APPEAL NO. 122175
FILED DECEMBER 20, 2012

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 September 6, 2012, with the record closing on September 13, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) average weekly wage (AWW) is $700.51. The appellant (carrier) appeals the hearing officer's decision and order, contending that:

> By consent, the parties also tried the issue of whether the carrier, after it receives the Employee's Multiple Employment Wage Statement [DWC-3ME] must *retroactively* adjust the [c]laimant's [AWW] and apply it to benefits that have already been paid. In other words, must the [c]arrier pay additional benefits pursuant to the [c]laimant's new [AWW] even though all of those benefits have been paid *prior* to the [c]arrier receiving the [c]laimant's [DWC-3ME]? The [h]earing [o]fficer's [d]ecision and [o]rder in this case did not make a 'determination of whether benefits are due' and 'an award of benefits due' under [S]ection 410.168(a)(2) and (3) of the Labor Code because the mere determination of the [c]laimant's [AWW] by the [h]earing [o]fficer does not address whether the [c]arrier must pay retroactively apply[ing] the [c]laimant's new [AWW] to benefits already paid.

The claimant responded, urging affirmance, contending that "[l]ooking at [28 TEX. ADMIN. CODE § 122.5 (Rule 122.5)] and its preamble, it is clear that once the [c]arrier receives a [DWC-3ME], it must then retroactively re-calculate benefits that have already been paid. Contrary to the [c]arrier's arguments, there is no time limit to report the multiple employment wages."

DECISION

Reversed and remanded.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury. It is undisputed that on the date of injury, the claimant was employed by two employers, [claim employer] and [non-claim employer]. The parties stipulated that the claimant's AWW for the claim employer is $175.51. In an unappealed finding, the hearing officer determined that the AWW for the non-claim employer is $525.00. It is undisputed that $175.51 added to $525.00 results in $700.51, which is the amount that the hearing officer determined to be the claimant's AWW. It is

undisputed that the claimant was paid temporary income benefits and impairment income benefits based only on the wages received from the claim employer and that all of these income benefits were paid by March 19, 2009. The records indicate subsequent to that date, on May 8, 2012, the carrier received from the claimant a DWC-3ME, documenting the wages from the non-claim employer.

Rule 128.1(h) 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 [DWC-3ME]), 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.

* * * *

(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 [DWC-3ME] 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 [DWC-3ME], 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 [DWC-3ME] with the insurance carrier and [the Texas Department of Insurance, Division of Workers' Compensation (Division)]. The carrier is not required to make an adjustment to AWW until the employee provides a complete [DWC-3ME] as described in subsections (d) and (e) of this section.

The only issue certified out of the benefit review conference (BRC) held on July 12, 2012, was the claimant's AWW. However, the record indicates that the parties were not litigating the math, the amount that would result from adding the calculated AWW of the claim employer with the calculated AWW of the non-claim employer.

Section 410.151(b) and Rule 142.7 essentially provide that an issue not considered at a BRC may only be added by consent of the parties or upon a showing of good cause. Consent may be inferred if the parties actually litigated an issue not otherwise identified. *See* Appeals Panel Decision (APD) 091047, decided August 20, 2009. The record in this case establishes that the parties litigated whether the carrier, after it receives the claimant's DWC-3ME, must retroactively adjust the claimant's AWW and apply it to benefits that have already been paid pursuant to Rules 122.5 and 128.1.

We reverse the hearing officer's determination that the claimant's AWW is $700.51 and remand the issue of AWW to the hearing officer. On remand, the hearing officer is to add a second issue of "whether the carrier, after it receives the claimant's DWC-3ME must retroactively adjust the claimant's AWW and apply it to benefits that have already been paid pursuant to Rules 122.5 and 128.1?" No additional evidence is to be presented by the parties. The hearing officer is to make a determination on the second issue and then make a determination on the claimant's AWW. Both determinations should be supported by the evidence and consistent with 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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

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Margaret L. Turner
Appeals Judge