

APPEAL NO. 013013-s
FILED JANUARY 18, 2002

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 November 7, 2001. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) average weekly wage (AWW) is \$329.11. The claimant appealed, contending that he should have been paid on the basis of his last paycheck, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.2(a) (Rule 128.2(a)), until the employer files a complete and correct Employer's Wage Statement (TWCC-3), which the parties agree was filed on April 24, 2001. The respondent (carrier) responds, urging that Rule 128.2 only provides a carrier to presume the correct wages in order to expedite payment of the income benefits.

DECISION

Affirmed.

The sole agreed-upon issue was what is the claimant's AWW. The parties do not dispute that the correct AWW is \$329.11, as determined by a TWCC-3 dated November 2, 1999, of a same or similar employee. Nonetheless, the claimant has appealed, asserting that he should have been paid income benefits based on his last paycheck.

The claimant sustained a compensable injury on _____, and it is undisputed that the claimant's last gross paycheck was \$357.00 for the pay period ending _____. The claimant had worked for the employer less than 13 consecutive weeks preceding his injury (see Section 408.041). On November 2, 1999, a TWCC-3 was filed for a same or similar employee, which showed an AWW of \$338.86.

At some point it was determined that the TWCC-3 that had been filed was in error because it included a period after the claimant's date of injury. An amended TWCC-3 was filed on April 24, 2001, based on the same or similar employee but for the correct time period showing an AWW of \$329.11.

The claimant's appeal cites Rule 128.2 entitled "Carrier Presumption of Employee's Wage" and which states:

Rule 128.2. Carrier Presumption of Employee's Wage; Employer Wage Statement Required.

- (a) A carrier shall promptly initiate the payment of income benefits as required by the [1989 Act]. To expedite payment, the carrier shall presume that the employer's last payment to the employee for personal services based on a full week's work (partial work week shall

be prorated for a full week) accurately reflects the employee's wage until:

- (1) the employer files the wage statement required by subsection (b) of this section; or
- (2) the correct wage is determined by other evidence, if the employer does not file the wage statement.

The stated purpose of Rule 128.2 is to expedite the payment of income benefits. Rule 128.2(b)(4) provides for the use of a same or similar employee's wages when the claimant has not been employed for the 13 continuous weeks before the injury.

The claimant argued that, pursuant to Rule 128.2(a), the presumption was that the claimant's last week's pay of \$357.00 was to be used to calculate the AWW for temporary income benefits (TIBs) to be paid to the claimant until the employer filed the valid TWCC-3, or from the date the benefits accrued through April 24, 2001. The claimant asserted that the carrier thus owed him back benefits to cover the difference between those paid (based on an AWW of \$338.86) and those calculated using the last weekly pay of \$357.00.

Texas Workers' Compensation Commission Advisory 97-05, Subject Clarification of Advisory 96-16, dated September 5, 1997, gives specific guidance on this matter. The first part of the advisory paraphrases Rule 128.2; however, it goes on to address the situation of "what to do when an employer files a wage statement (TWCC-3) that is incomplete or invalid . . . ; specifically, should the carrier continue to use the last paycheck amount?" The advisory instructs that:

In this situation the carrier should:

- consider the information on the incomplete TWCC-3 to be "other evidence" as referenced in Rule 128.2(a)(2);
- use this evidence to determine the [AWW] and use that AWW to pay benefits (including any deficits owed) until a complete TWCC-3 is obtained;
- continue to try to obtain a complete TWCC-3 from the employer; and
- once a completed TWCC-3 is obtained, adjust the [AWW] and pay any deficit payment owed per that filing.

That procedure was followed in this case. The first TWCC-3 was used to determine the AWW of \$338.86, which was paid until the "complete [correct] TWCC-3 [was] obtained." The advisory then clearly contemplates that an adjustment is to be made based on the correct AWW (\$329.11) not the last paycheck (\$357.00).

The correct procedure was followed and the hearing officer correctly determined the

AWW to be \$329.11. The claimant's TIBs are to be calculated based on the AWW of \$329.11.

The hearing officer's decision and order are affirmed.

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

**LINDA LEWIS
1600 NORTH COLLINS BLVD., SUITE 300
RICHARDSON, TEXAS 75080.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge