APPEAL NO. 93602

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On June 9, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer), presiding. The issues to be resolved at the CCH were: 1) what is claimant's average weekly wage (AWW), and an additional issue requested by claimant; 2) whether claimant was entitled to temporary income benefits (TIBS) from the date of injury to the date of the CCH. The hearing officer determined that claimant's correct AWW was $165.11 (which is less than $8.50 per hour) and that claimant established disability for those weeks between August 7, 1991, to May 23, 1992, in which she earned less than her AWW of 165.11.

Appellant, claimant herein, contends that the hearing officer erred in computing her AWW, and that (Ms. Mc) should have been accepted as a similar employee. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

It is undisputed that claimant worked for (employer), employer herein, in the capacity of a sales representative (and, as claimant testified, in some management positions). Claimant had worked for employer some 22 years and her wages consisted solely of sales commissions. Claimant was 52 years old at the time of the accident. On (date of injury) claimant was carrying a vacuum down some steps and "missed the last step" causing her to jar her whole body. Claimant testified that she had only worked intermittently in latter 1990 and in 1991 because she was in the process of moving back to (city). It was agreed that claimant had not worked regularly for the 13 weeks immediately preceding the injury. Claimant testified she promptly reported her injury to the employer's office manager but that she had difficulty in seeing a doctor because employer's management personnel were inexperienced and did not know how to process a workers' compensation claim. Claimant testified she continued to work and go into the office periodically after her injury, but that she was unable to aggressively pursue sales because she was physically unable to do demonstrations and other selling activities which required strenuous physical activity including "cold canvassing" and door to door selling. According to claimant, because employer's local management personnel and her supervisor were new, she was not authorized to see a doctor until April 16, 1992, when she saw (Dr. N). Dr. N restricted her lifting and indicated he would refer her to a neurologist in September 1992. (Dr. S) saw claimant on May 19, 1992, and diagnosed a "myofascial syndrome." She saw (Dr. C) in June 1992, and it was Dr. C's overall impression that claimant had "[p]ost traumatic myofascial pain syndrome, involving the shoulder and pelvic girdle muscles and the cervical and lumbosacral paraspinals." Dr. C recommended physical therapy. Dr. C released claimant for light work, "no lifting over 10-15 lbs." on 9-29-92. Claimant was seen by an orthopedic surgeon, (Dr. W), on November 12, 1992. Dr. W diagnosed "1) chest pain 2)

left arm pain" and had nothing further to offer. Claimant saw several other health care providers.

Because claimant had not worked for the employer the 13 consecutive weeks immediately preceding the injury, employer submitted the name and earnings of (Ms. W) as a similar employee performing similar services for use in calculating the AWW. Claimant obtained a statement from Ms. W which indicated Ms. W was 73 years old, had retired and been unable to work since 1986 and that Ms. W's earnings in 1991 "were simply a result of residual sales and repairs I receive from old customers." Ms. W states she had been unable to sell door to door and canvass for new business and sales since prior to 1991. Claimant in rebuttal offered the name and wage statement of Ms. Mc as a similar employee for use in calculating the AWW. Claimant testified she had met Ms. Mc at a home show and that their ideas and methods of sales work were very similar. Ms Mc had only been employed by the employer since 1990, but claimant states they "have held the same positions and have been trained by [employer]." No evidence was submitted regarding the number of hours Ms. Mc worked or the number of customers she sees in a pay period.

The hearing officer found Ms. W was a similar employee as claimant, but did not perform similar services, because Ms. W did not canvass for new business or do door to door selling. The hearing office further found Ms. Mc was a similar employee but that claimant had not established she performed similar services because there was no showing of comparable number of hours worked or a comparable number of customers seen. The hearing officer calculated claimant's AWW by taking claimant's reported earnings in the 13 weeks immediately preceding her injury divided by the number of weeks actually worked in this period as a fair, just and reasonable calculation of claimant's AWW. The hearing officer further determined that claimant was unable to earn her preinjury wage in some weeks between August 7, 1991, and May 23, 1992, because of her compensable injury and concluded that claimant established disability for those weeks between August 7, 1991, to May 23, 1992, in which she earned less than her AWW. An interlocutory order providing for the payment of TIBS, dated April 14, 1993, was superseded by the hearing officer's decision and order.

Claimant appeals alleging that since she worked less than the 13 consecutive weeks prior to her injury, Rule 128.3(e) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(e)) must apply and that for purpose of computing the AWW under Rule 128.3, Ms. Mc "is the 'appropriate similar employee'."

The 1989 Act prescribes the method for computing AWW in Article 8308-4.10, which states in pertinent part:

(a). . . if the employee has worked for the employer for at least 13 consecutive weeks immediately preceding the injury, the average weekly wage of an

employee 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.

(b)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 the average weekly wage equals the usual wage that the employer pays a similar employee for similar services. If no such employee exists, then the average weekly wage equals the usual wage paid in that vicinity for the same or similar services provided for remuneration.

(g)If the methods adopted under Subsections (a) and (b) of this section cannot be applied reasonably due to the irregularity of the employment or if the employee has lost time from work during said 13-week period due to illness, weather, or other cause beyond the control of the employee, the commission may determine the employee's average weekly wage by any method that it considers fair, just, and reasonable to all parties and consistent with the methods established under this section.

Pursuant to Rule 128.2(b)(4), if an employee was not employed for 13 continuous weeks before the date of injury, the employer shall identify a similar employee performing similar services, as those terms are defined in Rule 128.3 which states in part:

(f)For purposes of computing average weekly wage under subsection (e) of this section, the following definitions apply:

(1)a "similar employee" is a person with training, experience, skills and wages that are comparable to the injured employee. Age, gender, and race shall not be considered;

(2)"similar services" are tasks performed or services rendered that are comparable in nature to, and in the same class as, those performed by the injured employee, and that are comparable in the number of hours normally worked.

The employer presumably identified Ms. W as a similar employee performing similar services. However, in a sworn statement, Ms. W states she has been unable to work full time since 1986 and that her earnings were simply the result of residual sales and repairs she received from old customers. There is sufficient evidence to support the hearing officer's finding that the carrier did not establish that Ms. W performed similar services because Ms. W did not canvas for new business or do door to door selling, and in fact,

according to her statement, did no selling but merely collected residuals from old customers.

Claimant, after showing Ms. W not to be an employee performing similar services, submitted the name and wage statement of Ms. Mc as a similar employee for purposes of calculation of the AWW. Although claimant testified how she came to submit Ms. Mc's name and wage statement, the record is silent how many hours a week Ms. Mc worked or how many customers or potential customers she saw. We note that similar services described in Rule 128.3(f)(2) quoted above, indicates that similar services include a comparable number of hours normally worked. In Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993, interpreting the language of Rule 128.3(f)(2), we approved language to the effect that the hearing officer must also consider whether the employees worked a similar number of hours per week. We approved the concept that while the number of hours worked per week need not be identical, they must be similar in order for persons with similar job descriptions to be considered similar employees. There was no evidence of the number of hours a week Ms. Mc worked and no comparison to the hours claimant worked. In Texas Workers' Compensation Commission Appeal No. 92073, decided April 6, 1992, and Appeal No. 93386, *supra*, we held Rule 128.3(f)(2) specifically states that similar services are those which are among other things, comparable to the number of hours normally worked by the injured employee. Thus while the hours need not be identical, they must be comparable. Therefore, the hearing officer did not abuse her discretion in interpreting Article 8308-4.10(b) and Rule 128.3(e) in finding that Ms. Mc was a similar employee but that claimant had not established that Ms. Mc worked similar hours or saw a comparable number of customers.

In that it is undisputed that claimant had not worked for employer for at least 13 consecutive weeks immediately preceding the injury, the method of computation set out in Article 8308-4.10(a) and Rule 128.3(d) could not be used. For the reasons stated above, the provisions of Article 8308-4.10(b) and Rule 128.3(e) regarding the AWW of a similar employee performing similar services was unable to be determined. Consequently the hearing officer used the fair, just and reasonable method of determining the AWW in accordance with Article 8308-4.10(g) and Rule 128.3(g). In doing so, the hearing officer calculated the actual wages paid claimant in the 13 weeks prior to the injury and divided that amount by the weeks actually worked in arriving at an AWW of $165.11. Parenthetically we note that no allegation or appeal was made that claimant might be a part-time employee in accordance with Article 8308-4.10(c) and Rule 128.4.

In Texas Workers' Compensation Commission Appeal No. 92205, decided July 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92238, decided July 22, 1992, we held that if the usual methods for calculating the AWW cannot be applied reasonably "due to irregularity of employment . . ." then the Texas Workers' Compensation Commission (Commission) may use a fair, just and reasonable method to compute the AWW. As in Appeal Nos. 92205 and 92238, *supra*, claimant in the instant case has

established by her testimony that the nature of her employment was irregular, based in large part on how her personal affairs of moving and selling her house were progressing. We believe that the hearing officer was correct in applying a "fair, just and reasonable" standard for calculating AWW based on Article 8308-4.10(g).

Based upon our review of the record, we do not find the hearing officer's calculation of the AWW to be an abuse of discretion. We, therefore, affirm the decision and order.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Gary L. Kilgore
Appeals Judge