

APPEAL NO. 100497  
FILED JULY 1, 2010

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 March 22, 2010. With regard to the sole issue before her the hearing officer determined that the respondent's (claimant) average weekly wage (AWW) is \$592.77.

The appellant (carrier) appealed, contending that the claimant had failed to document wage payments from his concurrent employment and that the claimant's concurrent employment was of a seasonal nature and therefore pursuant to 28 TEX. ADMIN. CODE § 128.5 (Rule 128.5) the claimant's total wages received in the 12 months preceding the date of injury should be divided by 50. The appeal file does not contain a response by the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury while employed with a delivery service on \_\_\_\_\_, and that the claimant's AWW based on his wages with the delivery service is \$186.62. The evidence further establishes that during the 13-week period prior to the injury, the claimant had concurrent employment working as an independent contractor umpiring baseball games for school age children from age nine through high school. The claimant asserted that his AWW should also include income from his concurrent umpiring employment.

Section 408.042 (based on a compensable injury that occurs on or after July 1, 2007) entitled "[AWW] For Part-Time Employee or Employee with Multiple Employment" sets out how the AWW is to be calculated. Section 408.042(d) provides that the commissioner shall:

- (1) prescribe a form to collect information regarding the wages of employees with multiple employment; and
- (2) by rule, determine the manner by which the [Texas Department of Insurance, Division of Workers' Compensation] collects and distributes wage information to implement this section.

Section 408.042(e) provides:

For an employee with multiple employment, only the employee's wages that are reportable for federal income tax purposes may be considered. The employee shall document and verify wage payments subject to this section.

Rule 128.1(h) amended effective May 16, 2002, states in pertinent part:

- (h) 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 of this title (relating to Employee's Multiple Employment Wage Statement), the carrier shall calculate the AWW using the wages from all the employers in accordance with this section. The employee's AWW shall be the sum of the AWWs for each employer.

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- (2) The portion of the employee's AWW based upon employment with each "Non-Claim Employer" (as the term is defined in Rule 122.5 of this title) shall be calculated in accordance with Rule 128.3 of this title (relating to [AWW] Calculations for Full-Time Employees, and for Temporary Income Benefits for All Employees) except that the employee's wages from the Non-Claim Employer(s) shall only include those wages that are reportable for federal income tax purposes.

Rule 122.5, effective May 16, 2002, states in pertinent part:

- (b) For an injury which occurs on or after July 1, 2002, a claimant may file a Multiple Employment Wage Statement for each employer the employee was working for on the date of injury.
- (c) If a claimant who is permitted by subsection (b) of this section chooses to file a Multiple Employment Wage Statement, it is the claimant's responsibility to obtain the required wage information from the Non-Claim Employer(s), providing any necessary corrections to the wage information, and filing the information on the Multiple Employment Wage Statement with the insurance carrier and commission. The carrier is not required to make an adjustment to AWW until the employee provides a complete Multiple Employment Wage Statement as described in subsections (d) and (e) of this section. [Emphasis added.]
- (d) The Multiple Employment Wage Statement shall include:
  - (1) the employee's name, address, and social security number;
  - (2) the date of the Non-Claim Employer's hire of the employee;

- (3) the date of injury;
  - (4) the Non-Claim Employer's name, address, and federal tax identification number;
  - (5) the name and phone number of a person at the Non-Claim Employer who can be contacted to verify the wage information (unless the wage information was not provided by a person at the Non-Claim Employer-such as if the wage information came from the Texas Workforce Commission or the employee's pay stubs);
  - (6) the wage information required by subsection (e) of this section with documentation that supports the wage information being reported; and
  - (7) a certification that the wage information provided includes all wage information required by subsection (e) of this section and that the information is complete and accurate.
- (e) The wage information required to be provided in a Multiple Employment Wage Statement includes the employee's Non-Claim Employer wages, as defined in Rule 128.1 of this title (relating to [AWW]: General Provisions), earned during the 13 weeks immediately preceding the date of injury and the number of hours the employee worked to earn the wages being reported. The wages are limited to those reportable for federal income tax purposes.

The claimant testified that he gets his assignments from "schedulers" but that he does not know who the schedulers work for. In evidence are statements from three schedulers. Scheduler (C) states the "season" begins in the middle of February and ends in the middle of November and that the claimant works as much as he can "and has averaged working [8] to 10 games per week at a rate of \$45.00 per game." Scheduler (S) states fees for umpires vary from \$35.00 to \$45.00 a game and that the claimant worked an average of twice a month from the beginning of 2009 through the beginning of May 2009 (claimant's date of injury was \_\_\_\_\_). Scheduler (F) states that during 2009 from the end of February to the end of April the claimant umpired 10 games at \$55.00 a game. The claimant testified that most, but not all, payments are made in cash.

