

APPEAL NO. 142224
FILED DECEMBER 17, 2014

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 3, 2014, in Tyler, 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 \$1,107.45. The appellant (carrier) appeals the hearing officer's determination of AWW, contending that the hearing officer erred in including per diem wages in the AWW and further erred in calculating the wages. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

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 Texas Department of Insurance, Division of Workers' Compensation 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).

The parties stipulated that the claimant sustained a compensable injury on [Date of Injury]. The claimant testified that he worked as a truck driver transporting mail from Texarkana, Texas, to Shreveport, Louisiana. In evidence are pay check stubs for the claimant, who was paid twice a month, for the 13-week period of October 1 through December 31, 2013. Additionally, there is a corresponding sheet notating the type and number of hours worked for each pay period. The claimant's gross pay is comprised of several different categories. He receives hourly wages based on how many regular and holiday hours he worked at a rate of \$18.99 an hour. He receives an additional \$150.00 per pay period which is designated supervisor pay. He receives \$25.00 per pay period as a phone reimbursement. He receives a \$59.00 per diem for meals and incidentals

each day that he drives a route that requires an extensive lay over, which as explained below, is included in the hourly wage. He additionally receives a monetary allowance of \$125.00, which is identified as a per diem lay over.

It was undisputed that the \$150.00 supervisor pay should be included in the claimant's AWW. It was further undisputed that the \$25.00 phone reimbursement should not be included since it was a reimbursement for the claimant's expense of maintaining a cell phone as required. The conflict, therefore, primarily pertained to whether the \$59.00 per diem and \$125.00 monetary allowance should be included in the calculation of the claimant's AWW. The carrier argued that these payments were made in order to reimburse truck drivers for any expenses incurred during their time away from home for meals and incidentals and lodging, respectively. As such, they should be considered reimbursements as under Rule 128.1(c)(1) and not included in the AWW. The claimant argued that these payments were not reimbursements but monetary allowances which are defined as part of pecuniary wages in Rule 126.1(3)(D), and therefore, should be included in the calculation of his AWW.

The hearing officer states in the Discussion section of the decision that “[b]ased on the nature of the formulation of the per diem in this case, and the basis on which it was paid, the ‘per diem’ paid to the claimant was more of a monetary allowance, and is therefore wages, regardless of how that payment is denominated for tax purposes by the employer. The same is true for the item labeled ‘per diem lay over’/‘reimbursements.’” In Finding of Fact No. 3, the hearing officer found that “[t]he amounts listed in the claimant’s pay as ‘per diem’ and ‘reimbursements’ are monetary allowances and not payments to reimburse for actual expenses incurred, and are therefore part of the claimant’s wages.” This finding of fact is supported by sufficient evidence and is affirmed.

Regarding the calculation of the claimant's AWW, the hearing officer explained his method in the Discussion section of his decision:

[T]he sheet for each pay period which showed the hours worked and other amounts paid was used to calculate gross hourly pay. For each pay period, the gross hourly wages was added to the \$150.00 supervisor pay, the amount listed on the pay stub as “per diem,” and the “reimbursements” amount from the check stub. That total figure was divided by 13, the number of weeks in the pay periods used, to obtain an AWW of \$1,107.45.

However, the evidence indicates that using this method results in an inaccurate calculation of the claimant's AWW. Using the first pay period (October 1 through October 15, 2013) figures, the hearing officer calculated the gross hourly wages by using the hours worked on the corresponding sheet (74.45 hours) and multiplying by the

claimant's hourly pay rate of \$18.99, which is \$1,413.80. He then added the supervisor pay (\$150.00), the per diem amount for meals and incidentals on the pay check stub (\$590.00), and the monetary allowance on the pay check stub (\$160.05). This results in \$2,313.85 for the pay period. However, the claimant's total amount paid for this pay period, including the \$25.00 phone reimbursement, was \$1,748.85, as indicated on the pay check stub as "gross pay this check." The hearing officer's calculation is clearly not representative of what the claimant was actually paid, because the hearing officer included the \$59.00 per diem amount for meals and incidentals twice in his calculation.

The carrier presented the testimony of (Mr. M), the Chief Financial Officer of Postal Fleet Services, the client company the claimant worked for. Mr. M explained that the \$59.00 per diem amount in the pay check stub is not an additional payment made to the claimant on top of his hourly wage, but rather an amount carved out of his hourly wage salary as a tax exemption for federal income tax purposes. This explanation is further reflected in the Internal Revenue Service documents that were submitted as evidence by the carrier. The documents describe a per diem as an allowance for meals and incidental expenses for travel away from home in lieu of paying actual travel expenses. The special rate for the transportation industry is \$59.00 a day. That amount is exempt from the withholding and payment of employment taxes.

Therefore, in calculating the claimant's AWW, the \$59.00 per diem amount is already included in the hourly wage calculation for the pay period and should not be added to it again. With this understanding and using the first pay period (October 1 through October 15, 2013) figures, the gross hourly wages are again calculated by using the hours worked on the corresponding sheet (74.45 hours) and multiplying the claimant's hourly pay rate of \$18.99, which is \$1,413.80. As this figure already includes the per diem amount on the pay check stub, the only amounts added to it would be the supervisor pay (\$150.00) and the monetary allowance (\$125.00). In the pay check stub for the first pay period, the monetary allowance is shown as being \$160.05 instead of \$125.00 because there was a \$35.05 pay adjustment made for wages the claimant earned in a prior pay period. As the \$35.05 was not earned during the 13-week period under consideration for calculating the AWW, it will not be included. Therefore, adding the above amounts results in \$1,688.80 for the first pay period. Using this methodology for all the pay periods from October 1 through December 31, 2013, results in the following figures:

Pay Period	Hours worked and holiday hours	Hourly pay rate	Gross hourly wages (including the \$59 per diem)	Supervisor pay (\$150)	Monetary allowance (\$125)	Total
10/1/2013-10/15/2013	74.45	\$18.99	\$1,413.80	\$150.00	\$125.00	\$1,688.80
10/16/2013-10/31/2013	71.33	\$18.99	\$1,354.56	\$150.00	\$125.00	\$1,629.56
11/1/2013-11/15/2013	64.81	\$18.99	\$1,230.74	\$150.00	\$125.00	\$1,505.74
11/16/2013-11/30/2013	86.35	\$18.99	\$1,639.79	\$150.00	\$125.00	\$1,914.79
12/1/2013-12/15/2013	96.08	\$18.99	\$1,824.56	\$150.00	\$125.00	\$2,099.56
12/16/2013-12/31/2013	93.06	\$18.99	\$1,767.21	\$150.00	\$125.00	\$2,042.21
					Total:	\$10,880.66

The total of the above 13-week pay period is then divided by 13 which results in an AWW of \$836.97. As the hearing officer's determination that the claimant's AWW is \$1,107.45 resulted by adding the \$59.00 per diem amounts twice, it is inaccurate. Therefore, we reverse the hearing officer's determination that the claimant's AWW is \$1,107.45, and we render a new decision that the claimant's AWW is \$836.97.

The true corporate name of the insurance carrier is **NATIONAL INTERSTATE 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.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge