

APPEAL NO. 171228
FILED JULY 13, 2017

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 April 24, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury sustained on (date of injury), does not extend to carpal tunnel syndrome (CTS), medial epicondylitis, or lateral epicondylitis of the right upper extremity; (2) the appellant (claimant) does have disability from May 14, 2016, and continuing through the date of the CCH as a result of the compensable injury sustained on (date of injury); (3) the claimant was employed by a non-claim employer, but is not entitled to increased income benefits pursuant to Section 408.042 and 28 TEX. ADMIN. CODE §128.1(h) (Rule 128.1(h)) (we note that the decision contains an incorrect reference to Section 408.043, which will be addressed below); (4) the claimant had post-injury earnings (PIE) from May 14 through August 27, 2016, and again from October 4, 2016, and continuing through the date of the CCH; (5) \$380.18 is the claimant's average weekly wage (AWW) and the claimant failed to establish the date income benefits began to accrue based on multiple employment wages; (6) the claimant reached maximum medical improvement (MMI) on July 5, 2016; and (7) the claimant's impairment rating (IR) is zero percent.

The claimant appealed all of the hearing officer's determinations that were adverse to her, contending that the evidence did not support those determinations. The respondent (carrier) responded, urging affirmance of the hearing officer's extent of injury, MMI, and IR determinations. The carrier did not respond regarding the remainder of the hearing officer's determinations.

The hearing officer's determination that the claimant does have disability from May 14, 2016, and continuing through the date of the CCH as a result of the compensable injury sustained on (date of injury), was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed as reformed.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), at least in the form of a right elbow and right lower arm strain. The claimant testified she was injured when lifting a heavy SUV engine with a coworker.

We note that the decision contains an incorrect statutory reference to Section 408.043 rather than the correct statutory reference to Section 408.042 in the Decision

and Order paragraph on the first page, Issue Statement 3, Conclusion of Law No. 5, and the Decision. We reform all references of Section 408.043 to Section 408.042.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury sustained on (date of injury), does not extend to CTS, medial epicondylitis, or lateral epicondylitis of the right upper extremity is supported by sufficient evidence and is affirmed

MMI AND IR

The hearing officer's determination that the claimant reached MMI on July 5, 2016, is supported by sufficient evidence and is affirmed.

The hearing officer's determination that the claimant's IR is zero percent is supported by sufficient evidence and is affirmed.

PIE

The hearing officer's determination that the claimant had PIE from May 14 through August 27, 2016, and again from October 4, 2016, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

AWW

The hearing officer's determination that \$380.18 is the claimant's AWW and the claimant failed to establish the date income benefits began to accrue based on multiple employment wages is supported by sufficient evidence and is affirmed.

INCREASED INCOME BENEFITS PURSUANT TO SECTION 408.042 AND RULE 128.1(h)

The claimant argued at the CCH that she worked for another employer, while she was working for the claim employer prior to her (date of injury), compensable injury. In evidence is an Employee's Multiple Employment Wage Statement (DWC-3ME) dated March 9, 2017, stating that she earned wages from the non-claim employer during the pay periods beginning on October 25, 2015, through February 13, 2016. We note that this DWC-3ME does not contain a date stamp showing receipt by the Texas Department of Insurance, Division of Workers' Compensation (Division).

The hearing officer determined that the claimant was employed by a non-claim employer but is not entitled to increased income benefits pursuant to Section 408.042 and Rule 128.1(h). The hearing officer explained her rationale as follows:

On March 9, 2017, [the] [c]laimant provided, in her exhibits, another [DWC-3ME] with the wage information of the second employer for the 13 weeks prior to her compensable injury . . . it is difficult to determine when she delivered this form, with the correct wage information, to the Division and [the] [c]arrier. It appears that the [c]arrier received this information when it was exchanged in preparation for the [CCH] on March 2, 2017. Since the correct information was not filed with the Division and [the] [c]arrier, [the] [c]laimant is not entitled to include the wages earned with the second employer when she sustained the compensable injury.

Section 408.042(e) provides:

For an employee with multiple employment, only the employee's wages that are reportable for federal income tax purposes may be considered. The employee shall document and verify wage payments subject to this section.

Rule 128.1(h), amended effective May 16, 2002, states in pertinent part:

(h) For employees injured on or after July 1, 2002, who are employed by more than one employer on the date of injury and the employee submits the wage information from the other employer(s) in the form and manner prescribed by [Rule] 122.5 of this title (relating to [DWC-3ME]), the carrier shall calculate the AWW using the wages from all the employers in accordance with this section. The employee's AWW shall be the sum of the AWWs for each employer.

* * * *

(2) The portion of the employee's AWW based upon employment with each "Non-Claim Employer" (as the term is defined in [Rule] 122.5 of this title) shall be calculated in accordance with [Rule] 128.3 of this title (relating to [AWW] Calculations for Full-Time Employees, and for Temporary Income Benefits for All Employees) except that the employee's wages from the Non-Claim Employer(s) shall only include those wages that are reportable for federal income tax purposes.

Rule 122.5(f), effective May 16, 2002, states:

(f) Employees who file [DWC-3MEs] are required to report all changes in employment status and/or earnings at the Non-Claim Employer to the carrier until the employee reaches [MMI].

(1) The employee shall report all changes in employment status at the Non-Claim Employer including termination or resignation within 7 days of the date the change takes place.

(2) The employee shall report within 7 days of the end of the pay period in which a change in earnings at the Non-Claim Employer related to the compensable injury took place. This would include both reductions and increases in wages as compared to the prior week as long as the difference was caused by the compensable injury such as because the employee's ability to work changed or the employer was more or less able to provide work that met the employee's work restrictions.

In Appeals Panel Decision 151496-s, decided September 30, 2015, the Appeals Panel clarified that Rule 122.5 does not establish a deadline for filing a DWC-3ME. In the case on appeal the claimant has effectively submitted the DWC-3ME for the non-claim employer to the carrier and the Division by the exchange of that document and its admission into evidence at the CCH. The hearing officer's failure to consider the claimant's DWC-3ME because she could not determine when the claimant filed the DWC-3ME with the Division and the carrier was legal error.

Rule 122.5 also provides the following:

(d) The Multiple Employment Wage Statement shall include

1. the employee's name, address, and social security number;
2. the date of the Non-Claim Employer's hire of the employee;
3. the date of injury;
4. the Non-Claim Employer's name, address, and federal tax identification number;
5. the name and phone number of a person at the Non-Claim Employer who can be contacted to verify the wage information (unless the wage information was not provided by a person at the Non-Claim Employer - such as if the wage information came from the Texas Workforce Commission or the employee's pay stubs);
6. the wage information required by subsection (e) of this section with documentation that supports the wage information being reported; and

7. a certification that the wage information provided includes all wage information required by subsection (e) of this section and that the information is complete and accurate.

- (e) The wage information required to be provided in a Multiple Employment Wage Statement includes the employee's Non-Claim Employer wages, as defined in [Rule] 128.1 of this title (relating to [AWW]: General Provisions), earned during the 13 weeks immediately preceding the date of injury and the number of hours the employee worked to earn the wages being reported. The wages are limited to those reportable for federal income tax purposes.

The March 9, 2017, DWC-3ME in evidence does not contain the non-claim employer's address or federal tax identification number as required under Rule 122.5(d)(4). Because the DWC-3ME did not contain all of the information required in Rule 122.5(d), the claimant is not entitled to increased income benefits pursuant to Section 408.042 and Rule 128.1(h). For this reason we affirm the hearing officer's determination that the claimant was employed by a non-claim employer, but is not entitled to increased income benefits pursuant to Section 408.042 and Rule 128.1(h).

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge