APPEAL NO. 080741
FILED JULY 29, 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 was held on May 7, 2008. The hearing officer decided that the respondent/cross-appellant's (claimant) average weekly wage (AWW) is $226.15.

The appellant/cross-respondent (carrier) appeals, contending that the hearing officer erred in his methodology to calculate the claimant's AWW by dividing the claimant's gross wages by 13 weeks instead of 14 weeks because the gross wages earned reflected a 14-week period (beginning December 31, 2006, through April 7, 2007) in the Employer's Wage Statement (DWC-3). The claimant responded. The claimant cross-appeals, contending that: (1) the hearing officer erred in not including tip income in her gross wages earned; and (2) the hearing officer erred in failing to shift the burden of proof on AWW to the carrier after it filed a "false" DWC-3 that omitted her tip income. The appeal file does not contain a response to the claimant's cross-appeal.

DECISION

Reversed and remanded.

It was undisputed that on _____, the claimant sustained a compensable injury and that the claimant had worked for the employer for 13 consecutive weeks or more immediately preceding the date of injury. It was undisputed that at the time of her work injury, the claimant, a full-time employee, earned $5.15 per hour as a "Passenger Service Assistant." It is clear from the hearing officer's discussion in the Background Information of his decision that he was persuaded that the claimant earned her hourly wage as well as collected tips from the customers whom she assisted. It is undisputed that tip income, if sufficiently established by the evidence, can be used in calculating gross wages paid to determine the AWW of an injured worker. However, the hearing officer found in his Finding of Fact No. 5 that "[t]here is insufficient evidence to determine the correct amount of Claimant's tip income during those [13] weeks so an amount could be added to her hourly income over that [13] weeks;" and that finding is supported by sufficient evidence. It has been held that the burden of proof is upon the claimant to offer sufficient competent evidence to establish his AWW, including wages from tips. *See* Appeals Panel Decision (APD) 94734, decided July 6, 1994. There is no legal authority for the claimant's argument that the burden of proof on AWW shifted to the carrier when no tip income was included in her DWC-3.

Section 408.041(a) provides as follows:

(a) Except as otherwise provided by this subtitle, the [AWW] of an employee who has worked for the employer for at least the 13 consecutive weeks immediately preceding an injury is computed by

dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13.

28 TEX. ADMIN. CODE § 128.3(d) (Rule 128.3(d)) provides as follows:

(d) If an employee has worked for 13 weeks or more prior to the date of injury, or if the wage at time of injury has not been fixed or cannot be determined, the wages paid to the employee for 13 weeks immediately preceding the injury are added together and divided by 13. The quotient is the [AWW] for that employee.

The claimant's date of injury was _____, and the DWC-3 for the claimant reflects wages for the 14-week period from December 31, 2006, through April 7, 2007, in bi-weekly payments (paid once every 2 weeks). In determining the claimant's AWW in the present case, it is clear that the hearing officer is attempting to apply the methodology in Section 408.041(a) and Rule 128.3(d), for a full-time employee who has worked for 13 consecutive weeks or more immediately preceding the date of injury by dividing the claimant's gross wages earned, as reflected by the DWC-3 admitted into evidence, by 13. However, the hearing officer erred in his Finding of Fact No. 3 as to the amount of the claimant's gross wages earned (reflected in bi-weekly paychecks for 14 consecutive weeks). The DWC-3 for the claimant shows the amount to be $2,945.03 and not $2,940.00. The hearing officer further erred in his methodology to calculate AWW under Section 408.041(a) and Rule 128.3(d) by dividing $2,940.00 (as gross wages earned for 14 weeks) by 13. Accordingly, we reverse the hearing officer's determination that the claimant's AWW is $226.15 as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We remand the AWW issue to the hearing officer to make a determination consistent with the evidence in this case, Section 408.041(a) and Rule 128.3(d).

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* APD 060721, decided June 12, 2006.

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
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge