APPEAL NO. 050140
FILED MARCH 14, 2005

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 December 20, 2004. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent's (claimant) average weekly wage (AWW) was $1,082.89 and that the claimant's weekly benefits, other than medical benefits, are to be paid at a maximum rate of $280.00. The claimant appealed the hearing officer's determination that his weekly benefits, other than medical benefits, are to be paid at a maximum rate of $280.00. The claimant contends that Sections 408.042 and 504.012 are not in conflict with each other. The respondent/cross-appellant (self-insured) responded, urging affirmance of the determination that the claimant's income benefits were limited to a weekly rate of $280.00. The self-insured additionally filed an appeal, arguing that the hearing officer erred in applying the fair and just AWW calculation methodology to a volunteer firefighter employed by a political subdivision that has made an election to provide increased benefits under Section 504.012(a); that the hearing officer erred in considering nonclaim employment income of a volunteer firefighter; and that the hearing officer erred in finding the AWW was $1,082.89. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The sole issue to be decided at the CCH was the claimant's AWW. It was undisputed that the claimant worked as a volunteer for the self-insured and that on _____, the claimant sustained damage or harm to the physical structure of his body while he was engaged in the exercises of his job duties with the self-insured. Although not reflected under Findings of Fact in the Decision and Order as stipulations, the hearing officer noted in the Background Information portion of the decision, and the record reflects, that the parties stipulated that in the 13 weeks before the date of injury the claimant earned $594.47 per week from (employer 1) and $88.42 per week from (employer 2). The hearing officer's finding that at the time of the compensable injury, the claimant was employed as a volunteer, as described in Section 504.012(a) of the 1989 Act was not appealed.

Section 408.042(c), effective for a claim for workers' compensation benefits based on a compensable injury that occurs on or after July 1, 2002, provides that the AWW for an employee with multiple employment is equal to the sum of the AWWs computed under Section 408.042(c)(2) and (3). Section 504.002 (the chapter providing for workers' compensation insurance coverage for employees of political subdivisions) specifically incorporates all of Chapter 408 of the 1989 Act, entitled "WORKERS' COMPENSATION BENEFITS," to the extent that the provisions are not inconsistent with Chapter 504. However, Section 504.002 specifically excepts specific provisions of

Chapter 408 concerning an action for exemplary damages in the instance of gross negligence or an intentional act or omission. The Appeals Panel has previously held that "we do not read Section 504.012(a) to be inconsistent with the provisions of Section 408.042." *See* Texas Workers' Compensation Commission Appeal No. 030735-s, decided May 12, 2003, and Texas Workers' Compensation Commission Appeal No. 040639, decided May 13, 2004. The self-insured contends that the above cited cases are no longer valid authority on this issue due to a district court ruling regarding Appeal No. 030735-s, *supra*. The district court ordered that the decision in Appeal No. 030735-s is reversed in its entirety and set aside. In Texas Workers' Compensation Commission Appeal No. 94994, decided September 9, 1994, the Appeals Panel held that the decision of a (city 1) District Court had no effect "beyond its factual context" and did not bind the Texas Workers' Compensation Commission (Commission) as a matter of stare decisis in the Commission's interpretation of the 1989 Act. Further, Rule of Appellate Procedure 47 concerning publication and citation of opinions was revised effective January 1, 2003. Present Rule 47.7 now provides opinions not designated for publication under the former rule "have no precedential value but may be cited with the notation, '(not designated for publication).'" *See* Carrillo v. State, 98 S.W.3d 789 (Tex.App.-Amarillo, 2003, pet. ref'd). District Court opinions are not reported and the same would apply.

The self-insured contends that "the correct analysis is to ignore Labor Code section 408.042, as only 504.012(a) is applicable to this case." We disagree. It is undisputed that the claimant was an employee of the self-insured. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(h) (Rule 128.1(h)) provides that for employees injured on or after July 1, 2002, who are employed by more than one employer on the date of injury and the employee submits the wage information from the other employer(s) in the form and manner prescribed by Rule 122.5, the carrier shall calculate the AWW using wages from all the employers. Section 504.002 which provides for the application of general workers' compensation laws to coverage for the employees of political subdivisions, has been amended since the effective date (September 1, 1999) of Section 504.012 which provides that the governing body of a political subdivision may elect to provide compensation payments to a person covered that are greater than the minimum benefits provided. However, no exception has been added in Section 504.002 to exclude another portion of Chapter 408, specifically the application of Section 408.042 to employees in the instance of coverage for employees of political subdivisions. If the legislature had intended for Section 408.042 not to apply to volunteers, it simply could have specifically added an exclusion for Section 408.042 in Section 504.002.

Nor do we agree with the self-insured's contention that the two sections are inconsistent and to apply Section 408.042 would render Section 504.012 meaningless. Even the self-insured acknowledges that Section 504.012(a) provides protection for the situation in which a volunteer has "no other gainful employment or only very low income amounts from other work." The claimant contends in its appeal that Section 504.012(a) appears to be intended "to provide a minimum floor of protection to the volunteers, not a maximum amount of exposure to the political subdivision."

The hearing officer found that "[w]ith respect to the employment from the claim[ed] injury, it is not possible to calculate Claimant's [AWW] in the manner described by Section 408.041(a) or (b)" and further, found it would be just, fair, and reasonable to determine that claimant's AWW from his claim employment is $400.00. For reasons set forth herein, we find Section 408.042 applicable in this case. The parties stipulated that the claimant earned $594.47 per week from employer 1 and $88.42 per week from employer 2. The employer's wage statement for the self-insured indicated that the claimant did not earn any wages and as previously stated the hearing officer's determination that at the time of his injury, the claimant was a volunteer for the self-insured was unappealed. Therefore, it is clear from the evidence that the self-insured paid the claimant $0. The hearing officer's finding that the claimant was engaged in concurrent employment as described in Section 408.042(c) of the 1989 Act, which employment paid him a weekly wage of $682.89, was not appealed.

We reverse the hearing officer's determination that the claimant has an AWW of $1,082.89 and render a new determination that the claimant has an AWW of $682.89.

We reverse Conclusion of Law No. 4 and that part of the decision that states that the claimant's weekly benefits, other than medical benefits, are to be paid at a maximum rate of $280.00, and render a new determination that the claimant should be paid temporary income benefits (TIBs) based upon an AWW of $682.89.

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

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

CONCURRING IN PART AND DISSENTING IN PART:

I concur with that portion of the majority decision that determines that the claimant's AWW is $682.89 as calculated pursuant to Section 408.042(c) and Rule 128.1(h).

I respectfully dissent from that portion of the majority decision that determines that the claimant should be paid TIBs based upon an AWW of $682.89, without providing for a maximum weekly income benefit of $280.00. The Appeals Panel previously held in Appeal No. 030735-s, that it did not read Section 504.012(a) to be inconsistent with the provisions of Section 408.042, and that decision was followed in Appeal No. 040639. The majority decision in the instant case follows those two decisions. I believe those decisions should be reconsidered.

The claimant was injured while working as a volunteer firefighter for the self-insured political subdivision. Pursuant to Section 504.012(a), as amended effective September 1, 1999, the self-insured political subdivision in this case elected to provide compensation payments to its volunteer firefighters in the weekly amount of $280.00. Section 504.002 provides in part that the provisions of Chapter 408, other than Sections 408.001(b) and (c), apply to and are included in Chapter 504 except to the extent that they are inconsistent with Chapter 504. Section 408.042(c) is not excluded from Chapter 504. However, if the claimant's TIBs are calculated based on an AWW of $682.89, his weekly TIBs rate could be approximately $478.00 under Section 408.103(a). The self-insured elected to provide a weekly compensation payment of $280.00 to its volunteer firefighters pursuant to statutory authority in Section 504.012(a). The hearing officer determined that the claimant's weekly income benefits are payable at a maximum rate of $280.00. If the self-insured political subdivision is required to pay a weekly income benefit amount in excess of $280.00, then that would be inconsistent with its statutory election under Section 504.012(a). I do not think that the provision in Section 408.042(g), that allows an insurance carrier to apply for and receive reimbursement from the subsequent injury fund for the amount of income benefits paid based on nonclaim employment, makes an income benefit payment that is in excess of the compensation payment elected by the political subdivision to be consistent with its election, because the payment itself would be in excess of that amount which it elected to pay under Section 504.012(a). I would affirm the hearing officer's determination that the claimant's weekly income benefits are payable at a maximum rate of $280.00.

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Robert W. Potts
Appeals Judge