

APPEAL NO. 110878  
FILED SEPTEMBER 9, 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 June 7, 2011. The hearing officer resolved the disputed issues by deciding that as of the date of the CCH, the respondent/cross-appellant (claimant) has sustained disability since March 23, 2011, only, and that the claimant's average weekly wage (AWW) is \$2,000.00.

The appellant/cross-respondent (carrier) appealed, disputing the hearing officer's determinations of the claimant's AWW and that portion of the hearing officer's determination that the claimant had disability from March 23, 2011, through the date of the CCH. The claimant responded, urging affirmance of the AWW and that portion of the disability determination that was favorable to him. The claimant cross-appealed disputing that portion of the hearing officer's determination that the claimant did not sustain disability from March 4 through March 22, 2011. The appeal file does not contain a response from the carrier to the claimant's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

It was undisputed that the claimant sustained a compensable injury on (date of injury). The claimant testified that he injured his low back and head when he slipped and fell.

The hearing officer's determination that the claimant sustained disability from March 23, 2011, through the date of the CCH only is supported by sufficient evidence and is affirmed.

The claimant testified that he worked for a non-claim employer in addition to the claim employer and requested that the wages from the non-claim employer be included in his AWW. The hearing officer stated in her discussion that the documentation provided substantiated the claimant's position that he earned slightly over \$1,000.00 during the weeks he worked for the employer, and earned an additional \$1,000.00 per week from his non-claim employment.

Section 408.042 (based on a compensable injury that occurs on or after July 1, 2002) 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 (Division)] 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.

28 TEX. ADMIN. CODE § 128.1(h) (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.

## [omission]

- (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 [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 his 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 of Section 408.042 and Rule 122.5 to document and verify wage payments. Therefore, the hearing officer should have calculated the AWW based solely on the wages of the claim employer. See Appeals Panel Decision (APD) 100497, decided July 1, 2010, and APD 100866, decided September 7, 2010.

In evidence is the wage statement for the claim employer showing that the claimant earned \$3,271.14 in wages for the 3 weeks preceding the date of injury, the amount of time the claimant had worked for the employer. There was no evidence of a same or similar employee for similar services in full-time employment. \$3,271.14 divided by 3 equals \$1,090.38. Accordingly, we reverse the hearing officer's determination that the claimant's AWW is \$2,000.00 and we render a new decision that the claimant's AWW is \$1,090.38.

### **SUMMARY**

We affirm the hearing officer's determination that the claimant sustained disability from March 23, 2011, through the date of the CCH only.

We reverse the hearing officer's determination that the claimant's AWW is \$2,000.00 and we render a new decision that the claimant's AWW is \$1,090.38.

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

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

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge