

APPEAL NO. 93780

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on July 28, 1993, to determine the appellant's (hereinafter claimant) correct average weekly wage (AWW) for purposes of temporary income benefits. The claimant seeks this panel's review of the hearing officer's determination of AWW based upon his wages earned for the 13 weeks prior to his injury, as adjusted. There was no response filed by the carrier.

DECISION

We affirm the decision and order of the hearing officer.

The claimant testified that he began working as a warehouseman for (employer), on (date of injury). His hourly rate of pay was a little under \$8.00 an hour, but pursuant to employer's policy he was hired as a "casual" or "part time"¹ employee, on a probationary basis. The import of this classification was that he did not get benefits and could not work any overtime; he said during that period of time he averaged around 39 hours per week. Toward the end of May 1992 he became "full time" and was assigned a number by employer which counted toward his seniority and meant he could work his way up to earning union wages. The change to "full time" status also meant he was eligible to work overtime, and he stated that most "full time" employees were working 55 to 60 hours per week. However, his hourly rate of pay did not change.

The claimant was injured on (date of injury). Claimant testified that the Employer's Wage Statement for claimant which was made part of the record accurately reflected the hours and wages he worked for the 13-week period preceding his injury. It shows that for the final two weeks of the period, after claimant had been moved to "full time" status, he worked 56 and 54.50 hours, respectively; prior to that time he worked anywhere from a low of 30.75 hours to a high of 46.50 hours per week. He worked no hours the week of March 15th, as he was away from work due to another, unrelated injury.

The 1989 Act, Section 408.041(a) (formerly Article 8308-4.10(a)) provides that, except as otherwise provided by that subtitle, the AWW of an employee who has worked for the employer for at least the 13 consecutive weeks immediately preceding an injury is computed by dividing the sum of the wages paid in those 13 weeks by 13. At the hearing and on appeal the claimant contended, however, that his AWW should be determined with reference to Section 408.041(b) (formerly Article 8308-4.10(b)), which states that the AWW of an employee whose wage at the time of injury has not been fixed or cannot be determined or who has worked for the employer for less than the 13 weeks immediately preceding the

¹The words "part time" and "full time" are put in quotations because those are the phrases claimant used to distinguish his work status before and after he became eligible for overtime work, and to distinguish them from the concept of full and part time as defined in the appropriate Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3 (Rule 128.3). It was claimant's testimony that even as a "part time" employee he generally worked in excess of 30 hours per week.

injury equals the usual wage that the employer pays a similar employee for similar services; or if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services. The claimant's position was that his wages were not "fixed" pursuant to subsection (b) above, as evidenced by the fact that his number of hours (and hence his earnings) increased after he was made a "full time" employee. Therefore, he argues, his AWW should be determined with reference to the wages of a same or similar "full time" employee.

The hearing officer determined that claimant was a full time employee as that term is used in Rule 128.3, finding that for the 13 weeks prior to his injury claimant regularly worked more than 30 hours per week for employer, and that his work schedule was comparable to other employees of employer who were not union employees. Claimant challenges this finding as incorrect, stating that the wage statements of other non-union similar "full time" employees would show higher wages due to an increased number of hours worked. However, our review of the record indicates support for this finding, which was made for purposes of establishing claimant as a full time employee as defined by the appropriate rule. That having been done, the hearing officer proceeded to calculate claimant's AWW, also pursuant to the 1989 Act and Rule 128.3,² by adding claimant's wages for the 13 weeks preceding the injury and dividing by 13. We find the hearing officer's use of this method correct and compelled by the facts of this situation. (In addition, the hearing officer credited claimant with an additional gross pay of \$380.16 to cover the week in which claimant had been off work.) The Act and the rules clearly state the method of calculation to be used when a claimant is a 13-week employee. Contrary to claimant's assertion, his wages for the 13-week period were fixed in the sense that they were determinable, and there was thus no need to determine his AWW by reference to the same or similar employee method of Section 408-041(b), or any other method contained in the statute. See, e.g., Texas Workers' Compensation Commission Appeal No. 92705, decided February 16, 1993. The hearing officer correctly determined claimant's AWW based on the plain language of the statute and rules.

We accordingly affirm the hearing officer's decision and order.

Lynda H. Nesenholtz

²The claimant notes an ambiguity between Section 408.041(b), which speaks of an employee whose wage has not been fixed or cannot be determined or who has worked for the employer for less than 13 weeks preceding the injury, and Rule 128.3(d), which says "[i]f an employee has worked for 13 weeks or more prior to the date of the injury, or if the wage at time of injury has not been fixed or cannot be determined. . . ." Despite this apparent inconsistency, the plain words of the statute clearly apply to claimant's situation in this case.

Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge