

APPEAL NO. 081230
FILED OCTOBER 22, 2008

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 July 15, 2008. With regard to the only issue before her, the hearing officer determined that the average weekly wage (AWW) is \$493.92.

The appellant (carrier) filed a Motion to Correct Clerical Error dated July 23, 2008, and a Conditional Request for Review if its Motion to Correct Clerical Error was not granted. The Motion to Correct Clerical Error has not been granted. The carrier, in its appeal, contends that the hearing officer erred in calculating the AWW by using "earnings for weeks **subsequent** to the date of injury of _____" (emphasis in the original). The appeal file does not contain a response from the respondent (claimant).

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he was hired on Monday, (date he was hired), and began work the next day on (date he began work). The hearing officer, in the Background Information, commented:

Claimant was injured on Friday, _____ and received his wages for that day. Claimant worked for the employer for 10 weeks and 4 days and was not therefore a 13 week employee for purposes of determining his [AWW].

Section 408.041 provides:

- (a) Except as otherwise provided by this subtitle, the [AWW] of an employee who has worked for the employer for at least the 13 consecutive weeks immediately preceding an injury is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13.
- (b) The [AWW] of an employee . . . who has worked for the employer for less than the 13 weeks immediately preceding the injury equals:
 - (1) the usual wage that the employer pays a similar employee for similar services; or

- (2) if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration.
- (c) If Subsection (a) or (b) cannot reasonably be applied . . . the [Texas Department of Insurance, Division of Workers' Compensation (Division)] may determine the employee's [AWW] by any method that the [Division] considers fair, just, and reasonable to all parties and consistent with the methods established under this section.

In this case, the hearing officer made unappealed findings of fact that the claimant had worked for the employer less than 13 consecutive weeks immediately preceding the injury and that the employer did not provide a wage statement of a similar employee.

The Employer's Wage Statement (DWC-3) reflects wages the claimant earned during pay periods beginning (date he was hired), through (11 days after date of hire). Gross wages earned during that 10-week period were \$3,831.96. The carrier contended at the CCH, a fair, just, and reasonable AWW was \$383.20, the gross wages for the 10-week period the claimant worked divided by 10 ($\$3,831.96 \div 10$).

Also in evidence is a Payroll Check History Report which shows pay checks issued to the claimant on dates beginning November 30, 2007, through and including checks issued on (1 week after date of injury) and (3 weeks after the date of injury). Both the DWC-3 and the Payroll Check History Report indicate the claimant was paid biweekly. The Payroll Check History Report indicates that the claimant received a check dated (3 weeks after the date of injury). The Payroll Check History Report shows gross wages, including checks dated (1 week after date of injury) and (3 weeks after the date of injury), totaled \$5,220.77. The hearing officer, in the Background Information, incorrectly comments that: "Payroll records reflect that Claimant earned gross wages of \$5,220.77 from (date he began work) through and including _____." The hearing officer found that a fair, just, and reasonable method of calculating the claimant's AWW is to divide his gross wages of \$5,220.77 (as shown on the Payroll Check History Report) by the number of weeks worked immediately preceding the injury (10.57) which the hearing officer determined resulted in an AWW of \$493.92 ($\$5,220.77 \div 10.57$). The carrier contends that the hearing officer's "calculation is incorrect for those dates. The Hearing Officer appears to have calculated earnings for weeks **subsequent** to the date of injury of _____ to arrive at the amount of \$5,220.77."

The hearing officer, at the CCH, asked the claimant if he had returned to work after the date of injury, to which he replied that he "worked one day." The hearing officer, at the CCH, commented on the payroll check entry listing the (3 weeks after the date of injury), check and again asked the claimant if he was working then, to which the claimant replied "they fired me." The claimant explained how he came to work "that Monday and Tuesday," told the employer he wanted to see a doctor and "when I came back they fired me." The hearing officer further commented that the payroll check of (3

weeks after the date of injury), shows overtime hours and asked the claimant whether he got “another pay check after you were fired” to which the claimant answered: “Yeah for a week and two days – no, a week and one day.” The carrier, at that time, represented that the DWC-3 in evidence represented the correct figures.

We agree that the hearing officer may use a fair, just, and reasonable method of calculating the AWW in accordance with Section 408.041(c). However, the hearing officer’s determination that the claimant’s AWW is \$493.92 is against the great weight and preponderance of the evidence because the Payroll Check History Report, which the hearing officer used to determine gross wages of \$5,220.77, indicates wages were paid after _____, which includes more weeks than the 10 weeks and 4 days the hearing officer commented that the claimant worked for the employer and used to determine the AWW. Section 408.041(c) provides that a fair, just and reasonable method of calculating AWW is to be consistent with the methods established under Section 408.041, and in this case the hearing officer’s method of calculating AWW was not consistent with the methods established under Section 408.041. See Appeals Panel Decision (APD) 030164-s, decided March 3, 2003.

We reverse the hearing officer’s determination that the AWW is \$493.92 and remand the case to the hearing officer for a determination that is supported by the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge