

APPEAL NO. 081525
FILED DECEMBER 10, 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 was held on September 9, 2008. With regard to the only issue before him, the hearing officer determined that the appellant's (claimant) average weekly wage (AWW) is \$219.35. The claimant appealed, arguing that the claimant's total earnings should have been divided by 12 rather than 13 applying a fair, just, and reasonable method of calculation. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The hearing officer found that the claimant's gross wages for the 13 weeks prior to her injury were \$2,851.50. This finding was not appealed. The claimant testified that she did not earn any wages during week 6 of the 13-week period because the employer closed for that entire week. She testified that she had not worked for the employer long enough to be paid vacation pay for the week the employer closed. The Employer's Wage Statement (DWC-3) reflects that the claimant earned no wages in week 6 of the 13-week period and "vacation" is noted for that week. In its response, the carrier does not dispute that all employees were on mandatory vacation during week 6 of the 13-week period and that the claimant was not paid for that week. No wage information was in evidence regarding the wage the employer paid a similar employee for similar services.

The hearing officer noted in the Background Information portion of his Decision that the statutory process for calculating the AWW recognized there would be weekly deviations in the gross earnings and that the 13-week period of time was sufficient to average out the high and low earning periods. Further, the hearing officer noted that in week 8 (of the 13-week period prior to the injury), the claimant worked 72 hours and that this higher gross wage week was included in the AWW.

Section 408.041(a) provides that a full-time employee's AWW shall be determined by dividing the wages from the 13 weeks preceding the compensable injury by 13. *See also* 28 TEX. ADMIN. CODE § 128.3(d) (Rule 128.3(d)). If a full-time employee did not work for the employer for the 13 weeks preceding the compensable injury, the AWW is calculated using "the usual wage that the employer pays a similar employee for similar services." Section 408.041(b)(1); Rule 128.3(e). If neither of the foregoing methods can "reasonably be applied," because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, the AWW is determined "by any method that the [Texas Department of Insurance, Division of Worker's Compensation] considers fair, just, and reasonable to all parties and

consistent with the methods established under [the 1989 Act].” Section 408.041(c); Rule 128.3(g).

The hearing officer did not indicate that the claimant’s testimony regarding the “mandatory vacation” was not credible. However, the hearing officer did not use the “fair, just, and reasonable” calculation method to determine the claimant’s AWW because the claimant worked extra hours in week 8 and earned “double her . . . weekly wage.” No evidence was presented that the employer did not close completely for the week in question. Although the claimant was employed for 13 weeks immediately prior to the compensable injury, she only earned wages for 12 of those 13 weeks. We hold that the hearing officer erred when he included the week of the employer’s closure in the calculation of the claimant’s AWW and failed to use the “fair, just, and reasonable” method to calculate the claimant’s AWW. See Appeals Panel Decision (APD) 031656, decided August 14, 2003, and APD 010476, decided April 5, 2001. In this case, the hearing officer’s decision is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust because it is undisputed that the claimant did not work or get paid for the 6th week of the 13-week period due to circumstances beyond the control of the claimant, that is the closure of the employer’s business for that week, and that week should not be included in the AWW calculation. Accordingly, we reverse the hearing officer’s determination that the claimant’s AWW is \$219.35 and render a new decision that the claimant’s AWW is \$237.63 (\$2,851.50 divided by 12).

The true corporate name of the insurance carrier is **TWIN CITY FIRE INSURANCE 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge