

APPEAL NO. 030584  
FILED APRIL 24, 2003

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 022860-s, decided January 3, 2003, where we remanded for the hearing officer to determine "what, if anything, the claimant could reasonably be expected to have earned during the summer vacation of 2002 if she had not been injured." In his decision on remand, the hearing officer noted that the parties "agreed no further hearing was necessary and none was held." Thus, no evidence was presented on the issue for which the case was remanded. The hearing officer determined that based upon the use to the term "may" in Section 408.0446 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.7(d)(3) (Rule 128.7(d)(3)), he would not permit the appellant (self-insured) to adjust the respondent's (claimant) average weekly wage (AWW) to zero for purposes of calculating temporary income benefits (TIBs) because it "would create a windfall for the Self-Insured and take away TIBs benefits the Claimant rightly deserves under the Act." In its appeal, the self-insured argues that the hearing officer "failed to properly apply" Rule 128.7(d)(3) "which allows the [AWW] to be adjusted to zero during that period of time when the school district employee reasonably could expect to earn no wages." In her response to the carrier's appeal, the claimant urges affirmance.

DECISION

Reversed and rendered.

In Appeal No. 022860-s, we specifically stated that "[i]f the hearing officer determines that the claimant did not reasonably expect to earn wages during the summer of 2002, the self-insured is entitled to adjust the claimant's AWW to zero pursuant to Rule 128.7 for purposes of payment of TIBs during that time." From that language, it is apparent that we had determined that the school district was entitled to reduce the claimant's AWW in the summer in this instance. The case was only remanded to have the hearing officer make a factual determination as to what the claimant could reasonably have earned in the summer of 2002 had she not been injured. As noted above, by agreement of the parties, no hearing on remand was held and, thus, there is no evidence in the record to support a determination of any reasonable expectation of earnings other than zero. As the hearing officer noted, Section 408.0446(b) states that the self-insured "may adjust a school district employee's [AWW] as often as necessary to reflect the wages the employee reasonably could expect to earn during the period for which [TIBs] are paid." In addition, Rule 128.7(d)(3) provides that "[f]or a period a school district employee would not have earned wages, the AWW may be adjusted to zero and no minimum benefit payment may be required." While we agree that both Section 408.0446 and Rule 128.7 use the term "may," we cannot agree with the hearing officer's interpretation that the use of that word gives him the discretion not to apply the law in this case. To the extent that the provisions at issue are discretionary, they vest the discretion of whether or not to adjust AWW with the self-

insured not the Texas Workers' Compensation Commission. There is no denying that the application of Section 408.0446 and Rule 128.7 yield a harsh result in this case. However, as we noted in Appeal No. 022860-s, the plain language of those provisions "allows the school district to adjust AWW for district employees under certain circumstances, potentially to [zero], depending upon what the employee could reasonably expect to earn." There is simply no basis for us to ignore the plain language of the statute in order to avoid a harsh result. In this case, there is no dispute that although the claimant's salary is paid over 12 months in accordance with her contract, she earns her salary over the 187 days of the school year. That is, she has no reasonable expectation of earning any of her salary over the summer. And, the claimant and her attorney put on no evidence either at the initial hearing or on remand of any reasonable expectation of earnings she would have had in the summer of 2002 had she not been injured. Accordingly, we reverse the determination that the self-insured is not entitled to adjust AWW pursuant to Section 408.0446 and Rule 128.7 and render a new determination that the self-insured was permitted to adjust the claimant's AWW to zero for computing TIBs during the summer of 2002.

We reverse the hearing officer's determination that the self-insured is not entitled to adjust the claimant's AWW for computing TIBs and render a new decision that the self-insured is entitled to adjust the claimant's AWW to zero for computing TIBs during the summer of 2002, when, based upon the record before us, the claimant had no reasonable expectation of earning any wages.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**SUPERINTENDENT  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Michael B. McShane  
Appeals Panel  
Manager/Judge