

APPEAL NO. 100675
FILED AUGUST 3, 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 April 28, 2010. The hearing officer resolved the disputed issues by deciding that the respondent's (claimant) average weekly wage (AWW) is \$1,124.16.

The appellant (carrier) appealed, disputing the hearing officer's determination of the claimant's AWW. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The sole issue to be decided at the CCH was the claimant's AWW. It was undisputed that the claimant worked as a volunteer for the claim employer and that on _____, the claimant sustained a compensable injury while she was engaged in the exercise of her job duties as a volunteer for (claim employer). The evidence reflected that the claim employer paid the claimant \$0.00. The record reflects that the claimant had concurrent employment with two other non-claim employers during the 13 weeks preceding the date of her injury or for some portion of the 13 weeks preceding the date of her injury. In evidence were Employer's Wage Statements (DWC-3) from the two other non-claim employers that the claimant worked for during all or a portion of the 13 weeks preceding the date of her injury. The DWC-3 for the (employer 1) reflects that the claimant worked 5 hours per week for \$20.00/hour in the 12 weeks prior to the date of injury and worked 10 hours in the 13th week prior to the date of injury. The claimant testified that she began working for (employer 2) on October 1, 2004, a date within 7 weeks from the date of injury.

Section 504.012(a) provides that a political subdivision may cover volunteer fire fighters, police officers, emergency medical personnel, and other volunteers that are specifically named. A person covered under this subsection is entitled to full medical benefits and the minimum compensation payments under the law. Section 408.042(c), effective for a claim for workers' compensation benefits based on a compensable injury that occurs on or after July 1, 2002, provides that the AWW for an employee with multiple employment is equal to the sum of the AWWs computed under Sections 408.042(c)(2) and (3). Section 408.042(f) provides that the commissioner by rule may define methods to determine a fair and just AWW consistent with this section. 28 TEX. ADMIN. CODE § 128.1(h)(2) (Rule 128.1(h)(2)) provides that the portion of the employee's AWW based upon employment with each "Non-Claim Employer" shall be calculated in accordance with Rule 128.3 of this title 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 128.3(e) provides that if an employee has worked for less than 13 weeks prior to the date of injury, the wages used for the AWW

calculation are those paid by the employee to a similar employee who performs similar services, but who earned wages for at least 13 weeks. If there is no similar employee at the employer's business, the calculation is based on wages paid to a similar employee who performed similar services in the same vicinity, for at least 13 weeks. Rule 128.3(g) provides that if the methods set forth in this rule cannot be applied reasonably due to the irregularity of the employment or, if the employee has lost time from work, without remuneration, during the said 13-week period due to illness, weather, or other cause beyond the control of the employee, the commission may determine the employee's AWW by any method that it considers fair, just, and reasonable to all parties and consistent with the methods established under this section. The Appeals Panel has previously held that Section 408.042 does apply for volunteers and that multiple employment wages can be considered in determining the AWW of a volunteer claimant. See Appeals Panel Decision (APD) 050140, decided March 14, 2005.

In Finding of Fact No. 3, the hearing officer found that the claimant worked for the claim employer less than the 13 consecutive weeks immediately preceding the injury. The evidence does not support this finding. The claimant testified that she had volunteered for the claim employer for 13 years. The evidence further reflected that the claimant had worked for a non-claim employer, employer 2, for less than 13 weeks prior to the date of injury.

In her Background Information, the hearing officer stated "[t]he payroll information that is in evidence indicates that the claimant earned \$963.57 with [employer 2], \$100.00 with [employer 1] and \$81.00 as received when injured for [temporary income benefits]. Therefore, the [AWW] is \$1,124.16." The hearing officer stated that she used a fair, just, and reasonable method to calculate the AWW. The claimant did not work for a full 13 weeks prior to the date of injury for employer 2, a non-claim employer, and no evidence was presented regarding the wages of a same or similar employee for employer 2, a non-claim employer.

It was error for the hearing officer to include \$81.00 in the calculation of the claimant's AWW. The \$81.00 is not wages paid to the claimant from the claim employer. See APD 050140, *supra*. The evidence reflected that the claimant received \$0.00 from her claim employer. Additionally, the evidence reflects that for the 13-week period prior to the date of injury, the claimant earned \$1,400.00 by employer 1 (a non-claim employer). We note that \$1,400.00 divided by 13 weeks would result in \$107.69 and not \$100.00, the amount used by the hearing officer in her calculation of the claimant's AWW. Further, the evidence reflects that the claimant earned \$6,745.00 for the 13-week period prior to the date of injury from employer 2 (a non-claim employer). We note however that the evidence reflects the claimant was actually only paid by employer 2, \$4,560.00 for the 13-week period prior to the date of injury. The hearing officer failed to make findings upon the AWW of employer 1 and employer 2, the non-claim employers. The figures used in the hearing officer's discussion to calculate the claimant's AWW do not add up to the amount of the AWW determined by the hearing officer (\$1,124.16).

We reverse the hearing officer's determination that the claimant's AWW is \$1,124.16. We remand this case to the hearing officer to make specific findings regarding the AWW for the claim employer and for each non-claim employer (employer 1 and employer 2) and then determine the claimant's AWW.

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 Texas Department of Insurance, Division of Workers' Compensation, 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RON O. WRIGHT, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge