APPEAL NO. 92485

A contested case hearing was held in (city), Texas, on August 12, 1992, before (hearing officer) as hearing officer. The two issues were whether appellant (claimant below) was a full-time or a part-time employee, and the amount of appellant's average weekly wage (AWW). The hearing officer held that appellant was working as a part-time employee as a regular course of conduct at the time of her injury on (date of injury). She also held that because there was no "similar employee" identified, appellant's AWW must be determined by another fair, just, and reasonable method. By applying this method, the hearing officer determined an AWW of $118.13. She accordingly ordered the respondent, employer's workers' compensation insurance carrier, to calculate temporary income benefits (TIBs) based on this AWW.

In her request for review, appellant disputes findings of fact concerning lack of a similar employee and the hours and weeks used by the hearing officer to determine AWW, and asks that this panel reverse the decision of the hearing officer. Respondent's reply argues that appellant has failed to allege that the hearing officer committed any error, and asserts that the appellant in asking that the facts be "reviewed again in establishing my hours per week" is asking for a *de novo* proceeding.

DECISION

We affirm the decision and order of the hearing officer.

We note briefly at the outset that appellant's request for review was sufficient to allow this panel to address the issues raised therein.

Appellant, a home health aide employed by (employer), was injured on (date) or (date of injury), while moving a patient in a bed. The employer did not dispute the compensability of the claim.

Appellant testified that she did not work at all in 1990, but in 1991 decided to pursue a career in nursing. She said she began working around the first week in January as a nurse's aide in a nursing home; there, she said she worked between 30 and 40 hours a week, but most weeks worked 40 hours. She said this was the same number of hours as the other nurse's aides. Around February she left the nursing home and began studying to become a certified nurse's aide. About the same time she began working for a private client eight hours a day, seven days a week, until the client died at the end of March. She testified that she began working for employer on May 6, 1991 as a sitter for $4.25 an hour. This job had no set hours, and she was called as needed. She worked for employer in this capacity for three weeks, during which time she received her certification as a nurse's aide. She said she could not recall the amount of money she made or the total number of hours she worked for employer during this three-week period. She left effective May 28th to take a job as a home health aide with (hospice). Upon leaving, she told a representative of employer that she wanted to be considered for future vacancies. She said that she worked

basically 40 hours per week for hospice, at $4.25 an hour. She left hospice on June 29th and went back to employer July 1st as a home health aide for $5.25 an hour.

Appellant said she worked "right at 40 hours" a week (including the first week, when she was in training) until she was injured and was not able to work as many hours. She said she stopped working for employer, on the advice of her doctor, on August 14th. She said she knew of four other aides who were sent by employer to patients' homes, as she was, but she did not know if they worked 13 continuous weeks prior to her date of injury. She stated that there were other home health aides working in the (city) area, but she could not identify any individual persons nor was she aware of how long any had worked.

(Ms. M), employer's benefits specialist, testified that both of appellant's positions with employer--sitter and home health aide--were classified as part time, as needed, which means that the employer draws such employees from a part time pool as the need arises. She said the particular needs of each assignment affects the number of hours, and agreed that persons she described as part-time employees could work as many as 40 or as few as five hours in one week. She said personnel action forms from employer's file on appellant showed appellant changed from a sitter to a private duty nurse aide effective July 14, 1991; however, another personnel form and a memorandum dated August 27th showed appellant receiving retroactive pay as an aide for the period (date of injury), when she was mistakenly paid at a sitter rate. In answer to a question from respondent's counsel, she agreed that this contradicted appellant's assertion that she began working for employer as a home health aide on July 1st.

The employer's wage statement, which was made part of the record admitted into evidence, was based upon the 13-week period ending August 24th. The employer did not use the 13 weeks immediately preceding the date of injury, as required by the 1989 Act and rules of the Commission. Article 8308-4.10(a), (c); Rule 128.2. Because appellant had not worked for employer for 13 weeks prior to her date of injury, the employer should have used, instead, the wages for a similar employee performing similar services. Article 8308-4.10(b), (c). However, neither appellant nor Ms. M testified that any such employees had worked for employer or another employer in the vicinity for 13 weeks prior to appellant's date of injury. The wage statement showed appellant worked a total of 50.8 hours during the four weeks prior to injury (June 16-July 13). It also showed she worked 7.75 hours the week of May 26-June 1. Appellant's time card for the week of July 7th through July 13th showed she worked a total of 25.75 hours. Pay stubs for the periods ending June 29th and July 13th showed she was paid for 11.45 and 39.5 hours, respectively. Appellant's W-2 form from hospice shows she was paid $501.51; since she worked at hospice approximately four and one-half weeks at $4.25 per hour, the hearing officer calculated she worked an average of 26.25 hours per week at this job.

The 1989 Act prescribes the methods for computing AWW for an employee who is entitled to income benefits. If the employee has worked for the employer for at least 13 consecutive weeks immediately preceding the injury, AWW equals the sum of the wages paid in those 13 weeks, divided by 13. Article 8308-4.10(a). If the employee has worked

for the employer for fewer than 13 weeks immediately preceding the injury, or if the wage at the time of the injury has not been fixed or cannot be determined, AWW equals the usual wage that the employer pays a similar employee for similar services. If no such employee exists, AWW equals the usual wage paid in that vicinity for the same or similar services. Article 8308-4.10(b). For purposes of computing AWW for TIBs, these same provisions apply to part-time employees. Article 8308-4.10(c); Rule 128.3. However, if the methods provided under subsections (a) and (b) 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 the control of the employee, 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 the act. Article 8308-4.10(g).

"Part-time employee" is defined as "an employee who, at the time of the injury, was working less than the full-time hours or full-time workweek of similar employees in the same employment, whether for the same or a different employer." Article 8308-4.10(c). Rule 128.3, which applies to calculation of TIBs for all employees, defines "full-time employee" as "one who regularly works at least 30 hours per week and that schedule is comparable to other employees of that company and/or other employees in the same business or vicinity who are considered full-time." [1]

The hearing officer stated in her discussion that it appeared by the preponderance of the evidence that appellant was working as a part-time employee as a regular course of conduct at the time of her injury. In Finding of Fact No. 10 she stated that appellant did not work 30 hours per week on a regular basis, and Conclusion of Law No. 3 was that appellant was a part-time employee as a regular course of conduct. The hearing officer reached this conclusion based on records from hospice as well as the employer, which she said indicated appellant was not employed full-time. However, because TIBs were the only income benefit for which the hearing officer could make a determination (there being no issue that appellant had reached maximum medical improvement or had been assigned an impairment rating), and because AWW for TIBs is determined solely under the criteria of Rule 128.3 for all employees, we hold that Finding of Fact No. 10 and Conclusion of Law No. 3 are unnecessary to a determination of this issue and may be disregarded. *See* Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991.

The hearing officer further found that appellant had not been employed by employer

[1] In the calculation of AWW for death benefits or income benefits other than TIBs, part-time employees are considered in two different categories: those who worked part-time as a regular course of conduct, and those who did not. A "regular course of conduct" for part-time work is determined by reviewing the work history of the employee for the 12-month period preceding the injury. If the employee only worked part-time during that period, the employee is presumed to have worked part-time as a regular course of conduct unless such presumption is rebutted by credible evidence. For an employee who worked part-time as a regular course of conduct, Article 8308-4.10(a) (b), or (g) and Rule 128.3 shall be used to determine AWW. A different method, by which AWW is calculated and then adjusted upward, is used for employees who do not work part-time as a regular course of conduct. Rule 128.4.

for 13 consecutive weeks prior to injury, a finding that was not disputed. Appellant does dispute Findings of Fact No. 5 and 6, that on (date of injury) employer did not employ a certified nurse's aide who was a similar employee to appellant and providing similar services, who had been employed for 13 weeks prior to (date of injury); and that there was no such similar employee in the (city) vicinity. The record below indicates that neither party offered sufficient evidence at the hearing to allow the hearing officer to make an AWW determination based on the wages of a similar employee. Although appellant's request for review contains names of home health aides employed by hospice, we cannot consider any evidence other than that which was made part of the record at the hearing. *See* Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992. We note parenthetically that the name of an employee alone would not suffice; there must also be evidence that the individual was a similar employee performing similar services, that he or she earned wages for at least 13 weeks prior to injury, and there must be a determination of the amount of that employee's wages.

The hearing officer found in Finding of Fact No. 7 that the irregular nature of appellant's employment resulted in it being unreasonable to calculate her AWW with regard to a similar employee. Appellant contends that the irregularity of her hours was due solely to her injury. The statute clearly indicates that irregularity of employment is determined pre-injury and not prospectively. We find that there is sufficient evidence in the record, including the testimony of appellant and Ms. B, and appellant's time sheet and pay stubs from employer, to indicate that her employment, which was on an as needed basis, was irregular so that the methods of AWW calculation contained in Article 8308-4.10(a) and (b) could not be applied reasonably. With regard to the method of calculation, we note that Article 8308-4.10(g) is similar to a provision in the prior statute, *see* TEX. REV. CIV. STAT. ANN. art. 8309, Section 1 (repealed), which allowed the fixing of a claimant's wage rate in a manner that was "just and fair" to both parties, where the wage rate was not determinable through use of actual wages or the wages of another employee in the same or similar employment. Courts have held that that provision "is not a matter of mathematical calculation," but must be established by the fact finder "on due consideration of all the facts and circumstances in the case which tend to establish" the claimant's earning capacity. Barrientos v. Texas Employers Insurance Association, 507 S.W.2d 900 (Civ. App.-Amarillo 1974, writ ref. n.r.e.); Southern Underwriters v. Buxton, 136 S.W.2d 264 (Civ. App.-Beaumont 1940, no writ). In this case, the hearing officer found irregularity of employment based upon sufficient evidence. Therefore, she had the discretion to apply any fair, just, and reasonable method to calculate AWW. Here, the hearing officer looked at the seven and one-half weeks preceding appellant's injury to determine an average workweek of 22.5 hours. Using appellant's most recent pre-injury hourly wage of $5.25, the hearing officer calculated an AWW of $118.15. Based upon our review of the record, we do not find that this was unfair, unjust, or unreasonable, nor an abuse of discretion on the part of the hearing officer. We, therefore, affirm the decision and order.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge