APPEAL NO. 022860-s
FILED JANUARY 3, 2003

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 October 14, 2002. The appellant (self-insured) appeals the hearing officer's determinations that the self-insured is not entitled to adjust average weekly wage (AWW) to adjust temporary income benefits (TIBs); and that the compensable right shoulder injury extends to and includes an injury to the cervical spine and low back. There is no response from the respondent (claimant) contained in our file. There is no appeal of the hearing officer's determinations that the claimant is a seasonal employee or that her AWW is $1,088.11. (We will therefore not review whether this amount was correctly computed.)

DECISION

We affirm in part and reverse and remand in part.

EXTENT OF INJURY

The hearing officer did not err in determining the extent of the claimant's injury. The claimant testified that she was employed as a schoolteacher on _____, when she slipped and fell. She testified that she immediately felt pain in her shoulder, low back, and cervical spine. She sought medical treatment later that same day and the medical records indicate that she was treated for injuries to her cervical spine, low back, and right shoulder. The carrier accepted the injury to the right shoulder and disputed the cervical spine and low back injuries.

The record in this case presented conflicting evidence for the hearing officer to resolve. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer with respect to the extent of injury determinations are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We therefore affirm the hearing officer's determinations that the injury extended to and included injuries to the claimant's cervical spine and low back.

ADJUSTMENT OF AVERAGE WEEKLY WAGE

The self-insured also contends that the hearing officer erred in his determination that the self-insured is not entitled to adjust the claimant's AWW pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.7 (Rule 128.7) which allows the AWW to be adjusted to zero during that period of time when the school district employee could reasonably expect to earn no wages.

We note that Section 408.0446 (governing computation of AWW for school district employees and effective for injuries on or after December 1, 2001) takes an approach analogous to that created for seasonal employees with respect to computing AWW and adjustments thereto for purposes of TIBs. It is this statute which must be applied rather than the "seasonal employee" statute. Section 408.0446 provides as follows:

> (a) For determining the amount of [TIBs] of a school district employee under Chapter 504, the [AWW] is computed on the basis of wages earned in a week rather than on the basis of wages paid in a week. The wages earned in any given week are equal to the amount that would be deducted from an employee's salary if the employee were absent from work for one week and the employee did not have personal leave available to compensate the employee for lost wages for that week.
>
> (b) An insurance carrier may adjust a school district employee's [AWW] as often as necessary to reflect the wages the employee ***reasonably could expect to earn*** during the period for which [TIBs] are paid. In adjusting a school district employee's [AWW] under this subsection, the insurance carrier may consider any evidence of the employee's reasonable expectation of earnings. [Emphasis added.]
>
> Further, the relevant provisions of (applicable) Rule 128.7 states as follows:
>
> (d) The AWW for computing [TIBs] may be increased or decreased to more accurately reflect wages the school district employee reasonably could expect to earn during the period for which [TIBs] are paid.
>
> (1) An insurance carrier (carrier) may adjust the AWW based on evidence of earnings.
>
> (2) A school district employee may request adjustments by submitting evidence of earnings to the carrier.
>
> (3) For a period a school district employee would not have earned wages, the AWW may be adjusted to zero and no minimum benefit payment may be required.

The claimant testified that she was not given an option of how her salary was to be paid. Her salary was paid over 12 months even though she was required to work only the typical school year (187 days). No contract was in evidence and the employer's wage statement expressed the expectation of the employment contract term as "185" days. The claimant testified that she worked during the summer vacations in 2000, 1999 and previous years. However, she had not worked during the summer of 2001 although she attended several mandatory training meetings during that time. She did not work during the summer of 2002 due to the effects of her injury.

The hearing officer stated:

> The [TIBs] should not have been adjusted for seasonal employment because this Claimant was paid under a contract spreading earned income over twelve monthly payments.
>
> It could not have been the legislative intent of this act or the rule that a teacher loses her contract pay and work comp benefits just because she doesn't work for the summer due to a compensable injury.

However, the plain language of Section 408.0446 and Rule 128.7 allows the school district to adjust AWW for school district employees under certain circumstances, potentially to 0, depending upon what the employee could reasonably expect to earn. Although the hearing officer, in his "Statement of The Evidence," discusses whether the claimant had a reasonable expectation of earning wages during the summer vacation, he made no Findings of Fact or Conclusions of Law in that regard. Furthermore, the discussion indicates that the hearing officer equated wages earned with wages paid, because he observed that the claimant could reasonably be expected to earn her regular wage over the summer, although in fact such money would have already been "earned" in the prior 187 days of the contract.

An analysis of what a school district employee could reasonably expect to ***earn*** over the summer should be made with reference to the work history of that employee and not with reference to the expectation of payment from the school district over a 12-month period.

Accordingly, we reverse the hearing officer's determination and remand for determination of what, if anything, the claimant could reasonably be expected to have earned during the summer vacation of 2002 if she had not been injured. If the hearing officer determines that the claimant did not reasonably expect to earn wages during the summer of 2002, the self-insured is entitled to adjust the claimant's AWW to zero pursuant to Rule 128.7 for purposes of payment of TIBs during that time.

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 Texas Workers' Compensation Commission's Division of Hearings, 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* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

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

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Manager/Judge