

APPEAL NO. 130643  
FILED APRIL 26, 2013

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 January 22, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the only issue before her, the hearing officer determined that the respondent's (claimant) average weekly wage (AWW) is \$856.00.

The appellant (carrier) appeals, contending that the hearing officer's determination is not supported by the evidence and that the hearing officer's mathematical calculation demands reversal. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The claimant testified that he was hired by the claim employer as a foreman to do fiberoptics, data, and various types of cabling and security, if needed. The claimant testified the employer agreed to pay him the same hourly rate that he had received from his previous employer, which was \$20.41 an hour (not the \$21.40 an hour recited by the hearing officer). The claimant testified that he was hired on Friday, June 3, 2011, and the employer had requested a completed application and copy of his last paycheck stub from his prior employer as proof of his hourly rate. The claimant submitted the wage information to the claim employer via e-mail on June 3, 2011. The claimant reported to work on [date of injury], and was injured the same date. The parties stipulated that the claimant sustained a compensable injury on [date of injury].

In evidence is an e-mail dated July 23, 2012, from the carrier's adjuster, which states that the "employer advised there are no same or similar employees" and that cable technicians are paid between \$11.00 to \$13.00 per hour and work an average of 25 to 30 hours per week. The carrier argues the AWW should be \$390.00 (\$13.00 an hour X 30 hours per week). As previously noted, the claimant testified he was hired as a foreman, not a cable technician.

The hearing officer, in the Background Information commented that "[the claimant's] testimony was credible, persuasive, and consistent with the limited documentary evidence that was available on this claim. Therefore [the claimant's] [AWW] will be calculated based on his testimony and using the fair, just, and reasonable method."

Section 408.041 provides how the AWW is to be calculated. In that the claimant had not been employed for the 13 consecutive weeks prior to his injury and there was no evidence of a same or similar employee, the hearing officer used the method provided for in Section 408.041(c) of a fair, just, and reasonable method in calculating the claimant's AWW.

The hearing officer in the Background Information and Finding of Fact No. 4 calculated the claimant's AWW by multiplying the claimant's "hourly wage of \$21.40 per hour by the [40] hours he expected to work each week." There is no evidence that the claimant's hourly wage was \$21.40 an hour. The claimant's testimony and "limited documentary evidence" was that the claimant expected to earn \$20.41 an hour for a 40 hour work week. The AWW based on the evidence is \$816.40 ( $\$20.41 \times 40$  hours per week), rather than the \$856.00 as found by the hearing officer. The hearing officer's determination that the claimant's AWW is \$856.00 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Accordingly, we reverse the hearing officer's Finding of Fact No. 4, Conclusion of Law No. 3 and the Decision portion of the hearing officer's decision and order and render a new decision that the claimant's AWW is calculated by multiplying the claimant's hourly wage of \$20.41 an hour by 40 hours and that the AWW is \$816.40.

The true corporate name of the insurance carrier is **HARTFORD CASUALTY 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 78701-3218.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge