

APPEAL NO. 042756-s
FILED DECEMBER 16, 2004

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 September 29, 2004. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) average weekly wage (AWW) from September 1, 2002, through January 31, 2003, for the purposes of computing temporary income benefits (TIBs) is \$694.40, and that the claimant's AWW from February 1, 2003, through April 8, 2004, for the purposes of computing TIBs is \$761.71. The appellant (self-insured) appealed, disputing the hearing officer's determination of the AWW for the time period of February 1, 2003, through April 8, 2004. The self-insured contends that the AWW is \$694.40 from September 1, 2002, through April 8, 2004. The claimant responded. The hearing officer's determination that the claimant's AWW from September 1, 2002, through January 31, 2003, for the purposes of computing TIBs is \$694.40 was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The sole issue to be decided at the CCH was the AWW for the purposes of computing TIBs between September 1, 2002, and April 8, 2004. The hearing officer determined that from September 1, 2002, through January 31, 2003, the claimant's AWW for the purposes of computing TIBs is \$694.40. The self-insured did not dispute this finding on appeal. It was undisputed that the claimant was a school district employee.

The claimant testified that while he was employed with the school district, the district paid a portion of his health benefits. The evidence reflects that effective February 1, 2003, the school district ceased paying for the claimant's medical and dental insurance. The self-insured contends that it was error for the hearing officer to include the amount paid by the school district for the claimant's health care premiums in the claimant's AWW for purposes of computing TIBs when the school district discontinued such payments from February 1, 2003, through April 8, 2004. We agree.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(c)(2) (Rule 128.1(c)(2)) provides that an employee's wage, for the purpose of calculating the AWW, shall not include any nonpecuniary wages continued by the employer after the compensable injury. Rule 128.1(c)(2) further provides that if the employer discontinues providing nonpecuniary wages, the AWW shall be recalculated and these discontinued nonpecuniary wages shall be included. However, it specifically provides that Rule 128.7 is an exception to this general rule. Rule 128.7 applies to school district employees injured on or after December 1, 2001. Rule 128.7(b) provides that for determining the

amount of TIBs of school district employees under Chapter 504 (Workers' Compensation Insurance Coverage for Employees of Political Subdivisions), the AWW is computed on the basis of wages earned in a week. The rule further provides that for this calculation "wages" includes only pecuniary wages. Rule 126.1(3) defines pecuniary wages as wages paid to an employee in the form of money. Rule 126.1(2) defines nonpecuniary wages as wages paid to an employee in a form other than money and provides that health insurance premiums is an example of nonpecuniary wage.

It was error for the hearing officer to include the \$292.68 monthly ($292.68 \div 4.34821 = \67.31 weekly) health and dental insurance premium that the employer ceased to provide in the calculation of the claimant's AWW since it is a nonpecuniary wage. We reverse the determination that the claimant's AWW from February 1, 2003, through April 8, 2004, for the purposes of computing TIBs is \$761.71 and render a determination that the claimant's AWW from February 1, 2003, through April 8, 2004, is \$694.40.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge