APPEAL NO. 130795
FILED JUNE 17, 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 February 27, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the sole issue before him, the hearing officer determined that the appellant/cross-respondent's (claimant) average weekly wage (AWW) "beginning [date of injury], through June 10, 2012, is $1,057.85," and "beginning June 11, 2012, is $1,488.04." The claimant appealed, contending that the hearing officer should have included wages earned from (employer 1) in addition to wages earned from (employer 2), the employer for whom he was working at the time of the injury. The respondent/cross-appellant (carrier) appealed the hearing officer's determination, contending that the hearing officer's AWW calculation contains a mathematical error. The appeal file does not contain a response from the carrier to the claimant's appeal, nor does the appeal file contain a cross-response from the claimant to the carrier's cross-appeal.

DECISION

Reversed and remanded.

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 (Division) 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).

It was undisputed that the 13-week period prior to the claimant's date of injury was February 11, 2011, through [date of injury]. It was also undisputed that the claimant was working for employer 2 at the time of the injury, and that the claimant had worked for employer 2 for approximately 2 weeks prior to the injury. The claimant contended that his AWW should include wages earned from employer 1, for whom he had worked prior to working for employer 2, as well as the wages he earned from

employer 2. The carrier argued that wages from employer 2 cannot be used because those wages were from a different company. The hearing officer noted in the Background Information section of the decision that the claimant explained employer 2 was a different and separate company from employer 1. The hearing officer stated that "[t]he legislature wrote [Section 408.041(b)][1] for those times an injured worker did not work for an employer for 13 weeks preceding his injury. This is the authority that states an injured worker cannot combine two employers to calculate his prior 13 weeks of wages."

The carrier provided wage information for four different employer 2 employees, alleging these employees earned wages similar to the claimant's. The hearing officer noted in the Background Information section of his decision that the legislature gave an option to calculate wages based on a same or similar employee, but that because there was "no evidence of wages in the vicinity" that method could not be applied. The hearing officer further noted that the remaining option was to "calculate a fair, just, and reasonable AWW to all parties." The hearing officer found in Finding of Fact No. 4 that a fair, just, and reasonable method of calculating the claimant's AWW is to take the AWW of the four same or similar employer 2 employees and divide that amount by four. The hearing officer determined that the claimant's AWW beginning [date of injury], through June 10, 2012, is $1,057.85, and beginning June 11, 2012, the claimant's AWW is $1,488.04. The hearing officer in the Background Information section of the decision describes in detail how he arrived at these numbers, as discussed below.

The hearing officer added the wage information in evidence for each of the four employer 2 employees, and added a $150.00 bonus, an amount that was undisputed by the parties, to each of the employees' wages. The hearing officer stated that the first employee earned total wages of $12,996.03, the second employee earned total wages of $13,147.40; the third employee earned total wages of $11,966.92; and the fourth employee earned total wages of $13,665.95. The hearing officer divided the first employee's total wages by 13 weeks, and the second, third, and fourth employees total wages by 12 weeks each, for an amount of $999.69, $1,095.62, $997.24, and $1,138.83, respectively. The hearing officer then added these four amounts, which equals $4,231.38, and divided this number by 4, which is $1,057.85. The hearing officer determined the claimant's AWW for the period of [date of injury], through June 10, 2012, is $1,057.85. It was undisputed by the parties that the employer stopped providing health insurance benefits at a rate of $430.19 as of June 11, 2010. The hearing officer added the amount of $430.19 to the claimant's AWW for a total of $1,488.04 beginning June 11, 2012.

[1] We note that the decision mistakenly cites Section 408.0041(b) rather than 408.041(b).

In this case the hearing officer did not err in using a fair, just, and reasonable method to determine the claimant's AWW.

The carrier contends in its cross-appeal that the hearing officer's AWW calculation is incorrect. Specifically, the carrier argues that the hearing officer included wages in his calculation from a week prior to the 13-week period, and that the hearing officer divided each of the four employees' total wages by 12 rather than the correct number of weeks.

The hearing officer divided the total wages for the second, third, and fourth employees by 12 weeks. However, the carrier provided seven paychecks for these employees, and it was undisputed that all employees, including the claimant, were paid every two weeks. Regarding the first employee, the carrier provided eight paychecks, which included an additional pay period of February 4, 2011. The hearing officer divided the wages for the pay period of February 4, 2011, by two, then added that amount to the rest of the first employee's total wages, and divided the first employee's total wages by 13. The hearing officer's inclusion of the wages for February 4, 2011, period is not error. However, it appears the hearing officer divided the total amount of wages for all four employees by an incorrect number of weeks. The hearing officer's determination that the claimant's AWW beginning [date of injury], through June 10, 2012, is $1,057.85, and beginning June 11, 2012, the claimant's AWW is $1,488.04 is against the great weight and preponderance of the evidence because the wage information provided by the carrier for the four same or similar employer 2 employees contained wages for a period longer than 12 weeks, which was the number of weeks used by the hearing officer to determine the claimant's AWW. *See* Appeals Panel Decision (APD) 081230, decided October 22, 2008. Accordingly, we reverse the hearing officer's determination that the claimant's AWW beginning [date of injury], through June 10, 2012, is $1,057.85, and beginning June 11, 2012, the claimant's AWW is $1,488.04. We remand the issue of AWW to the hearing officer for a determination that is supported by the evidence.

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 **NEW HAMPSHIRE 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 78701-3232.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge