

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

JUL - 5 2016

WORKERS' COMPENSATION

ALLEN CONELL,

Claimant,

vs.

NESTLE USA,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5036585

REHEARING DECISION

Claimant, Allen Conell, filed an application for rehearing (application). Defendants filed a resistance. The application is considered.

Claimant contends in the application, the appeal decision in this case did not address the issue of rate, raised on appeal by the claimant. Page three of the appeal decision indicates: "I find the deputy commissioner provided sufficient analysis on all of those issues raised in the arbitration proceeding and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues."

Contrary to contentions in the application, I did affirm the Deputy's Findings of Facts and Conclusions of Law as they pertained to the issue of rate.

The record in this case indicates that the 13 weeks preceding the injury, claimant worked the following hours:

Week 1 - 52.00
Week 2 - 60.00
Week 3 - 76.00
Week 4 - 68.00
Week 5 - 44.00
Week 6 - 72.00
Week 7 - 68.25
Week 8 - 72.00

Week 9 - 44.00
Week 10 - 76.00
Week 11 - 80.25
Week 12 - 56.00
Week 13 - 70.00

Claimant contends that week five and nine should be excluded from the calculation to determine an Average Weekly Wage (AWW) as they are, allegedly, non-representative of the customary hours claimant worked. (Appellee Brief, pages 18-20)

According to the record, claimant only worked less than 60 hours during four different weeks. Using claimant's logic, weeks 1 and 12 would also be excluded from calculating the rate. Week 11 is the only week where claimant worked 80 hours. Using claimant's rationale would require exclusion of week 11.

As noted in the arbitration decision, the record is unclear why claimant's hours varied from week to week. In some weeks claimant worked 44 hours. In one week he worked slightly more than 80 hours. In every week used in the calculation, claimant worked more than 40 hours. The record indicates the hours claimant worked from week to week varied based on the needs of his employer. Claimant worked between 44 to 80 hours per week. The average of the 13 weeks preceding the injury is the best evidence of claimant's customary hours. As such, weeks 5 and 9 should not be excluded from the calculation.

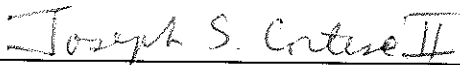
Based on the analysis above, claimant's application for rehearing is denied.

ORDER

Therefore, it is ordered:

Claimant's application for rehearing is denied.

Signed and filed this 5th day of July, 2016.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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