

APPEAL NO. 022453
FILED NOVEMBER 18, 2002

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 August 16, 2002, with the record closing on August 28, 2002. The hearing officer determined that the respondent's (claimant) average weekly wage (AWW) is \$760.47. The appellant (carrier) appeals the hearing officer's AWW determination, specifically arguing that the hearing officer erred in determining that a collective bargaining agreement payment to the claimant represented a remuneration for personal services and therefore is against the great weight and preponderance of the evidence. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that the 13 weeks prior to the compensable injury began on (dates encompassing the 13 week period prior to date of injury); that the claimant's gross wages for the 13 weeks prior to the date of injury were \$8,921.86; that the claimant's fringe benefits for the 13 weeks prior to the date of injury were \$134.55; that the claimant's wages for the 13 weeks prior to the date of injury were \$9,056.41 (\$8,921.86 (gross wages) + \$134.55 (fringe benefits)); and that the claimant received a payment of \$2,987.82 on December 21, 2001, pursuant to a collective bargaining agreement.

The claimant testified that she was employed as a fleet service worker for the airline employer and that she earned \$20.11 per hour. The claimant contends that pursuant to a collective bargaining agreement ratified on October 26, 2001, she received an hourly wage increase of \$1.94, a raise from \$21.11 to \$22.05, that was retroactive to March 1, 2001. On December 21, 2001, the claimant received a retro check in the amount of \$2,987.82, pursuant to the terms of the collective bargaining agreement. The claimant contends that her AWW should include her retroactive wage of \$22.05 per hour rather than \$20.11 for the 13 weeks prior to the injury. The carrier contends that the retro check in the amount of \$2,987.82 should not be included in the claimant's AWW because it was issued on December 21, 2001, a date after the claimant's injury as a result of renegotiation of a collective bargaining agreement.

The issue before the hearing officer was to determine the claimant's AWW and to consider whether a retroactive payment (retro check) pursuant to a collective bargaining agreement should be included in the determination of the claimant's AWW. The claimant testified and the employer's representative corroborated, that a collective bargaining agreement was reached on October 21, 2001. A letter dated November 5, 2001, addressed to all union employees specifically states that:

the retro check will be a check separate from the regular paycheck. The following deductions will apply to the retro check:

- 401(k) contributions - will be deducted at your current percentage
- Garnishments - all applicable garnishments and any over due funds will be deducted in accordance with the terms of the garnishment/child support, etc. orders
- Federal withholding tax - the retro check will be taxed at the supplemental rate of 27.5%; all other taxes will be withheld at the applicable rate

Another letter dated November 5, 2001, addressed to all union employees states that the “[t]he retro period is 03/01/01 through 11/23/01. All hours paid after 11/23/01 will be at the new rates and on the 12/21/01 regular paycheck.” And in the “Explanation” section of the letter it states “[a]ctual hours paid during retro period; difference between old rate and new rate.

Section 408.041(a) provides that a full-time employee's AWW shall be determined by dividing the sum of the wages from the 13 weeks preceding the compensable injury by 13. The definition of "wages" in Section 401.011(43) includes all forms of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration.

The hearing officer did not err in determining that the claimant's AWW is \$760.47. The hearing officer was persuaded that the evidence showed “the retro payment represented a wage increase differential payment for services rendered during the time period from 3/1/01 through 11/23/01.” The evidence established that the retro payment was subject to tax and 401(k) withholding and garnishment of wages during the 13 weeks prior to the claimant's injury. The hearing officer could and therefore concluded that the “[t]he preponderance of the credible evidence is that a portion of the retro payment clearly represented remuneration for personal services performed and accrued during the 13-week period prior to the date of the injury, and falls within the definition of wages as that term is defined in [Section] 401.011(43).” The hearing officer properly determined that the claimant's “payment was for an increase in wages for the time period from 3/1/01 through 11/23/01, the entire 13-week period preceding the date of injury falls within this time period, and the differential rate is \$1.94 per hour (the difference between \$22.05-\$20.11 per hour); the total number of hours worked by the Claimant during this 13-week period is [\$(427.70 x \$1.94=\$829.74.” The hearing officer calculated the claimant's AWW as follows:

- | | |
|---------------------------|-------------------------|
| 1. Total Gross Wages= | \$9,751.60 ¹ |
| 2. Total Fringe Benefits= | \$ 134.55 |

AWW=\$9,996.15² divided by 13= \$760.47

We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Veronica Lopez
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge

¹ \$8,921.86 (gross wages)+ \$829.74 (retro wages)=\$9751.60

² \$9,751.60 + \$134.55=\$9,996.15