APPEAL NO. 92292

A contested case hearing was held in (city), Texas, on May 20, 1992, with (hearing officer) presiding. The single disputed issue from the benefit review conference was the following: What is claimant's (appellant herein) average weekly wage based on his employment with (employer) during the period July to November 1991. The hearing officer determined that the facts in the case required appellant's average weekly wage (AWW) to be determined on a fair, just, and reasonable method of computation. By substituting an earlier week and by giving appellant credit for four sick days, the hearing officer determined AWW for the period of July to November 1991 to be $133.76. Appellant appeals this decision. Respondent, employer's workers' compensation insurance carrier, contends the hearing officer correctly applied the fair and just rule of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

DECISION

We affirm the decision of the hearing officer, with modification.

At the outset, we must address respondent's motion to dismiss appellant's request for review. The appeal, which was timely filed, simply stated: "I hereby appeal the decision of the hearing officer in my case. I was told I could not appeal by TWCC." Respondent cites Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § Rule 143.3 (Rule 143.3), which provides in part that a request for the appeals panel to review a decision of a hearing officer shall clearly and concisely rebut each issue in the decision that the appellant wants reviewed and state the relief the appellant wants granted. Respondent claims that by failing to set out why the appellant is dissatisfied with the decision, it is impossible to respond to the request.

Rule 143.3 is based on Article 8308-6.41(b), which says that "a request for appeal or a response must clearly and concisely rebut or support the decision of the hearing officer on each issue on which review is sought." Given the circumstances of this case, which involved a single issue upon which limited testimony and evidence were adduced, we are unwilling to say that appellant's pleading, although extremely terse, did not meet minimum standards, nor that it deprived respondent of the opportunity to meaningfully respond. We would presume that the appellant's complaint is based on sufficiency of evidence to support the findings of fact and conclusions of law. *See* Texas Workers' Compensation Commission Appeal No. 92081 (Docket No. redacted), decided April 14, 1992.

Appellant worked for employer and was assigned to (manufacturer), where he worked in the warehouse for $5.00 an hour. He was injured in the course and scope of his employment on (date of injury) and is receiving Temporary Income Benefits (TIBs), but he believes his AWW should be based on his gross pay for 1991 as shown on his W-2 statement from employer, in the amount of $2026.38. Appellant said he only worked a total of 13 weeks for employer before he was injured. He believed he went to work for employer in July or August, but not on July 23rd. (Ms. B), a supervisor for employer, testified that

appellant registered with employer on July 16th and was assigned to manufacturer on July 23rd. She prepared the employer's wage statement (TWCC-9) which was made part of the record and which showed appellant's days worked, hours paid, and gross pay for 13 work weeks (August 12th through November 10th), including the week in which the injury occurred. The total gross pay for that period was $1548.88. She said appellant had worked an additional three weeks before this 13-week period. For the two weeks immediately preceding, he had earned $190 and $172.50, for a total of $362.50. Although she did not have the records from his first week of work, she agreed with respondent's attorney that adding $362.50 to $1548.88 and subtracting the total from the $2026.38 on the W-2 resulted in a difference of $115.

Respondent testified that the job with manufacturer required him to work 40 hours a week. The employer's wage statement showed no 40-hour weeks worked, and only two weeks in which appellant worked five days. Five of the weeks appellant worked only four days; four weeks he worked four days; four weeks he worked two days; and one week he did not work at all. Appellant said he was off several days due to bronchitis during the weeks of September 30th - October 6th and October 7th - October 13th. In each of these weeks he worked a total of two hours. He said he also missed approximately two or three days due to a tooth abscess. He said he missed work the week of October 21st through 27th when the manufacturer laid everyone off because of inventory. Ms. B testified, however, that her records reflected that other employees of the employer worked for the manufacturer that week.

Article 8308-4.10(a) provides that if an employee has worked for an employer at least 13 consecutive weeks immediately preceding the injury, AWW shall be computed as of the date of the injury and equals the sum of the wages paid in the 13 consecutive weeks immediately preceding the injury divided by 13. One exception to this rule is that if the above-cited method cannot be applied reasonably due to the irregularity of employment or if the employee has lost time from work during the 13-week period due to illness, weather, or other cause beyond his control, the Commission may determine the employee's AWW by any method it considers fair, just, and reasonable to all parties and consistent with the methods established under this section of the 1989 Act. Article 8308-4.10(g).

In this case, we believe the hearing officer correctly applied the fair, just and reasonable test because of uncontroverted evidence that gross pay during these 13 weeks was diminished to some extent due to illness, a circumstance clearly beyond appellant's control. We also find the hearing officer correctly excluded the partial week of (date), as appellant suffered his injury on (date of injury). The hearing officer then added in the week of August 5-11, wherein appellant earned $190, and gave appellant credit for four sick days. While appellant was not able to say with certainty how many days he had missed due to illness, we believe four days is a fair and just approximation.

While we find the hearing officer's methodology in arriving at AWW to be fair and just, we note an arithmetical difference if the appellant is given credit for four full sick days. We

therefore modify the order to adjust AWW from $133.76 to $139.91. With this modification, the hearing officer's decision is affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Joe Sebesta
Appeals Judge