

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CYNTHIA KIRKENDALL,

FILED

Claimant,

JUN 06 2017

vs.

WORKERS COMPENSATION

CARGILL MEAT SOLUTIONS CORP.,

File No. 5055494

Employer,

RULING ON

and

MOTION FOR REHEARING

THE INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,

Insurance Carrier,
Defendants.

An arbitration decision was issued in this case on May 18, 2017 by the undersigned. On May 30, 2017, the claimant timely filed an application for rehearing on the issue of the claimant's weekly rate.

For the reasons set forth below the application is granted in part and denied in part.

The arbitration decision found the following;

Defendants assert claimant's average gross income is \$504.94, which results in a weekly workers' compensation rate of \$353.99, with married and 2 exemptions. (Ex. C, pp. 1 - 22) Claimant did not offer any contrary evidence. I find the claimants [sic] weekly rate to be \$353.99.

Claimant asserts that the arbitration decision was in error by adopting the defendants' wage calculation which used the week of injury and did not include the overtime hours paid at straight time. Claimant submitted a copy of part of hearing Exhibit C with her wage calculation to support her position.

Iowa Code 85.36(6) provides;

In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by

dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

The defendants used the week of injury in calculating the weekly rate. I adopted that calculation and it was in error to do so.

The claimant's weekly rate is recalculated using the weeks and hours set forth below.

Date	Hours	Rate	Shif. Dif.	Vac. Pay	Total Wages
11/29/2009	31.94	\$12.75	.23	\$111.53	\$519.00
11/22/2009	40.17	\$12.75	.38		\$512.55
11/15/2009	40.32	\$12.75	.38		\$514.36
11/1/2009	32.18	\$12.75	.30		\$410.59
10/25/2009	32.92	\$12.75	.30		\$420.03
10/18/2009	40.94	\$12.75	.38		\$522.37
10/4/2009	40.00	\$12.75	.38		\$510.38
9/27/2009	32.85	\$12.75	.30		\$419.14
9/20/2009	41.53	\$12.75	.37		\$529.88
9/13/2009	45.82	\$12.75	.47		\$584.62
8/30/2009	40.87	\$12.75	.37		\$521.46
8/23/2009	50.20	\$12.75	.49		\$640.54
8/2/2009	38.88	\$12.75	.37		\$496.09

TOTAL WAGES	\$6,601.01
AVERAGE WEEKLY WAGE	$\$6,601.01 \div 13 = \507.77
Rate M/2 2009 – 2010 rate book	\$355.83

I find on the date of injury the claimant had gross weekly earnings of \$507.77, was married, and entitled to 2 exemptions. As such, his weekly benefit rate is \$355.83.

The claimant's argument that that the rate should be recalculated to include the overtime hours as straight time is denied. The reason for the denial is not that the claimant's argument may not have legal merit, but it would require me to consider facts that were not presented at the hearing.

Claimant has argued that she assumed rate to be a settled issue until the hearing. Claimant provided no documentary evidence as to her calculation of rate. Claimant did not testify in sufficient detail for me to decide whether the overtime hours were being excluded.

The claimant argues that she has "cracked the code" as to how the records in Exhibit C should be read as to overtime hours. This is a factual issue that needed to be presented at the hearing. This "code breaking" evidence was not presented at the hearing.

The Division of Workers' Compensation has a rule that provides that no additional evidence is admissible after the close of the record. 876 IAC .31 provides; "Completion of contested case record. No evidence shall be taken after the hearing."

As the claimant is relying upon facts not presented at the hearing, I cannot accept them, even if assuming claimant is correct.

The Division of Worker's Compensation does have a procedure before the commission to introduce new evidence in limited circumstances

876 IAC 4.28 provides, in part;

The commissioner shall decide an appeal upon the record submitted to the deputy workers' compensation commissioner unless the commissioner is satisfied that there exists additional material evidence, newly discovered, which could not with reasonable diligence be discovered and produced at the hearing. A party must file a request for taking additional evidence within 20 days after the notice of appeal was filed.


The arbitration decision is amended to provide that the claimant's weekly rate is \$355.83 per week. Defendants shall pay benefits at this rate.

THEREFORE IT IS ORDERED

Claimant application for rehearing is granted in part and denied in part.

All benefits shall be paid at the weekly rate of three hundred fifty-five and 87/100 dollars (\$355.87).

Signed and filed this 6th day of June, 2017.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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