

APPEAL NO. 100866  
FILED SEPTEMBER 7, 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 was held on June 3, 2010. The issues before the hearing officer to be decided were:

- (1) What is the average weekly wage (AWW)?
- (2) Did the respondent (claimant) have disability from November 7, 2009, through March 29, 2010, resulting from an injury sustained on \_\_\_\_\_?
- (3) Is the appellant (carrier) entitled to reduce and/or suspend the claimant's impairment income benefits (IIBs) to recoup previous overpayment of temporary income benefits (TIBs), and if so, in what amount?

The hearing officer determined that:

- (1) The claimant's AWW is \$1,762.64;
- (2) The claimant did not have disability from November 7, 2009, through March 29, 2010, resulting from an injury sustained on \_\_\_\_\_; and
- (3) The carrier is entitled to suspend the claimant's IIBs to recoup its previous overpayment of TIBs in the amount of \$10,352.69.

The carrier appealed the hearing officer's AWW determination, contending that the hearing officer erred in her calculation of AWW based upon multiple employment. The appeal file does not contain a response by the claimant. The hearing officer's disability determination was not appealed and has become final pursuant to Section 410.169. The hearing officer's determination that the carrier is entitled to suspend the claimant's IIBs to recoup its previous overpayment of TIBs in the amount of \$10,352.69 was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, while at work for the claim employer.

## AWW

In the Background Information section of her decision, the hearing officer stated that:

The [c]laimant proved that her [AWW] is \$1,762.64 based on documentary evidence showing she worked for two employers as a nurse for at least [13] weeks preceding \_\_\_\_\_, the date she was injured while in the course and scope of employment for [the claim employer]. The [c]laimant's wages for [the claim employer] totaled \$10,681.42 and for the [non-claim employer] totaled \$12,232.87.

The claimant asserted that her AWW should include income from her concurrent employment with the non-claim employer and the hearing officer calculated the claimant's AWW based upon adding together the wages for the claim and non-claim employers. The hearing officer erred in her calculation of AWW as a matter of law. The claimant failed to comply with Section 408.042(d) and 28 TEX. ADMIN. CODE § 128.1(h) (Rule 128.1(h)) amended effective May 16, 2002, and Rule 122.5, effective May 16, 2002.

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 (Division)] collects and distributes wage information to implement 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 [TIBs] 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 [Division]. 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.
- (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.

There is no Multiple Employment Wage Statement filed by the claimant in evidence. The sole documentary evidence submitted by the claimant are copies of her check stubs from the non-claim employer, which do not contain the required information under Rule 122.5(d)(2), (3), (4), and (7). 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 hearing officer should have calculated the AWW based solely on the wages of the claim employer. See Appeals Panel Decision 100497, decided July 1, 2010.

In evidence is the wage statement for the claim employer showing that the claimant earned \$10,681.42 in wages for the 13 weeks preceding the date of injury. \$10,681.42 divided by 13 results is \$821.65. Accordingly, we reverse the hearing officer's determination that the claimant's AWW is \$1,762.64 and we render a new decision that the claimant's AWW is \$821.65.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** 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 78701-3232.**

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Cynthia A. Brown  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge