APPEAL NO. 92492

A contested case hearing was held on July 28, 1992, in (city), Texas, (hearing officer) presiding as hearing officer. This hearing was a result of a remand directed by Texas Workers' Compensation Commission Appeal No. 92181, decided June 25, 1992, on the issue of the respondent's (hereinafter called claimant) average weekly wage (AWW). Based upon a fair, just and reasonable standard, the hearing officer determined the claimant's AWW was $191.55. Appellant (hereinafter called carrier) urges error on the part of the hearing officer in rejecting a proffered document from the employer showing the wages of a "same or similar employee."

DECISION

Determining there was a sufficient basis for the hearing officer's finding of AWW at the rate of $191.55, we affirm his decision.

The evidence on the single issue of AWW on this remand was not extensive. The claimant introduced an undated Employer's Wage Statement (TWCC Form 3) showing hours worked and gross pay for a 10 week period. The carrier introduced a TWCC Form 3 dated "7/23/91" stating that it is a report of wages for a employee similar to the respondent. This latter report covers a 13 week period from "3-2-91" to "5-31-91," and includes a number of weeks when that employee worked less that 35 hours per week including a week when only 7.28 hours were worked. The claimant's date of injury was (date of injury). The claimant testified that he made $5.00 per hour working for employer during his some 10 weeks of employment. He also testified that he was advised that to be a full-time employee and to qualify for health insurance, an employee had to work a minimum 35 hour week. He testified that he always worked longer that 35 hours per week and never averaged less that 37 hours per week.

Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE. § 128.3 (TWCC Rule 128.3), implementing TEX. REV. CIV. STAT. ANN., art. 8308-4.10 (Vernon Supp. 1992) (1989 Act), provides a scheme for determining AWW. In essence, if an employee has worked 13 weeks for the employer, then the wage for the 13 weeks immediately preceding the injury are added together and divided by 13. If an employee has not worked for the employer for 13 weeks, then the wages for a similar employee who performed similar services and who has worked for 13 weeks is used. When a similar employee is identified, the wages paid to the person for the 13 weeks immediately preceding the injury are used. If neither of these two methods can be applied reasonably, then any method that the Commission considers fair, just and reasonable to all the parties can be used.

The hearing officer established the rate of $191.55 as the AWW using a fair, just and reasonable standard. In doing so, he considered the testimony of the claimant and information from the TWCC Form 3 he introduced. He did not accept the TWCC Form 3 proffered by the carrier as establishing the AWW for the claimant. We do not find fault with his determination under the circumstances, and find no reason to disturb his decision and

order. We observe that there is evidence that the purported "similar" employee reflected in the carrier's TWCC Form 3 may well not have qualified as a full-time employee given the number of weeks when that person worked fewer than 35 hours. The evidence supports an inference that the claimant always qualified as a full-time employee while working for the employer. (Rule 128.3(a) defines a full-time employee as one who regularly works at least 30 hours per week.) Also, we note that the TWCC Form 3 proffered by the carrier only included a time frame up to 2 weeks prior to the claimant's injury rather than reflecting wages immediately preceding the claimant's injury. Significantly, one of the earliest two weeks used in this form was a week when only one day was worked, and five of the weeks reflect less than 30 hours.

While we find some basis to agree with the carrier's complaint with the hearing officer's findings that appear to indicate the carrier was required to offer testimony on the TWCC Form 3 proffered by them, or to otherwise establish that the preparer of the form was aware of statutory definitions, this provides no basis for reversal in this case. We agree the form itself is largely self explanatory and the certification block requires the person to certify that it complies with the Texas Workers' Compensation Act. However, in this case, the information provided on the similar employee is not binding on the hearing officer since, on its face, it does not meet the criteria in the rules. We do not find merit to the assertions of error requiring corrective action on our part.

The decision and order are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge