

APPEAL NO. 071129
FILED AUGUST 24, 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 was held on May 16, 2007. The hearing officer decided that the respondent's (claimant) average weekly wage (AWW) is \$966.37. The appellant (carrier) appealed the AWW determination, arguing that the hearing officer erred in using the fair, just, and reasonable method and including nonpecuniary wages (health insurance premiums) in calculating AWW. Also, the carrier stated that the hearing officer improperly placed the burden of proof on the carrier in determining AWW. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

FACTUAL SUMMARY

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that she was employed as an international flight service manager and that her regular pay period averaged 70 hours every two weeks. It was undisputed that: (1) the claimant earned \$48.15 per hour; (2) the claimant worked 13 weeks immediately preceding the date of injury; and (3) the Employer's Wage Statement (DWC-3) correctly reflected the claimant's pecuniary and nonpecuniary wage information for the identified 13 weeks.

AWW

The hearing officer improperly placed the burden of proof on the carrier because the claimant had the burden of proof on AWW in this case. See Appeals Panel Decision (APD) 94734, decided July 6, 1994, citing Texas Employer's Insurance Association v. Bragg, 670 S.W.2d 712 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.). However, the hearing officer made no findings that the carrier failed to meet its burden of proof and the record reflects that the claimant provided sufficient evidence to prove the amount of the AWW. Therefore, we perceive no reversible error in the improper placement of the burden of proof on the carrier in this case. The hearing officer found that the claimant lost a significant amount of time from work during the 13 weeks immediately preceding her compensable injury due to causes beyond her control and that finding is supported by the evidence. The hearing officer did not err in applying a fair, just, and reasonable method to determine the claimant's AWW.¹ See APD 040467 decided April 22, 2004; APD 031837 decided August 28, 2003.

¹ In calculating an AWW of \$966.37, the hearing officer added the claimant's earnings during three pay periods or 6 weeks (gross wages: \$1,725.25 + \$2,688.25 + \$1,298.03 = \$5,711.53) and added the claimant's nonpecuniary wages (health insurance premiums) paid during that same period (health insurance premiums: \$28.90 + \$28.90 +

Next, the carrier argues that the hearing officer erred in calculating AWW by including health insurance premiums. Section 401.011(43) provides that “wages” includes all forms of remuneration payable for a given period to an employee for personal services, and that 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. Section 408.045 provides that the Texas Department of Insurance, Division of Workers’ Compensation may not include nonpecuniary wages in computing an employee’s AWW during a period in which the employer continues to provide the nonpecuniary wages. 28 TEX. ADMIN. CODE § 128.1(c)(2) (Rule 128.1(c)(2)) provides in part that an employee’s wage, for the purpose of calculating the AWW, shall not include any nonpecuniary wages continued by the employer after the compensable injury. Rule 126.1(2) provides that nonpecuniary wages are wages paid to an employee in a form other than money, and one of the examples is health insurance premiums. APD 060272-s decided April 6, 2006.

In evidence is a DWC-3 which reflects under “Nonpecuniary Wage Information” that the employer will continue to provide health insurance premiums. Also in evidence is an email to the employer dated October 20, 2006, which reads in part, that the claimant’s “Benefits continue.” No evidence refuted the email or the DWC-3. The hearing officer erred in including the nonpecuniary wages of health insurance premiums in the amount of \$86.70 in his calculation of the claimant’s AWW because the evidence reflects that the health insurance premiums have been continued to be paid by the employer after the compensable injury. Consequently, the AWW needs to be recalculated by excluding the nonpecuniary wages (health insurance premiums) paid in the amount of \$86.70.² Accordingly, we reverse the hearing officer’s determination that the claimant’s AWW is \$966.37 and render a new decision that the claimant’s AWW is \$951.92.

\$28.90 = \$86.70) for a total amount of \$5,798.23 (\$5,711.53 + \$86.70 = \$5,798.23). The hearing officer divided \$5,798.23 by 6 weeks for an AWW of \$966.37 ($\$5,798.23/6 = \966.37).

² In recalculating an AWW of \$951.92, the claimant’s earnings during three pay periods or 6 weeks used by the hearing officer in determining a fair, just, and reasonable AWW are added together (gross wages: \$1,725.25 + \$2,688.25 + \$1,298.03 = \$5,711.53) and then divided by 6 weeks for an AWW of \$951.92 ($\$5,711.53/6 = \951.92), which excludes the nonpecuniary wages of health insurance premiums continued to be paid by the employer after the compensable injury. We note that Rule 128.1(c)(2), provides in part, that if the employer discontinues providing nonpecuniary wages, the AWW shall be recalculated and these discontinued nonpecuniary wages shall be included.

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
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge