APPEAL NO. 060272-s
FILED APRIL 6, 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 January 5, 2006. The disputed issue at the CCH was the appellant's (claimant) average weekly wage (AWW) after September 1, 2004. The hearing officer resolved the disputed issue by deciding that the claimant's AWW on and after September 1, 2004, is $520.48. The claimant appeals, contending that his AWW effective September 1, 2004, should be recalculated to $698.77 based on the inclusion of discontinued nonpecuniary wages. The respondent (self-insured) requests affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on ___, and that the claimant's AWW through August 31, 2004, is $520.48. The issue concerns the claimant's AWW after September 1, 2004. The parties disagreed on whether the premiums the self-insured paid for the claimant's health and dental insurance should be included in his AWW after September 1, 2004, and also disagreed on the amount of such premiums. The claimant has worked for the self-insured as an hourly employee for about 17 years. He was enrolled in the self-insured's health and dental insurance program, which is administered through a union health and welfare trust. It is undisputed that prior to his compensable injury and after the compensable injury up through August 31, 2004, the self-insured paid its portion of the premiums for the claimant's health and dental insurance. Because the self-insured had continued to pay its portion of the premiums after the compensable injury up through August 31, 2004, the stipulated AWW of $520.48 through August 31, 2004, does not include the amount the self-insured was paying for the health and dental insurance premiums. It is unclear how or whether the claimant's portion of the health and dental insurance premiums were paid after his injury up through August 31, 2004, but it is undisputed that his health and dental insurance coverage remained in effect up through August 31, 2004.

Effective September 1, 2004, the health insurance carrier for hourly employees changed and those employees were required to enroll with the new health insurer to continue coverage. This was for both health and dental coverage. The claimant said that he was off work due to his compensable injury and did not receive notice of the change in health insurance carriers or the need to enroll with the new carrier to continue coverage. He said that in prior years the open enrollment period for health insurance was only for adding or changing coverage. The hearing officer found that the claimant did not receive notice of the open enrollment period in August 2004 because he was off work due to his compensable injury and that the claimant did not re-enroll in the group health and dental insurance coverage for the period beginning September 1, 2004, because he was unaware of the open enrollment period to re-enroll in such coverage.

The hearing officer further found that because the claimant was not enrolled in the group health and dental insurance program on or after September 1, 2004, the self-insured did not pay any premiums for that insurance on claimant's behalf on or after September 1, 2004. The evidence reflects that the claimant's health and dental insurance was terminated effective September 1, 2004, due to the claimant's failure to submit enrollment forms.

In the Background Information section of the hearing officer's decision, the hearing officer stated in part:

> Since the Claimant did not re-enroll in the health or dental insurance program for the period beginning September 1, 2004, these coverages were fringe benefits that the Claimant did not opt to obtain. Thus, the employer's premium contributions paid on behalf of the Claimant prior to September 1, 2004, which constitute nonpecuniary wages as defined by [TEX. ADMIN. CODE Section 126.1(2)] Division Rule 126.1(2), were discontinued on and after September 1, 2004 due to the Claimant's failure to re-enroll in the insurance program, and such were not discontinued by the employer for any other reason. Consequently, there are no nonpecuniary wages that were shown to be included in the Claimant's AWW on and after September 1, 2004. His AWW on and after September 1, 2004, therefore, is $520.48.

The claimant contends that the hearing officer erred in determining that his AWW on and after September 1, 2004, is $520.48, the same amount as his AWW prior to September 1, 2004, because he contends that under Rule 128.1(c)(2), his AWW should be recalculated effective September 1, 2004, to include the discontinued nonpecuniary wages in the form of the self-insured's contribution for his health and dental insurance premiums. We agree with the claimant's contention.

Section 401.011(43) provides that "wages" includes all forms of remuneration payable for a given period to an employee for personal services, and that the term includes the market value of board, lodging, laundry, fuel, and any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration. Section 408.045 provides that the Texas Department of Insurance, Division of Workers' Compensation (Division) may not include nonpecuniary wages in computing an employee's AWW during a period in which the employer continues to provide the nonpecuniary wages. Rule 126.1(2) provides that nonpecuniary wages are wages paid to an employee in a form other than money, and one of the examples is health insurance premiums.

Rule 128.1(c), amended to be effective May 16, 2002, provides that an employee's wage, for the purpose of calculating the AWW, shall not include:

> (2) any nonpecuniary wages continued by the employer after the compensable injury. However, except as provided by § 128.7 of

> this title and Texas Labor Code § 408.042(e), if the employer discontinues providing nonpecuniary wages, the AWW shall be recalculated and these discontinued nonpecuniary wages shall be included.

With regard to the exceptions stated in Rule 128.1(c)(2), Section 408.042(e) has to do with the AWW of an employee with multiple employment and is not applicable to the facts of this case. The other exception is Rule 128.7 and it pertains to the AWW for school district employees and provides in subsections (b) and (e) that only pecuniary wages are used in calculating the AWW of a school district employee. Rule 126.1(3) provides that pecuniary wages are wages paid to an employee in the form of money. In Appeals Panel Decision (APD) 042756-s, decided December 16, 2004, a school district continued to pay its portion of a health and dental insurance premium for the injured school district employee until several months after the compensable injury, the school district then ceased to pay the premium, and the hearing officer included the health and dental premium paid by the school district in the injured employee's AWW for the purpose of computing temporary income benefits (TIBs) as of the date the school district discontinued those payments. The Appeals Panel held that it was error to include the health and dental premium in the AWW of the school district employee because Rule 128.7, pertaining to the AWW for school district employees, is an exception to Rule 128.1(c)(2), and Rule 128.7(b) provides that wages includes only pecuniary wages. Rule 128.7 and APD 042756-s are not applicable to the present case because the claimant is not a school district employee.

Because Rule 128.1(c)(2), as amended effective May 16, 2002, does not provide for an analysis of why the employer discontinued providing nonpecuniary wages, the reason the employer discontinued providing nonpecuniary wages is not relevant in determining the AWW. In this case, the hearing officer used an irrelevant factor in determining the AWW because the hearing officer concluded that the AWW should not be recalculated based on the claimant's failure to re-enroll in the health and dental insurance program. As noted, the only two exceptions to the recalculation provision of Rule 128.1(c)(2) are Rule 128.7 and Section 408.042(e), neither of which apply to the facts of this case. Accordingly, we hold that the hearing officer erred in determining that the discontinued nonpecuniary wages in the form of health and dental insurance premiums paid by the self-insured but discontinued effective September 1, 2004, are not to be included in the claimant's AWW on and after September 1, 2004.

The hearing officer did not make a finding as to the amount of the discontinued nonpecuniary wage. The claimant contended that the AWW on and after September 1, 2004, should be recalculated to $698.77 to include the discontinued nonpecuniary wage and contended that Claimant's Exhibit 2, Page 1, supported that amount. The self-insured disagreed with the claimant and contended that if AWW were to be recalculated for discontinued nonpecuniary wages, the recalculated amount would be $633.54 and contended that Carrier's Exhibit C supported that amount. Because the hearing officer did not address the amount of the discontinued nonpecuniary wage and because the amount is in dispute, we remand the case to the hearing officer to make a determination on the amount of the discontinued nonpecuniary wage in the form of the self-insured's

contribution to the claimant's health and dental insurance premiums and to include that amount in the claimant's recalculated AWW on and after September 1, 2004. Because it appears that the self-insured made monthly contributions for health and dental insurance, a conversion to a weekly amount will need to be made to recalculate the AWW. The hearing officer may request that the parties provide additional evidence on the amount of the discontinued nonpecuniary wage.

We reverse the hearing officer's decision that the claimant's AWW is $520.48 on and after September 1, 2004, and we remand the case to the hearing officer to make a determination on the amount of the discontinued nonpecuniary wage in the form of the self-insured's contribution to the claimant's health and dental insurance premiums and to include that amount, after conversion to a weekly amount, in the claimant's recalculated AWW on and after September 1, 2004.

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 Division, pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

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).

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Robert W. Potts
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Margaret L. Turner
Appeals Judge