APPEAL NO. 080268-s
FILED APRIL 7, 2008

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 15, 2008. The disputed issues at the CCH were: (1) is the appellant (carrier) entitled to suspend the respondent's (claimant) income benefits to recoup the previous overpayment; and (2) what is the average weekly wage (AWW). The hearing officer determined that the claimant's AWW for temporary income benefits (TIBs) is $282.15; that the claimant's AWW for impairment income benefits (IIBs) is $293.44; and that the carrier is not entitled to suspend the claimant's income benefits to "recoup the overpayment."

The carrier appeals, noting a clerical error and asserting that the hearing officer erred in her methodology in calculating the AWW for IIBs, contending that it should be $81.00 by applying 28 TEX. ADMIN. CODE § 128.7(e) (Rule 128.7(e)). The carrier also asserts that it is entitled to recoup a $5,518.68 overpayment. The claimant responds, urging affirmance and noting that she had provided wage information from other employers for whom she had worked in the 12 months immediately preceding the injury in accordance with Rule 128.7(e)(2). The hearing officer's determination that the claimant's AWW for TIBs is $282.15 has not been appealed.

DECISION

Reformed and reversed and remanded.

The carrier notes that there are two Findings of Fact No. 5. Clearly the second Finding of Fact No. 5 should in fact be Finding of Fact No. 7. We reform the hearing officer's decision to consecutively number the Findings of Fact 1 through 7.

The parties stipulated that on _____, the claimant was an employee of the employer, a school district, and sustained a compensable injury. It is undisputed that the claimant was hired as a custodian by the school district on January 31, 2005. It is also undisputed that the claimant earned $1,692.92 in wages from the school district prior to her injury on _____. There is evidence that the claimant had been employed by several other employers during 2004 prior to her employment by the school district on January 31, 2005. In evidence were 2004 Form W-2-Wage and Tax Statements (W-2) from the claimant's other employers in 2004 as well as the claimant's 2004 1040 U.S. Individual Income Tax Return (2004 tax return) and an amended 2004 tax return.

The methodology for calculating the AWW for IIBs for school district employees injured on or after December 1, 2001, is set out in Section 408.0446 and Rule 128.7. The pertinent portions of Section 408.0446 providing for the calculation of the AWW for IIBs state:

(c) For determining the amount of [IIBs] . . . of a school district employee under Chapter 504, the [AWW] of the employee is computed by dividing the total amount of wages earned by the employee during the 12 months immediately preceding the date of the injury by 50.

(d) If the commissioner determines that computing the [AWW] of a school district employee as provided by this section is impractical because the employee did not earn wages during the 12 months immediately preceding the date of the injury, the commissioner shall compute the [AWW] in a manner that is fair and just to both parties.

The pertinent portion of Rule 128.7 providing for the calculation of the AWW for IIBs for school district employees states:

(e) For determining the amount of [IIBs] . . . the AWW shall be computed in accordance with this subsection using only pecuniary wages.

(1) The carrier shall add together the total wages earned by the school district employee during the 12 months immediately preceding the injury and dividing the result by 50 weeks.

(2) If the school district employee provides wage information from other employers for whom the employee worked in the 12 months immediately preceding the injury, these wages shall be included in the calculation of the AWW. Note that for injuries on or after July 1, 2002, the effect of wages from a Non-Claim Employer (as the term is defined in §122.5 of this title (relating to Employee's Multiple Employment Wage Statement)) on the employee's AWW is governed by §128.1(h)(2) of this title (relating to [AWW]: General Provisions).

The hearing officer summarized the methodologies used by the parties regarding AWW for IIBs and commented:

> I find that neither method suggested by the parties is the most accurate reflection of Claimant's AWW for IIBs. Based on a fair and reasonable method, I have multiplied Claimant's average earnings for the six weeks of $282.15 by 52 to find annual expected earnings totaling $14,671.80. Dividing this by 50 as required by Rule 128.7(e), I find Claimant's AWW for IIBs is 293.44.

We hold that the hearing officer erred in using a "fair and reasonable method" in calculating a school district employee's AWW to determine the amount of IIBs because the only provision for using a "fair and just" method is in Section 408.0446(d) and it provides for computing the AWW using a fair and just method if it is determined by the commissioner that computing the AWW as provided by Section 408.0446 "is impractical because the employee did not earn wages during the 12 months immediately preceding the date of the injury."[1] In this case, the claimant proved she earned wages during the 12 months preceding the date of injury.

The carrier contends that while the claimant offered tax documents (W-2 forms and the 2004 tax returns) from several employers during the year 2004, "there was no way for the [carrier] or the Hearing Officer to determine the wages earned for the 12 months preceding the injury." The carrier goes on to contend that Rule 128.7(e)(2) "would only apply if the Claimant had earned wages from the non-claim employer(s) for the 12 months preceding the injury and was employed by the non-claim employer at the time of the injury." (Emphasis in the original.) We disagree. We read Rule 128.7(e)(2) to have two parts. First, the rule states that if the school district employee provides wage information from other employers for whom the employee worked in the 12 months immediately preceding the injury, these wages shall be included in the calculation of the AWW. This provision does not require that the "other employers" be non-claim employers and that the claimant still be employed with them at the time of the injury. The second part of Rule 128.7(e)(2) has a "note" which deals with non-claim employers as defined by Rule 122.5 and provides that the effect of wages from a non-claim employer on the employee's AWW is governed by Rule 128.1(h)(2).[2] We also refer to Section 408.0446(c) which provides that for determining the amount of IIBs for a school district employee the AWW "is computed by dividing the total amount of wages earned by the employee during the 12 months immediately preceding the date of the injury by 50." That provision is consistent with Rule 128.7(e)(1) and (2). We note that the Texas Supreme Court stated in Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999) that "we liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents."

The claimant has submitted wage information from other employers for whom the claimant worked for the entire year of 2004. The hearing officer did not apply the correct provision of Section 408.0446. We reverse the hearing officer's determination that the claimant's AWW for IIBs is $293.44 and remand the case for a determination of the AWW for IIBs based on the total wages the claimant earned in the 12 months immediately preceding the date of the injury (i.e. from _____, through _____), divided by 50 weeks, in accordance with Section 408.0446(c) and Rule 128.7(e). Because the AWW for IIBs has been reversed and remanded, and has not been

[1] Rule 128.7(f) provides that "[i]n the event the school district employee and/or carrier believes that the AWW computed based on the calculations in this rule does not reflect the true AWW, the employee and carrier may enter into a written agreement regarding the AWW or request a benefit review conference."
[2] Rule 122.5(a) defines "Non-Claim Employers" as employers other than the claim employer by whom the employee was employed at the time of the on-the-job injury.

determined, we also remand the case to the hearing officer on the issue of whether the carrier is entitled to suspend the claimant's income benefits to recoup a previous overpayment.

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 Department of Insurance, Division of Workers' Compensation, 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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(INSURANCE CARRIER)** and the name and address of its registered agent for service of process is

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge