APPEAL NO. 110018
FILED MARCH 4, 2011

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 December 2, 2010. The issues before the hearing officer were:

1. Does the compensable injury of _____, extend to the diagnosis of right shoulder impingement syndrome?

2. Did the appellant (claimant) have disability from the compensable injury of _____, from January 30, 2008, to the present?

3. What is the average weekly wage (AWW)?

The hearing officer determined that: (1) the compensable injury of _____, does not extend to right shoulder impingement syndrome; (2) the claimant sustained disability beginning January 30, 2008, and continuing through the date of the CCH (December 2, 2010); and (3) the AWW is "the minimum [AWW] applicable to the injury at the time it occurred."

The claimant appealed the hearing officer's extent of injury and AWW determinations. The respondent (carrier) responded, urging affirmance.

The hearing officer's disability determination has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant suffered a compensable injury on _____. We note that a review of the record shows that the parties also stipulated that (Dr. K) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine the extent of the claimant's compensable injury although the hearing officer failed to include the stipulation in his decision and order. The claimant testified that he slipped and fell on a roof at work, injuring his left knee and right shoulder.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of _____, does not extend to right shoulder impingement syndrome is supported by sufficient evidence and is affirmed.

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." Sections 408.041(b)(1) and 408.041(b)(2); 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 Division 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).

In the Background Information section of the decision and order, the hearing officer stated:

> The [c]laimant argues that he was told that the job he was placed on had the potential for continued roofing work, and AWW should not be based on his only 9 hours work at basically minimum wage. He also testified that the work he was doing as a roofer would pay $9.50 or more per hour and, since he worked on the roof that day, his future expected earning[s] would be a $9.50 per hour or more. There is no other evidence to support these contentions. It amounts only to a supposition or potential, without any support in fact. The job to which the [c]laimant was referred was a temporary position with only the day of work involved. He had no permanent position and no evidence of a realistic potential for work beyond the day of injury. A fair, just, and reasonable method of calculating the [c]laimant's AWW is to take his one day of earnings as his only expected earnings.

We agree that under the facts of this case, the calculation of AWW is not based on the claimant's contentions that he could potentially earn $9.50 per hour or more.

The claimant testified that he was hired as a laborer. The client estimated that his wage was $5.65 per hour. The claimant testified that he had not worked for the employer the preceding three months before the date of his work injury. The claimant further testified that he was injured on his second day of work. There is in evidence an Employer's First Report of Injury or Illness (DWC-1) reflecting that the claimant was paid $48.83 for 9 hours of work. Also in evidence is a Labor Ready Accident/Injury Report reflecting that the claimant was paid $5.85 per hour. As previously mentioned, the claimant was injured at work on _____. In evidence is an Employer's Wage Statement (DWC-3) providing that for the period of January 26 through February 1, 2008 (week 1), the claimant worked 9 hours for a total of $52.65 gross wages earned. We agree with the hearing officer's analysis that the claimant worked for the employer

less than the 13 consecutive weeks immediately preceding the injury. There is no evidence of the usual and customary wage paid by the employer to a similar employee for similar services. There is no evidence of the usual wage in the vicinity of the claimant's employment for the same or similar services.

We agree with the hearing officer's analysis that the AWW is determined by any method that the Division considers fair, just, and reasonable to all parties and consistent with the methods established under Section 408.041(c) and Rule 128.3(g). However, the hearing officer erred in failing to make findings of fact, conclusions of law, and a decision and order that explained how he calculated the claimant's AWW by a method fair, just, and reasonable to the parties and that specified an amount for the AWW. Accordingly, we reverse the hearing officer's determination that the AWW is the minimum AWW applicable to the injury at the time it occurred as an incomplete decision and remand the AWW issue to the hearing officer. On remand, the hearing officer is to make findings of fact, conclusions of law, and a decision and order on the AWW issue in dispute consistent with the evidence and this decision.

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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** 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.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Carisa Space-Beam
Appeals Judge