APPEAL NO. 022628-s
FILED NOVEMBER 15, 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 (CCH) was held on September 12, 2002. Most of the issues were resolved by stipulation, leaving only the issue of average weekly wage (AWW). The hearing officer found that the appellant/cross-respondent's (claimant) AWW was $581.17.

Both sides appeal this finding, with the claimant asserting she is entitled to a greater AWW under the fair, just, and reasonable calculation, which should be applied in this case, and with the respondent/cross-appellant (carrier) asserting that there was no evidence to support any of the claimant's self-serving testimony that her salary was increased by cash payments from the register. The claimant responds by refuting arguments made by the carrier in its appeal.

DECISION

Reversed and remanded.

According to official records maintained by the employer, a chain department store with many outlets, the claimant was promoted to store manager on June 18, 2000, with a wage of $650 per week. The claimant was injured on _____, but she continued to work until sometime in November 2000, when her disability began. (At one point, the claimant also asserted an October 6, 2000, injury but this was resolved by agreement at the beginning of the CCH in which it was stipulated that she did not have such an injury.)

To greatly summarize the evidence, both a Dispute Resolution Information System note and the benefit review conference report reflect that the claimant's position on AWW was that she should be paid in accordance with the position that she was promoted into. No assertion was made that the wage statement was inaccurate for the period of time it covered. The opening statement of the claimant's attorney at the CCH was to similar effect.

However, when the claimant testified, she asserted that her promotion in fact occurred in "the middle" of April 2000, and that she would be paid by Mr. P, the district manager for several stores operated by the employer, out of the cash register, in an amount that made up the difference between the ostensible promoted wages and what she actually earned in her paycheck. She said that if she "made" $350, then $300 would be taken out of the register. These amounts were not reported on the employer's wage statement, which listed the amounts shown as gross wages on the paycheck stubs for the 13 weeks prior to the date of injury.

She portrayed Mr. P as not taking the time prior to mid-June to make the adjustment on the employer's records to effectuate her promotion. The objective employer records (some dating before the injury) and her paycheck stubs show that the claimant's wages were increased in February 2000 from $6.00 to $7.00, and then on May 21, 2000, to $7.50, prior to her promotion to store manager, effective June 18. She was paid $650 per week on a salaried basis as store manager

The claimant said that the additional cash register payments stopped around the end of May. The claimant said she did not report these additional amounts as income on her federal income tax return and that Mr. P took her taxes out of the cash register amounts. The hearing officer found that the employer's wage statement was inaccurate based on claimant's testimony and adjusted the wages and resulting AWW as if $650 was earned for 10 out of the 13 weeks before the date of injury (even though the claimant's testimony was that such payments were only made from mid-April until two weeks prior to June 18).

We will address the claimant's appeal first, which seeks application of a "fair, just, and reasonable" standard to computation of her AWW. It is clear that the purpose of temporary income benefits is to compensate (in some measure) for lost wages and the amount paid to an injured worker for the 13 weeks prior to the injury was to provide a measure for deriving a weekly wage. Section 408.041(a). The statute itself, however, provides a means of dealing with cases where the arithmetical formula set out in Section 408.041(a) will not yield results that fairly reflect the wages being paid at the time of injury. Section 408.041(b) states:

> (b) The average weekly wage of an employee whose wage at the time of injury has not been fixed or cannot be determined or who has worked for the employer for less than 13 weeks immediately preceding the injury equals:
>
> (1) the usual wage that the employer pays a similar employee for similar services; or
>
> (2) if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration.

Where, as here, there are three wage amounts, and a job change immediately prior to the injury, a situation can be said to exist where the wage of the employee "has not been fixed" at the time of the injury, and resort to the "same or similar" formula outlined in Section 408.041(b)(1) or (2) should be made. While we note that in Texas Workers Compensation Commission Appeal No. 93780, decided October 13, 1993, the Appeals Panel said that the employee's wages in that case were fixed because they were "determinable," that case is factually distinguishable; the worker's rate of pay in that case was not changed, just his hours of work. Moreover, as a principle of statutory construction, we cannot characterize "has not been fixed" to mean the same thing as

"cannot be determined" and will not apply Appeal No. 93780 in a manner that would render this statutory language a redundancy.

Accordingly, we reverse the hearing officer's AWW determination and remand the decision so that the hearing officer can apply Section 408.041(b) to the claimant's situation (as well as Section 408.041(c), if a wage statement is not produced for a same or similar employee). While we tend to agree that the hearing officer's finding that the employer's wage statement was inaccurate is against the great weight and preponderance of the evidence, the accuracy of the employer's wage statement and wages earned by the claimant in the 13 week period prior to the date of injury is moot under our application of the statute.

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 **THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge