [Texas Workers=Compensation Commission] or a court in which the facts set out in the report are contradicted by the employer or insurance carrier.

The carrier contended that the claimant worked for the employer less than 40 hours a week during the 13 weeks immediately preceding the date of injury and also contradicted other information on the TWCC-1 that the hearing officer may have considered in rendering her decision.

We reverse the decision of the hearing officer and remand for her to make findings of fact and conclusions of law, to render a decision, and enter an order based on the evidence in the record and with proper application of the provisions of Section 409.005(f). 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 Texas Workers= Compensation Commission= Division of Hearings, pursuant to Section 410.202. See 409.005(f). Texas Workers=Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge