APPEAL NO. 052864-s
FILED FEBRUARY 21, 2006

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 November 9, 2005. With regard to the disputed issues, the hearing officer determined that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. H) on (11 days after the injury), did not become final under Section 408.123, that the compensable injury on ___, extends to and includes lumbar/cervical myofascial pain in addition to disc protrusions at the L2-3, L3-4, L4-5 and L5-S1 levels and that the respondent (claimant) sustained disability beginning on October 28, 2004, and continuing through the date of the CCH.

The appellant (self-insured) appealed the three issue determinations as being against the great weight and preponderance of the evidence. The claimant responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was employed as a mechanic by the self-insured and the parties stipulated that the claimant sustained a compensable injury on ___. It is relatively undisputed that the injury was to the claimant's low back and left leg. The parties stipulated that Dr. H provided the first certification of the claimant's MMI date and IR.

FINALITY

On October 29, 2004, the claimant was sent to Dr. H. Dr. H diagnosed a lumbar strain, prescribed medication and physical therapy and released the claimant back to regular duty. On (11 days after the injury) Dr. H certified that the claimant reached MMI on that date and that the claimant does not have any permanent impairment. On January 11, 2005, the claimant had an MRI of the cervical spine which revealed mild spinal stenosis due to bulging at C4-5 through C6-7. Another MRI performed on March 25, 2005, references post surgical changes (from a 1985 surgery) at L4-5 and L5-S1 and spinal stenosis at L3-4 due to a combination bulging annulus, right posterolateral disc protrusion and marked facet hypertrophy. The hearing officer commented that the claimant conceded that he did not timely dispute the MMI date and IR within 90 days. Section 408.123(d) provides that except as provided in subsections (e), (f), and (g), the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means. Section 408.123(e) (now Section 408.123(f) and referred to in the hearing officer's decision as Section 408.123(f)) provides in pertinent part that the first certification of MMI and/or IR may be disputed after the 90-day period

if: (1) there is compelling medical evidence establishing the following: "(B) a clearly mistaken diagnosis or a previously undiagnosed medical condition" or (C) improper or inadequate treatment of the injury before the date of the certification or assignment. Subsequent testing after (11 days after the injury), diagnosed the claimed conditions. The hearing officer determined in Finding of Fact No. 6, that there was compelling medical evidence "of a significant error in a clearly mistaken diagnosis, a previously undiagnosed medical condition, and improper or inadequate treatment of the injury before the date of the certification assignment that would render the certification or assignment invalid." The part of the hearing officer's determination that found a "clearly mistaken diagnosis [or] a previously undiagnosed medical condition" is supported by the evidence. That portion of the hearing officer's determination that found "improper or inadequate treatment of the injury before the date of the certification or assignment" is not supported by the evidence in that there is no compelling medical evidence of improper or inadequate treatment of the injury before the date of the certification or assignment. *See* Appeals Panel Decision 052666-s, decided February 1, 2006. The hearing officer's determination on this issue is affirmed based on the clear mistaken diagnosis exception.

EXTENT OF THE INJURY

There was conflicting medical evidence on the extent of injury and the hearing officer's determinations are sufficiently supported by the evidence and are affirmed.

DISABILITY

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The claimant worked for the self-insured beginning October 28, 2004, and continuing through the date of the CCH at his preinjury wage and does not have disability based on his employment with the self-insured. However, in this case the claimant had concurrent employment and the hearing officer references Section 408.042(c)(2). Section 408.042 (effective for injuries that occur on or after July 1, 2002,) deals with the average weekly wage (AWW) for an employee with multiple employment. It is undisputed that the claimant's concurrent employment was a part-time position as a "salesman" assembling items for display for (employer W or the Non-Claim Employer) and that he had worked that concurrent employment the 13 weeks immediately preceding the injury. The claimant testified that he worked anywhere from 15 hours a week in the summer to 20 or 25 hours a week other times at about $8.75 an hour for the Non-Claim Employer. The hearing officer found that Section 408.042(c)(2) is applicable. That section provides that for employees with multiple employment the AWW is computed "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 and dividing by 13." The hearing officer appears to realize that to establish disability the preinjury wage must be determined. At one point at the CCH the hearing officer asks "is this an AWW issue?" The self-insured responded by pointing

out that there has been no documentation regarding what the claimant was paid or what his hours were while working for employer W, the Non-Claim Employer. Section 408.042(d) provides that "[t]he Commission [Texas Department of Insurance, Division of Workers' Compensation (Division)] shall: (1) prescribe a form to collect information regarding the wages of employees with multiple employment; and (2) by rule determine the manner by which the division collects and distributes wage information to implement this section." Section 408.042(e) provides that for employees with multiple employment, only the employee's wages that are reportable for federal income tax purposes may be considered and that the employee (claimant) "shall document and verify wage payments subject to this section." (Emphasis added.) Section 408.042(g) provides that the carrier (self-insured in this case) is entitled to apply for and receive reimbursement 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 also cites 28 TEX. ADMIN. CODE § 128.1(h) (Rule 128.1(h)). 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 § 122.5 of this title (relating to Employee's Multiple Employment Wage Statement), 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.
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> * * * *
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> (2) The portion of the employee's AWW based upon employment with each "Non-Claim Employer" (as the term is defined in § 122.5 of this title) shall be calculated in accordance with § 128.3 of this title (relating to Average Weekly Wage 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, effective May 16, 2002, states in pertinent part:

> b) For an injury which occurs on or after July 1, 2002, a claimant may file a Multiple Employment Wage Statement for each employer the employee was working for on the date of injury.
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> c) If a claimant who is permitted by subsection (b) of this section chooses to file a Multiple Employment Wage Statement, it is the claimant's

responsibility to obtain the required wage information from the Non-Claim Employer(s), providing any necessary corrections to the wage information, and filing the information on the Multiple Employment Wage Statement with the insurance carrier and commission. The carrier is not required to make an adjustment to AWW until the employee provides a complete Multiple Employment Wage Statement as described in subsections (d) and (e) of this section. [Emphasis added.]

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 § 128.1 of this title (relating to Average Weekly Wage: 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.

As the hearing officer appears to recognize a subsumed threshold factor in determining disability is determining the preinjury wage. Both the Act in Section

408.042 and Division Rules in Rule 128.1 and Rule 122.5, recited herein in some detail, specify how the AWW from concurrent employment is to be calculated and more importantly how the wage information from the Non-Claim Employer is to be documented. We note that Rule 128.1(h)(2) states that to be included in the AWW "wages from the Non-Claim Employers shall only include those wages that are reportable for federal income tax purposes." More importantly Rule 122.5(c) establishes that "it is the claimant's responsibility to obtain the required wage information from the Non-Claim Employer(s)." Rule 122.5 goes on to specify what information is to be provided.

In this case, as the self-insured contends, there is no documentation regarding the wages the claimant received from the Non-Claim Employer other than testimony that he worked somewhere between 15 and 25 hours a week at about $8.75 an hour. That falls far short of the statutory requirement of Section 408.042(e) that the employee "shall document and verify wage payments subject to [Section 408.042]." We note again that Section 408.042 applies only to part-time employees and employees with multiple employment.

We hold that the claimant has failed to establish the wages he earned while working for employer W for establishing his AWW for his multiple employments. The claimant's AWW for determining disability in this case are based on the wages from the Claim-Employer in the absence of documentation of wages from the Non-Claim Employer. Because the claimant has failed in his burden of proof to show that because of the compensable injury he was unable to obtain and retain employment at the preinjury wage, we reverse the hearing officer's determination that the claimant had disability beginning October 28, 2004, continuing through the date of the CCH and render a new decision that the claimant has failed to prove the elements of disability and therefore does not have disability.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge