APPEAL NO. 151496-s
FILED SEPTEMBER 30, 2015

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 July 1, 2015, with the record closing on July 7, 2015, in Denton, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent's (claimant) average weekly wage (AWW) is $1,084.28; and (2) the appellant (carrier) is required to pay benefits retroactively due to a change in AWW which is based upon pre-injury wages from a non-claim employer reflected on an Employee's Multiple Employment Wage Statement (DWC-3ME) which was not submitted to the carrier until after the claimant had reached maximum medical improvement (MMI) and all income benefits which were due had been paid.

The carrier appealed the hearing officer's determinations, contending that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The claimant responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed.

The parties stipulated in part that the claimant sustained a compensable injury on (date of injury), and the claimant reached MMI on the statutory date of March 15, 2014. Also, the parties stipulated to the amount of the AWW with and without the inclusion of pre-injury wages paid to the claimant by a non-claim employer, Healing Touch Homecare (HTH), as follows: (1) the claimant's AWW exclusive of wages from the non-claim employer, HTH, is $972.73, and benefits were paid based upon that figure; and (2) the claimant's AWW including wages from the non-claim employer, HTH, is $1,084.28.

In this case, the evidence reflects that on the date of injury the claimant was employed by a claim employer, and two non-claim employers, Lakes Regional MHMR Center (LR) and HTH, respectively. In evidence is a letter dated February 26, 2015, from the claimant to the carrier requesting that the amount of AWW be re-calculated based on the pre-injury wages from the second non-claim employer.

The carrier states in its appeal that it paid temporary income benefits (TIBS) based upon the pre-injury wages from the claim employer and one non-claim employer, LR. The carrier argues that since the claimant has been paid all income benefits and

the claimant's date of MMI has passed, the claimant is prohibited from requesting an adjustment to her AWW from an additional non-claim employer.

Section 408.042(e) provides:

> For an employee with multiple employment, only the employee's wages that are reportable for federal income tax purposes may be considered. The employee shall document and verify wage payments subject to this section.

28 TEX. ADMIN. CODE § 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 [Rule] 122.5 of this title (relating to [DWC-3ME]), 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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> (2) The portion of the employee's AWW based upon employment with each "Non-Claim Employer" (as the term is defined in [Rule] 122.5 of this title) shall be calculated in accordance with [Rule] 128.3 of this title (relating to [AWW] Calculations for Full-Time Employees, and for [TIBs] 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(f) effective May 16, 2002, states in pertinent part:

> (f) Employees who file [DWC-3ME] are required to report all changes in employment status and/or earnings at the Non-Claim Employer to the carrier until the employee reaches [MMI].
>
> (1) The employee shall report all changes in employment status at the Non-Claim Employer including termination or resignation within 7 days of the date the change takes place.
>
> (2) The employee shall report within 7 days of the end of the pay period in which a change in earnings at the Non-Claim Employer related to the

> compensable injury took place. This would include both reductions and increases in wages as compared to the prior week as long as the difference was caused by the compensable injury such as because the employee's ability to work changed or the employer was more or less able to provide work that met the employee's work restrictions.

The carrier argued that the claimant had waived the right to seek further adjustment of her AWW because of lack of due diligence in obtaining and submitting an updated wage statement from her second non-claim employer, HTH; the claimant violated Rule 122.5(f) when she submitted the DWC-3ME for one non-claim employer, LR, but not for the additional non-claim employer, HTH; and pursuant to Rule 122.5(f) the claimant's obligation to report changes ceases upon reaching MMI, placing an affirmative duty upon the claimant to submit wage information while benefits are still being paid.

The hearing officer explains in the discussion portion of his decision that in this case Rules 128.1 and 122.5 do not provide an exception where there is a delay in filing the DWC-3ME, whereas the carrier has a duty to adjust the AWW and to make payments based upon the correct AWW. The hearing officer's determinations that: (1) the claimant's AWW is $1,084.28; and (2) the carrier is required to pay benefits retroactively due to a change in AWW which is based upon pre-injury wages from a non-claim employer reflected on DWC-3ME which was not submitted to the carrier until after the claimant had reached MMI and all income benefits which were due had been paid, are supported by sufficient evidence and are affirmed.

A written decision is being issued in this case to clarify that Rule 122.5 does not establish a deadline for filing a DWC-3ME. Rule 122.5(f) defines the time period, up to the date the claimant reaches MMI, for which any change in employment status or wages must be reported to the carrier.

The preamble to Rule 122.5 clarifies that there is no deadline for filing a DWC-3ME (27 Tex. Reg. 4032, 2002). The following public comment and Texas Department of Insurance, Division of Workers' Compensation (Division) response to Rule 122.5 states:

> Comment: Commenter was concerned that the rule did not provide a timeframe in which to file a [DWC-3ME] which "will result in continuing uncertainty as to the proper AWW." The commenter suggested adding a time limit to the rule so that claimants would have 30 days from the date they received the Employer's Wage Statement to file their own [DWC-3MEs].

[Division] Response: The [Division] disagrees that the employee should have only 30 days to report the multiple employment wages. Employees may have difficulty obtaining wage information from non-claim employers and to put a limit on the amount of time the employee has to submit the information might punish the employee for the inactions of the non-claim employer (who is not required by statute to provide the information). It may turn out that the employee is only able to obtain the information from the Texas Workforce Commission. According to their process, wage reports are filed quarterly and subsequently loaded into database files where wage reports for given individuals are generated. Based on their schedule, a considerable gap in time exists, potentially six months, between the time the wages are earned and the time that a wage report reflecting the needed earning can be generated.

If a carrier receives a late wage statement that proves that the AWW that the carrier has been using to pay benefits is too high, the carrier is not prevented from using this new information even though the employer was in noncompliance by failing to timely file the report. Putting a limit on the amount of time the employee has to report the wages from a non-claim employer while not putting such a limit on a claim employer would result in an unwarranted double standard.

## SUMMARY

The hearing officer's determinations that the claimant's AWW is $1,084.28, and the carrier is required to pay benefits retroactively due to a change in AWW which is based upon pre-injury wages from a non-claim employer reflected on DWC-3ME which was not submitted to the carrier until after the claimant had reached MMI and all income benefits which were due had been paid are supported by sufficient evidence and are affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY**
**211 EAST 7TH STREET, SUITE 620**
**AUSTIN, TEXAS 78701-3218**.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge