

APPEAL NO. 050677-s  
FILED MAY 11, 2005

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 24, 2005. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the eighth quarter.

The appellant (self-insured) appeals, contending that the hearing officer erred in determining the claimant's earnings during the qualifying period because the claimant had returned to work earning more than 80% of the claimant's average weekly wage (AWW). The claimant responds, essentially urging affirmance of the hearing officer's decision.

DECISION

Reversed and a new decision rendered.

At issue in this case is whether the claimant returned to work earning less than 80% of her AWW as a direct result of her impairment, which is a criteria for SIBs set out in Section 408.142(a)(2) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.102(b)(1) and 130.102(c) (Rules 130.102(b)(1) and 130.102(c)) or whether the claimant's earnings during the applicable qualifying period exceeded 80% of her AWW and how to calculate the claimant's post-injury earnings.

It is undisputed that the claimant, a school teacher, sustained a compensable injury on \_\_\_\_\_. The parties stipulated that the claimant has a 15% impairment rating, that impairment income benefits were not commuted and that the qualifying period for the eighth quarter began on July 4 and ended on October 2, 2004. Although not stipulated the parties appear to agree that the claimant's preinjury AWW was \$844.93 and 80% of that amount is \$675.94. In evidence is a term contract for the 2004-2005 school year whereby the claimant would provide teaching services for 10 months and be paid \$51,065. The beginning date of the contract was August 9, 2004, and the ending date was May 26, 2005. The claimant testified that she was not given a choice of whether to be paid over a 10 month period or a 12 month period. It is also undisputed that the claimant received her first pay check under the contract on August 25, 2004, in the gross amount of \$4,213.75 and a second pay check on September 24, for the pay period ending September 25, 2004, also in the gross amount of \$4,213.75. The hearing officer, in the Background Information section of the decision, comments that "[d]uring the qualifying period Claimant earned \$8,427.50, which was less than 80% of her [AWW] of \$844.93 [sic]." (The hearing officer apparently meant that 80% of the \$844.93 preinjury AWW was \$675.94 multiplied by 13 weeks which is \$8,787.22 which is more than the \$8,427.50 the claimant received in her two pay checks.) Based on this inferred calculation the hearing officer determined that the claimant was entitled to SIBs because she had returned to work in a position relatively equal to her ability to work

(Rule 130.102(b)(2)) and that she had “earned less than 80% of her preinjury wage as a direct result of that impairment.” (Rule 130.102(b)(1)).

Section 408.144 deals with the computation of SIBs and in Section 408.144(b) provides:

- (b) Subject to Section 408.061, the amount of a [SIBs] for a week is equal to 80 percent of the amount computed by subtracting the weekly wage the employee earned during the reporting period provided by Section 408.143(b) from 80 percent of the employee’s [AWW] determined under Section 408.041, 408.042, 408.043, or 408.044.

Rule 130.102(f) deals with the SIBs calculation and states:

[SIBs] payment is calculated quarterly as follows:

- (1) multiply the injured employee’s [AWW] by 80% (.80);
- (2) add the injured employee’s wage for all 13 weeks of the qualifying period;
- (3) divide the total wages by 13;
- (4) subtract this figure from the result of paragraph (1) of this subsection;
- (5) multiply the difference by 80% (.80);
- (6) if the resulting amount is greater than the maximum rate under the Act, Texas labor Code, § 408.061, use the maximum rate; and,
- (7) multiply the result by 4.34821.

The carrier cites Section 408.0446 entitled “[AWW]; School District Employee” including subsections (c) and (d) which indicate how a school district employee’s preinjury AWW is to be computed. We find that section to be inapplicable in this case in that it was apparently undisputed that the claimant’s preinjury AWW was \$844.93 and 80% of that amount was \$675.93 and that this section is only effective for injuries that occur on or after December 1, 2001. Section 408.0446(a) however is instructive (although dealing with temporary income benefits and not in effect for this injury) in that it states that the AWW “is computed on the basis of wages earned in a week rather than on the basis of wages paid in a week.” The question before us is what is “the weekly wage the employee earned during the reporting period.” (Section 408.144(b)).

Rule 130.101, the definitions section of the SIBs Subchapter, in Rule 130.101(9) defines wages as:

All forms of remuneration payable for personal services rendered during the qualifying period as defined in Texas Labor Code § 401.011(43). . . . (Emphasis added.)

Section 401.011(43) defines wages in similar terms as being all forms of remuneration payable for a given period. We disagree with the claimant's position, in her response brief, that "payable" means "both rendered and paid." Payable does not equate to paid. Rather we reference the method referred to by the legislature in Section 408.0446(a) as being "wages earned . . . rather than . . . wages paid in a week." The hearing officer erred in his calculations in simply adding the two checks the claimant received during the qualifying period as arriving in the amount the claimant "earned" during the qualifying period.

To calculate the amount the claimant earned we look for guidance to Rule 128.7(C)(1)(B), which admittedly applies to injuries occurring on or after December 1, 2001. However, using that formula the claimant's \$51,065 salary is divided by the 10 months of the term contract to arrive at a \$5,106.50 monthly figure which is divided by 4.34821, the weeks in a month, to arrive at a weekly wage of \$1,174.39. We agree with the claimant that she did not earn any wages for 5 weeks and one day (the period between July 4 when the qualifying period began until August 8, 2004, the day before she started work). The claimant then earned wages for 7 weeks and six days (eight weeks) to the end of the qualifying period ( $\$1,174.39 \times 8 = \$9,395.12$ ) for a total of \$9,395.12 wages earned during the 13 weeks of the qualifying period. Using the calculation method set out in Rule 130.102(f), the claimant's AWW of \$844.93 is multiplied by .80 which is \$675.94. As calculated above the claimant's total wages of \$9,395.12 are divided by 13 which is \$722.70, an amount greater than \$675.94, the 80% of the claimant's AWW. We conclude that the claimant did not earn less than 80% of her preinjury AWW and in fact earned \$46.76 more per week than 80% of her AWW. Consequently, the claimant did not meet the criteria in Section 408.142(a)(2) and Rules 130.102(b)(1) and (c) and therefore does not meet the eligibility requirement for SIBs during the eighth quarter.

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the eighth quarter and render a new decision that the claimant is not entitled to SIBs for the eighth quarter.

The true corporate name of the insurance carrier is **a governmental entity that self-insures, either individually, or collectively through the Texas Association of School Boards Risk Management Fund** and the name and address of its registered agent for service of process is

(NAME)  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Margaret L. Turner  
Appeals Judge