In evidence is an Internal Revenue Service (IRS) Form 1099 for the year 2009 listing the payer's name as an incorporated little league, the payer's address, telephone number and federal identification number as well as the claimant's social security number and address. The amount paid, as reflected in the IRS Form 1099, in 2009 was

\$875.00. There is no evidence how much, if any, of that amount was paid in the 13 weeks prior to the injury. Although the claimant submitted a list of other leagues, schools and teams that he umpired for, the claimant does not provide IRS Forms 1099 or documentation from those leagues, schools and teams.

The claimant filed an Employee's Multiple Employment Wage Statement (DWC-003ME) which included estimated earnings for the 13 weeks prior to the date of injury. The claimant multiplies the hours worked (games umpired) by an estimated "\$40 a game." When that figure is divided by 13 the result is an estimated AWW of \$406.15. This form does not have any non-claim employer's information. Also in evidence, as a claimant exhibit, is a worksheet which uses the scheduler's estimates to arrive at an estimated AWW of \$577.90 for umpiring. The claimant, at the CCH, testified that he estimated his earnings from umpiring during the 13 weeks prior to the injury as being \$600.00 a week. It is undisputed that the claimant did not report his umpiring income to the IRS (except for the IRS Form 1099 showing \$875.00 income from an incorporated little league). The claimant did not submit any other tax information or documentation from the non-claim employers for the 13 weeks prior to the injury.

The claimant, at the CCH, argued that the burden of proof was misplaced and that the carrier, who had the necessary resources, could have obtained the information from the various leagues, schools and teams for which the claimant umpired. That contention is directly contrary to Section 408.021(e) and Rule 122.5(a). Both the statute and rule establish that it is the claimant's responsibility to obtain the required wage information from the non-claim employer(s). Rule 122.5 goes on to specify what information is to be provided. While the claimant provided the names of leagues, schools and teams that he worked for the only real documentation provided, other than estimates and averages from the schedulers, is the IRS Form 1099 from the incorporated little league. The claimant provided no other information from the leagues, schools or teams he umpired for during the 13 weeks prior to his injury.

The hearing officer, in her Background Information, cites Section 408.042(e) and comments that it "appears that under Section 408.042(e), the [c]laimant's wages must be 'reportable' to the IRS; not necessarily reported." The hearing officer also comments that "it is troubling that the [c]laimant, especially with legal representation, has not provided any documentation of his umpire earnings in question." The hearing officer then goes on to comment that the record "persuasively shows that some amount of income from umpiring was received by the [c]laimant during the period in question." The hearing officer then determined the AWW is \$592.77 (\$186.62 from the claim employer and \$406.15 from the non-claim employer(s)). We hold that the claimant has failed to establish the wages he earned umpiring necessary to establish his AWW for his multiple employments.

While the carrier, in opening argument at the CCH, comments that the claimant's work is seasonal, seasonal employment was not addressed by the hearing officer as a specific issue and was not listed as an issue to be decided at the CCH. Both parties agreed on the disputed issue to be heard at the CCH. Rule 128.1(g) provides, in part,

that additional adjustments to the AWW may be made in specific circumstances for seasonal employees. Rule 128.5(a) defines a seasonal employee as an employee who as a regular course of conduct engages in seasonal or cyclical employment which may or may not be agricultural in nature. However, even if the non-claim employment were to qualify as seasonal employment, the claimant failed to meet his burden to show entitlement to an increase in his AWW. Rule 128.5(c) provides that evidence of earnings shall be submitted at the time an adjustment is requested and that the evidence should include proof of the employee's earnings in corresponding time periods of previous years. The Appeals Panel has previously held that the need to produce historical wage information on which a finding can be based on what the worker "reasonably could have expected" to earn, along with the use of the word "regular," indicates that the worker must have a demonstrated historical pattern or practice of engaging in seasonal and cyclical work. See Appeals Panel Decision (APD) 030164-s, decided March 3, 2003. The claimant, in this case, has provided only one IRS Form 1099 for the year 2009. The claimant has failed to produce historical wage information beyond the guesses, estimates and averages from the schedulers.

The claimant's evidence does not comply with the statutory requirements to document and verify wage payments subject to Section 408.042 and Rule 122.5. The requirements of Rule 122.5(d) and (e) as to the non-claim employer have not been met (with the exception of the one IRS Form 1099). There is no provision in Section 408.042 or Rules 128.1(h) and 122.5 to accept estimates, guesses and averages. See APD 052864-s, decided February 21, 2006. Accordingly, we reverse the hearing officer's determination that the claimant's AWW is \$592.77 and render a new decision that the claimant's AWW is \$186.62.

The true corporate name of the insurance carrier is **LM INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701.**

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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