

APPEAL NO. 93335  
FILED JUNE 17, 1993

On March 29, 1993, a contested case hearing was held. The hearing officer determined that the appellant (claimant herein) was injured in the course and scope of his employment on (date of injury); that the claimant has had disability at various times from (date of injury), through March 29, 1993; and that the claimant is a seasonal employee. The hearing officer ordered the respondent (carrier herein) to provide medical and income benefits to the claimant in accordance with his decision, the Rules of the Texas Workers' Compensation Commission (Commission), and the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The claimant disputes the hearing officer's conclusion that he was a seasonal employee. The claimant urges that he was a student. The carrier responds that the hearing officer correctly concluded that the claimant was a seasonal employee. The carrier further responds that there was no issue nor evidence presented that the claimant was a student at the time of his injury.

DECISION

That portion of the decision of the hearing officer that decides that the claimant was injured in the course and scope of employment and has had disability is affirmed. That portion of the decision of the hearing officer that decides that the claimant was a seasonal employee is reversed and a decision is rendered that the claimant was not a seasonal employee. We remand the case to the hearing officer for further consideration and development of evidence, as appropriate, and for findings in regard to whether the claimant was a student at the time of his injury.

The parties agreed that the issues at the hearing were: 1) whether the claimant sustained an injury in the course and scope of his employment on (date of injury); 2) whether the claimant has disability as a result of his injury of (date of injury), or was disability solely caused by a preexisting condition; and, 3) whether the claimant is a seasonal employee. However, in regard to the seasonal employee issue, at the benefit review conference (BRC) the claimant's stated position was that he was a student, at the hearing the claimant continued to take the position that he was a student and specifically requested that a finding be made that he was a student, and on appeal the claimant continues to request a finding of student status. The hearing officer made no findings or conclusions regarding whether the claimant was a student at the time of his injury. No appeal was filed in regard to the hearing officer's determinations in favor of the claimant on the first two issues. In his request for review, the claimant contends that the hearing officer erred in finding that he was a seasonal employee, and, as indicated, asks that a determination be made that he was a student. The carrier asserts that the claimant was a seasonal employee and that there was no issue or evidence presented at the hearing that the claimant was a student at the time of his injury.

The parties stipulated that the claimant was employed by the employer on (date of injury), and that the employer had workers' compensation insurance coverage with the carrier on that date.

The claimant injured his back working for the employer on (date of injury). He was 19 years of age at the time. The claimant's doctor took him off work on July 8, 1992. The claimant was subsequently diagnosed as having a herniated disc, a discectomy was performed on August 5, 1992, the surgical incision became infected and a second operation to drain the incision was performed on September 10, 1992.

Beginning in February 1990, when the claimant was in the 11th grade, he worked for his church locking and unlocking doors for an unspecified number of hours per week at an unspecified wage. He continued working for his church until August 1990 when he got a job at a pharmacy working 25 to 30 hours per week for \$5.00 per hour. He worked the same number of hours per week for the pharmacy throughout his senior year of high school and through the following summer. The claimant did not work during his freshman year at (University). He testified that he did not work during his first year of college because he did not need to. On June 1, 1992, after he had finished his first year of college, the claimant began working for the employer, a book publisher. He was injured on (date of injury), when he picked up a box of books, stepped over another box, and fell down. The claimant testified that he was not going to work for the employer when he went back to college after the summer. A foreman for the employer testified that summer was the employer's "heaviest working time" because during the summer the employer tries to deliver books to schools before the school year starts. The foreman further testified that the employer normally has more employees working during the summer than at any other time of the year and that the claimant would have worked only during the summer. The foreman testified that every year the employer lays off employees in September. During the five weeks the claimant worked for the employer prior to the week of his injury, he had four weeks in which he worked from 36 to 56 hours per week and one week in which he worked 9.5 hours. His total gross pay for the period worked for the employer was \$1091. In a letter to the carrier, the employer's Human Resources Coordinator described the claimant as "temporary help" and said that the claimant's job entailed sorting cartons and matching them to orders, checking the packing slips for accuracy, and general material handler work. The employer indicated that the claimant's employment status was "seasonal" on an Employer's Wage Statement (TWCC-3).

The claimant did not work for the employer after he was injured at work on (date of injury). A report from his doctor indicates that he was unable to work as of (day after date of injury). However, starting about July 17th he worked full time for two weeks at a Boy Scout Camp making \$100 a week. He left that job because of problems he experienced with his injury. After his surgery on August 5th, the claimant went back to college the last week of August 1992. The claimant's incision from his surgery became infected and a second operation was performed in September 1992. He said he missed some classes but was able to complete the Fall semester. He did not work during that semester. The claimant said that due to problems from missing classes for his second surgery, he did not

attend (University) for the Spring semester of 1993, but instead attended a community college that semester. About February 1, 1993, while the claimant was attending community college, he began working for a car dealership as a porter washing and waxing cars for 30 hours per week at \$5.50 per hour. On the date of the hearing, the claimant was still attending community college and working for the car dealership. He said that he had worked continuously for the car dealership since February 1, 1993. The claimant said he is studying ranching in college. He also said that it was possible that he would go back to (University).

With respect to the issue of whether the claimant was a seasonal employee, the hearing officer made the following finding of fact and conclusion of law:

**Finding of Fact No. 6.** Prior to his back injury of (date of injury), the claimant's regular course of conduct with respect to employment was to attend college during the college year, not to seek employment during the college year, and to obtain employment during the months of June, July, and August.

**Conclusion of Law No. 4.** The claimant is a seasonal employee as that term is defined under Article 8308-4.10(d) of the 1989 Act.

Article 8308-4.10 pertains to the computation of an employee's average weekly wage (AWW). Subsections (d) and (e) of that article are as follows:

(d) In this subsection, "seasonal employee" means an employee who, as a regular course of that employee's conduct, engages in seasonal or cyclical employment that does not continue throughout the entire year. The average weekly wage of a seasonal employee shall be computed for the purpose of determining temporary income benefits as provided by Subsections (a) and (b) of this section, adjusted as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid. The average weekly wage of a seasonal employee shall be computed for the purpose of determining impairment income benefits, supplemental income benefits, lifetime income benefits, or death benefits by dividing the amount of total wages earned by the employee during the 12 months immediately preceding the injury by 50. If, for good and sufficient reason as determined by the commission, it is impractical to compute the average weekly wage for a seasonal employee as provided by this subsection, the commission shall compute the average weekly wage as of the time of the injury in a manner that is fair and just to both parties.

(e) The average weekly wage for an employee who is a minor,

apprentice, trainee, or student at the time of the injury, whose employment or earnings at the time of the injury are limited primarily because of apprenticeship, continuing formal training, or education intended to enhance the employee's future wages, and whose wages would reasonably be expected to change, based on a change of employment during the period in which impairment income benefits, supplemental income benefits, lifetime income benefits, or death benefits are payable, shall be adjusted to reflect the level of expected wages during that period for the purpose of computing those benefits. The adjustment shall not consider expected wage levels for a period occurring more than three years after the date of the injury.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE. § 128.5 (Rule 128.5) is entitled "Average Weekly Wage Calculation For Seasonal Employees" and provides as follows:

- (a) A "seasonal employee" is an employee who as a regular course of conduct engages in seasonal or cyclical employment which may or may not be agricultural in nature, that does not continue throughout the year.
- (b) The average weekly wage used to determine temporary income benefits for seasonal employees shall be determined according to the procedure described in Sec. 128.3(d) or (e) of this title (relating to Average Weekly Wage Calculation For Full-Time Employees, and for Temporary Income Benefits For All Employees), subject to the periodic adjustment described in this rule.
- (c) The average weekly wage for computing temporary income benefits may be increased or decreased to more accurately reflect the seasonal nature of the employment, if such an adjustment would more accurately reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid. Evidence of earnings shall be submitted at the time an adjustment is requested. The evidence should include proof of the employee's earnings in corresponding time periods of previous years. In case of dispute, the commission shall set a benefit review conference to consider whether an adjustment should be made.
- (d) The average weekly wage used to determine impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits for a seasonal employee shall be calculated by:
  - (1) adding together the total wages received by the employee in the twelve months preceding the date of injury and dividing the result by 50;  
or
  - (2) if it is impractical to compute the average weekly wage as provided by

paragraph (1) of this subsection, another fair, just, and reasonable method as determined in a benefit review conference if requested by the person claiming income benefits or the insurance carrier.

Rule 128.6 is entitled "Average Weekly Wage Adjustment For Certain Employees Who Are Also Minors, Apprentices, Trainees, Or Students" and provides as follows:

- (a) In order to adjust average weekly wage under this rule, for purposes of computing impairment income, supplemental income, lifetime income, and death benefits, an injured employee must come within one of the following definitions, on the date of injury:
  - (1) a "minor" is an employee less than eighteen years of age and not emancipated by marriage or judicial action, and is also an apprentice, trainee, or student;
  - (2) an "apprentice" is an employee learning a skilled trade or art by practical experience under the direction of a skilled crafts person or artisan;
  - (3) a "trainee" is an employee undergoing systematic instruction and practice in some art, trade, or profession with a view towards proficiency in it; and
  - (4) a "student" is an employee enrolled in a course of study or instruction in a high school, college, university, or other institute of higher education or technical training.
- (b) The average weekly wage used to determine temporary income benefits for a minor, apprentice, trainee, or student shall be computed according to Sec. 128.3 of this title (relating to Average Weekly Wage Calculation for Full-Time Employees and for Temporary Income Benefits for all Employees), and may not be adjusted. The basic average weekly wage for other income and death benefits shall be calculated depending upon whether the employee worked full-time, part-time, or as a seasonal employee, and may be adjusted as described in this section.
- (c) The average weekly wage of an employee who is less than 18 years of age, but not a "minor" as defined in this section, shall not be adjusted.
- (d) The average weekly wage used to determine impairment income benefits, supplemental income benefits, lifetime income benefits, or death benefits for an employee defined under subsection (a) of this section shall be adjusted on the basis of this rule if the employee also proves that:

- (1) the employee's employment or earnings at the time of the injury were limited primarily because of apprenticeship, continuing formal training, or education that can be reasonably calculated to enhance the employee's future wages: and
- (2) the employee's wages would reasonably be expected to change during the period for which the impairment income, supplemental income, lifetime income and death benefits are payable not to exceed three years after the date of injury.
- (e) An insurance carrier and the person claiming income benefits may agree to adjust the average weekly wage used to compute impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits for an employee who meets the requirements of subsections (a) and (d) of this section. The adjustment shall not reflect the level of the expected wages for a period in excess of three years after the date of injury.
- (f) If an insurance carrier and the person claiming income benefits dispute the need for, or the amount of, an adjustment for expected wage levels, the commission shall schedule a benefit review conference. The commission shall then consider the evidence submitted by the insurance carrier and the claimant. Objective, documentary, or expert evidence is favored over testimony of interested parties, in determining an expected wage level which is fair and just.

In Larson's Workmen's Compensation Law, Vol. 2, Sec. 60.22(a) (Matthew Bender 1992), it is stated that: "It is well-known that many employments are normally seasonal, and wages may to some extent be adjusted so that the worker expects to live on his seasonal earnings during the regular periods of unemployment." Professor Larson states the basic rule concerning seasonal employment as follows: "it is the inherent seasonal nature of the employment that controls, not the claimant's seasonal connection with it." One of the cases cited by Professor Larson in his discussion of seasonal employment is May v. James H. Drew Shows, Inc., 576 S.W.2d 524 (Ky. Ct. App. 1978). In that case, the employee was hired to work as a roustabout by a traveling carnival for the summer between his junior and senior year of high school. He was subsequently injured while in the course of employment. The court held that, for the purposes of computing the benefits to which the employee was entitled, he was not a seasonal employee. The court's rationale was that the seasonal nature of an occupation is determined by what the job itself entails, rather than by the length of time the employee intended to work.

Under the 1989 Act, a "seasonal employee" means an employee who, as a regular course of that employee's conduct, engages in seasonal or cyclical employment that does not continue throughout the entire year. Article 8308-4.10(d). Rule 128.5(a) provides that seasonal or cyclical employment may or may not be agricultural in nature. Webster's Ninth

New Collegiate Dictionary (1990) defines "cyclic" or "cyclical" as "(a): of, relating to, or being a cycle; (b): moving in cycles." Given the employer's Human Resources Coordinator's description of what the claimant's job entailed - general material handler work - it is difficult to conclude from that description alone that the claimant's employment at the employer was seasonal or cyclical in nature. However, the foreman's testimony to the effect that the claimant was hired as summer help to work only during the employer's busy season when it delivers books to schools tends to indicate some seasonal or cyclical nature to the claimant's work for the employer. If we assume for the purpose of this decision that the claimant was engaged in seasonal or cyclical employment with the employer, that does not, in and of itself, make the claimant a seasonal employee since the statute and rule require that the claimant's regular course of conduct be looked to in determining whether he is a seasonal employee.

The question becomes: what is the claimant's regular course of conduct as it relates to engaging in seasonal or cyclical employment? Prior to obtaining his job with the employer, the claimant had worked at a church for several months during his junior year of high school and during the summer before his senior year of high school, and he had worked at a pharmacy throughout his senior year of high school and during the summer prior to attending college. There is no indication in the record that the church or pharmacy work was seasonal or cyclical in nature. Assuming that the claimant's work for the employer was seasonal employment, it was the only arguably seasonal or cyclical employment he had engaged in prior to his injury. When the claimant's work history prior to his injury is considered, the employment with the employer does not, in our opinion, amount to a regular course of conduct of engaging in seasonal or cyclical employment.

We observe that the claimant's work history following his injury shows that he worked at a Boy Scout camp for two weeks following his injury in the Summer of 1992, which could reasonably be considered as seasonal employment, and then he worked during part of his second year of college as a porter for a car dealership, which is most likely not seasonal work. Thus, when the claimant's work history to the date of his injury is considered he held three jobs for a total of about 20 months, with only one of those jobs being seasonal in nature and it composed only about one month of his work history, although had he not been injured he would have worked three months at the employer. The claimant's entire work history to the date of the hearing shows that he has worked five jobs for a total of about 22½ months, that only two of those jobs were seasonal in nature, and that they composed about 1½ months of his work history. While Finding of Fact No. 6 may well be supported by the evidence, albeit the claimant had attended only one year of college, that finding does not support Conclusion of Law No. 4 that the claimant is a seasonal employee, because the conclusion fails to take into account the overwhelming weight of the evidence that shows the claimant does not, as a regular course of conduct, engage in seasonal or cyclical employment that does not continue throughout the year. In this case, the claimant has a work history which covers more than just his first year of college and the following summer. He worked during high school. He also worked during his second year of college. We think that the evidence overwhelmingly demonstrates that not working during a school year is more of an exception than the rule for this particular

claimant and that working in seasonal type employment is not his regular course of conduct.

On appeal, the claimant, who was not represented at the BRC or the hearing, and is not represented on appeal, requests that we find that he was a student at the time of his injury. The hearing officer made no finding or conclusion concerning whether the claimant was a student at the time of his injury. The carrier contends that there was no issue regarding student status at the hearing. We think the matter of whether the claimant was a student at the time of his injury was properly before the hearing officer, notwithstanding that the issue was framed in terms of seasonal employment, because the claimant contended that he was a student at both the benefit review conference and at the hearing in responding to the carrier's contention that he was a seasonal employee and he requested the hearing officer to make a finding on his student status. The Appeals Panel has previously looked to the positions of the parties as stated in the BRC report and their positions at the hearing in determining whether the hearing officer failed to address an issue raised at the BRC. Texas Workers' Compensation Commission Appeal No. 92071, decided April 9, 1992. And, the Appeals Panel has previously remanded a case for determination of the actual issue in dispute notwithstanding that the parties agreed to the framing of an issue at the hearing which did not encompass the disputed issue as shown in the BRC report. Texas Workers Compensation Commission Appeal No. 92006, decided February 19, 1992. Consequently, we remand the case to the hearing officer for further consideration and development of evidence, as appropriate, and for findings concerning the issue of whether the claimant was a student at the time of his injury. If it is finally determined that the claimant was a student at the time of his injury and it is then later determined that the claimant is entitled to income benefits other than TIBS and the claimant requests an adjustment to his AWW for the purpose of computing those benefits based on student status, then, at that time, the claimant will need to prove that he has met the other requirements for such an adjustment as set forth in Article 8308-4.10(e) and Rule 128.6.

That portion of the hearing officer's decision that the claimant sustained a compensable injury during the course and scope of his employment and that he has had disability at various periods is affirmed. That portion of the hearing officer's decision that the claimant was a seasonal employee is reversed and a decision is rendered that the claimant was not a seasonal employee. The case is remanded to the hearing officer for further consideration and development of evidence, as appropriate, and for findings on the issue of whether the claimant was a student at the time of his injury.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas

Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. See Texas Worker's Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge