APPEAL NO. 030735-s
FILED MAY 12, 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 February 26, 2003. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) was employed by a nonclaim employer on _____, and that he is entitled to increased income benefits pursuant to Section 408.042(c)(1) of the 1989 Act. The appellant (self-insured) appealed, arguing that Section 408.042 does not apply to the claimant because he was a volunteer firefighter. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

The facts in this case were largely undisputed. The parties stipulated that the claimant was a volunteer firefighter and had worked in that capacity for over thirteen weeks; that the claimant sustained a compensable injury while in the course and scope of his volunteer firefighting; and, that the claimant was also employed by a nonclaim employer, and had been so employed for over thirteen weeks. The hearing officer specifically found that the claimant earned no wages as a volunteer firefighter for the county.

It is undisputed that the self-insured is a political subdivision. *See* Section 504.001(3). Because the self-insured is a political subdivision, the applicable statute is Section 504.001 *et seq*. Section 504.001(2) defines employee as (A) a person in the service of a political subdivision who has been employed as provided by law; *or* (B) a person for whom optional coverage is provided under Section 504.012 (which specifically provides for optional coverage of volunteer firefighters) or 504.013. The parties stipulated that "on _____, employer provided workers' compensation coverage through self insurance through the TAC WC Self-Insurance Fund." We find no merit in the self-insured's contention that employees under the definition of Section 504.001(2)(B) "are volunteers and do not work for a political subdivision." The hearing officer did not err in finding that the claimant was an employee under the applicable statute.

The self-insured argues that volunteer firefighters are not employees as defined in Section 401.012 and the provisions of Section 408.042 do not apply to them. However, Section 504.002 specifically excepts the definition of employee contained in Section 401.012. Pursuant to Section 504.002, Section 408.042 applies. Section 504.002 specifically incorporates all of Chapter 408 of the 1989 Act, entitled "WORKERS' COMPENSATION BENEFITS," with the exception of the provisions concerning an action for exemplary damages in the instance of gross negligence or an

intentional act or omission. Further, nothing in Section 408.042 limits the term employee to the definition contained in Section 401.012.

Section 408.042(c)(1) provides that the average weekly wage (AWW) for an employee with multiple employment is equal to the sum of the AWWs computed under Section 408.042(c)(2) and (3). Since the claimant had worked for both employers for at least thirteen weeks preceding the injury, only Section 408.042(c)(2) applies. That section provides that for each of the employers for whom the employee has worked for at least the 13 weeks immediately preceding the date of injury, the AWW is equal to the sum of the wages paid by that employer to the employee in the 13 weeks immediately preceding the injury divided by 13. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §128.1(h) (Rule 128(h)) provides that 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, the carrier shall calculate the AWW using wages from all the employers. Rule 128.1(h)(2) further provides that the portion of the employee's AWW based upon employment with each "Non-Claim Employer" shall be calculated in accordance with Rule 128.3 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.

We do not read Section 504.012(a) to be inconsistent with the provisions of Section 408.042. We note Section 408.042(g) provides that an insurance carrier is entitled to apply for and receive reimbursement at least annually from the subsequent injury fund for the amount of income benefits paid to a worker under Section 408.042 that are based on employment other than the employment during which the compensable injury occurred.

The hearing officer did not err in determining that the claimant was an "employee with multiple employment" and correctly applied the rules to determine that the claimant's AWW is $514.38. We find no error in the hearing officer's determination that the claimant is entitled to increased benefits pursuant to Section 408.042(c)(1).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **self-insured through the TEXAS ASSOCIATION OF COUNTIES WORKERS' COMPENSATION SELF-INSURANCE FUND** and the name and address of its registered agent for service of process is

EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge