

APPEAL NO. 070931  
FILED AUGUST 13, 2007

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 April 19, 2007. The issues were: (1) Did the respondent/cross-appellant (claimant) have disability from September 6, 2006, through December 23, 2006?; (2) What is the average weekly wage (AWW)?; and added for good cause at the appellant/cross-respondent's (carrier) request (3) What is the amount of temporary income benefits (TIBs) to which the claimant is entitled for the period of time from September 6, 2006, through December 23, 2006? The hearing officer decided that: (1) the claimant had disability for the period of time beginning September 6, 2006, through December 23, 2006; (2) the claimant's AWW is \$1,634.33; and (3) the claimant's TIBs for the period of time in issue is \$540.00 per week for the weeks encompassing September 6, 2006, through September 30, 2006, and then \$674.00 per week for the period beginning on October 1, 2006, through December 23, 2006.

The carrier appeals, contending that the hearing officer erred in his determinations on the amount of the maximum TIBs rate for the claim for the period beginning on October 1, 2006, through December 23, 2006, on disability, and on the calculation of AWW. The claimant timely responded, urging affirmance. However, in that same response, the claimant also appealed a portion of the hearing officer's determination on AWW, urging the calculation of AWW should have included the paid per diem for lodging without regard to actual expense. Insofar as the claimant's response is a cross-appeal, the claimant's cross-appeal was not timely filed and was not considered. The appeal file does not contain a response from the carrier to the claimant's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

**TIMELINESS OF CLAIMANT'S CROSS-APPEAL**

Although the claimant's response was timely as a response, it was untimely as an appeal. The deemed date of receipt of the hearing officer's decision was May 7, 2007, and a timely appeal must have been filed by Tuesday, May 29, 2007. The claimant's response/cross-appeal was sent to the Texas Department of Insurance, Division of Workers' Compensation (Division) by certified mail, return receipt requested, dated and postmarked June 6, 2007, and was received by the Division on June 11, 2007. Accordingly, insofar as the claimant's response is considered a cross-appeal, the cross-appeal, not having been filed or mailed by May 29, 2007, is untimely as a cross-appeal. See 28 TEX. ADMIN. CODE § 143.3(e), 102.5(d), and 143.3(d)(1) (Rules 143.3(e), 102.5(d), and 143.3(d)(1)). The claimant's response was timely and was considered.

## **BACKGROUND INFORMATION**

It was undisputed that the claimant was hired on April 19, 2006, to work as an electrician at \$19.50 per hour. In a prior CCH, held on September 5, 2006, the hearing officer determined that the claimant sustained a compensable injury on \_\_\_\_\_. That decision was appealed, but the decision of the hearing officer became final and is the final decision of the Appeals Panel. Section 410.204(c). It was undisputed that the claimant worked for the employer, (BCL), less than the 13 consecutive weeks immediately preceding the date of the injury. The claimant testified that his work as an industrial electrician for BCL was a heavy, physical job and that after his injury, he could not return to, nor was he released by his doctor to return to, his preinjury duties without restrictions.

The claimant testified that he was subsequently hired by (IEL) as an electrician at \$14.00 per hour, beginning September 4, 2006. The claimant further testified that while he worked for IEL, his doctor had him on light duty with restrictions. The claimant testified that he did not inform IEL of his restrictions but that the work that he performed for IEL was within those restrictions.

## **DISABILITY**

The evidence supports the hearing officer's decision that the claimant had disability from September 6, 2006, through December 23, 2006. Accordingly, we affirm the hearing officer's determination on the issue of disability.

## **AWW**

Next, we consider the assertion that the hearing officer erred in determining that the claimant's AWW is \$1,634.33. The hearing officer, in an unappealed finding, determined the claimant worked for the employer, BCL, less than the 13 consecutive weeks immediately preceding the injury. In an appealed determination the hearing officer found that a similar employee performing similar services working similar hours at a similar wage rate does not exist. That determination is supported by the evidence and is affirmed. See Sections 408.041(a) and (b); Rule 128.3(e). The hearing officer's method of calculating AWW was fair, just and reasonable and consistent with the methods established in Section 408.041 to calculate AWW by taking the claimant's gross wages earned (excluding an amount of \$385.00 a week per diem<sup>1</sup>) and dividing that amount by the three weeks that the claimant worked to calculate the amount of AWW. However, the hearing officer erred in calculating what the amount of the claimant's gross wages were for the three weeks worked. As evidenced by the Employer's Wage Statement (DWC-3) and the Employee History Inquiry, documenting the claimant's wages and hours, the record reflects that the amount of gross wages are: 1) \$1,365.00 (the first week for 60 hours); 2) \$1,628.25 (the second week for 69 hours); and 3) \$1,540.50 (the third week for 66 hours). Those earnings total \$4,533.75

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<sup>1</sup> The hearing officer determined that "[h]aving the burden of proof, [c]laimant's sparse evidence on the per diem was unpersuasive."

(contrary to the hearing officer's mathematical calculation of \$4,903.00<sup>2</sup>) and divided by 3 equals \$1,511.25, the amount of the claimant's AWW. Accordingly, we reverse the hearing officer's determination that the claimant's AWW is \$1,634.33 and render a new decision that the claimant's AWW is \$1,511.25.

### **AMOUNT OF TIBS**

We note that although the carrier is disputing the claimant's AWW and disability, the carrier also contends if the Appeals Panel affirms the determinations on those issues, the carrier is also appealing the maximum rate of TIBs for the claimed period of disability. There is no dispute that if the claimant had disability for the period at issue, he would be entitled to the maximum TIBs amount even considering post-injury earnings. Section 408.061(a) provides a weekly temporary income benefit may not exceed 100% of the state AWW under Section 408.047 rounded to the nearest whole dollar. Section 408.047(b) provides in part that the state AWW for the period beginning September 1, 2005, and ending September 30, 2006, is \$540.00. Section 408.061(g) provides that the maximum weekly income benefit in effect on the date of injury is applicable for the entire time that the benefit is payable. See *also* Appeals Panel Decision 950041, decided February 22, 1995. We affirm the hearing officer's determination that the claimant's TIBs for the period of time beginning September 6, 2006, through September 30, 2006, is \$540.00 per week. However, the hearing officer erred in his determination that the weekly benefit for the claimant increased beginning October 1, 2006, through December 23, 2006, rather than remaining at the rate of \$540.00 per week as provided by Section 408.061(g). We reverse the hearing officer's determination that the claimant's TIBs for the period of time beginning on October 1, 2006, through December 23, 2006, is \$674.00 per week and render a determination that the claimant's TIBs for the period of time beginning October 1, 2006, through December 23, 2006, is \$540.00 per week.

### **SUMMARY**

We affirm the hearing officer's determination that the claimant had disability from September 6, 2006, through December 23, 2006, and that the claimant's TIBs for the period of time beginning September 6, 2006, through September 30, 2006, is \$540.00 per week. We reverse the hearing officer's determination that the claimant's AWW is \$1,634.33 and render a new decision that the AWW is \$1,511.25. We reverse the hearing officer's determination that the claimant's TIBs for the period of time beginning on October 1, 2006, through December 23, 2006, is \$674.00 per week and render a new decision that the claimant's TIBs for the period of time beginning October 1, 2006, through December 23, 2006, is \$540.00 per week. The Appeals Panel does not have jurisdiction to review the hearing officer's determination regarding the claimant's cross-appeal because a timely cross-appeal was not filed with the Division by the claimant.

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<sup>2</sup> It appears that the hearing officer used the figures of \$1,735.00, \$1,628.00, and \$1,540.00 (which totaled \$4,903.00) which were provided in closing argument to the hearing officer by the claimant's attorney in a spread sheet and not admitted into evidence. The evidence does not support that the spread sheet figures are the claimant's actual gross wages.

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

**LEO F. MALO  
12222 MERIT DRIVE, SUITE 700  
DALLAS, TEXAS 75251.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge