APPEAL NO. 93950

On September 20, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The hearing was held to determine the average weekly wage (AWW) of the appellant (claimant). Since the claimant had not worked for the employer for 13 weeks immediately preceding his injury, the hearing officer based the claimant's AWW on the wages of a similar employee, (JA), who had worked for the employer for 13 weeks preceding the injury. The claimant's AWW was determined to be $439.58. The claimant disagrees with the hearing officer's decision and contends that his AWW should have been determined using the wages paid to another employee, (GW), who was employed by the employer. The claimant asserts his AWW should be $517.16. No response was filed by the respondent (carrier).

DECISION

The decision of the hearing officer is affirmed.

Pursuant to Section 408.041(b), the AWW of an employee who has worked for the employer for less than the 13 weeks immediately preceding the injury equals: (1) the usual wage that the employer pays a similar employee for similar services; or (2) if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration. Section 408.046 provides that the determination as to whether employees, services, or employment are the same or similar must include consideration of: (1) the training and experience of the employees; (2) the nature of the work; and (3) the number of hours normally worked. Subsections (e) and (f) of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3 (relating to AWW calculation for full-time employees, and for temporary income benefits for all employees) provide as follows:

(e)If an employee has worked for less than 13 weeks prior to the date of injury, the wages paid to that employee are not considered. Instead, the wages used for the AWW calculation are those paid by the employer to a similar employee who performs similar services, but who earned wages for at least 13 weeks. If there is no similar employee at the employer's business, the calculation is based on wages paid to a similar employee who performed similar services in the same vicinity, for at least 13 weeks. When a similar employee is identified, the wages paid to that person for the 13 weeks immediately preceding the injury are added together, and divided by 13. The quotient is the AWW for the injured employee.

(f)For purposes of computing AWW 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 claimant began working for the employer, (employer)., on August 27, 1991, and was injured at work on (date of injury), which was a period of employment less than 13 weeks. Three Employer's Wage Statements for the claimant were in evidence. One reflected wages actually paid to the claimant, a second reflected wages paid to JA as a similar employee during the 13 week period prior to the claimant's injury, and the third reflected wages paid to GW as a similar employee during the 13 week period prior to the claimant's injury.

The evidence was conflicting on whether the claimant and JA performed similar services for the employer. The claimant said that JA worked in the yard but did not perform similar duties. The claimant said that GW performed duties similar to his own. (Ms. S), an administrative manager for the employer, testified that the claimant, JA, and GW were all yardmen and all performed similar services for the employer.

The claimant made $7.00 per hour for the eight weeks he worked prior to his injury. JA and GW also made $7.00 per hour, but both had increases to $7.50 per hour during the 13 week period preceding the claimant's injury. GW had worked for the employer for about two years prior to the claimant's injury whereas JA had worked for the employer for only several months. During the eight week period the claimant worked for the employer prior to his injury, JA worked a total of about 30 more hours than the claimant had and GW worked a total of about 70 more hours than the claimant had. Ms. S testified that one of the reasons GW worked more hours than either the claimant or JA was that GW had seniority and was selected to work more overtime. The claimant agreed that prior to his injury, the employees with the best training worked the most hours. The claimant said that he had not completed his training prior to his accident.

In her discussion of the evidence, the hearing officer stated that the nature of the work performed by the claimant prior to his injury was the same or similar to both JA and GW. The hearing officer judges the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer also resolves conflicts in the evidence. In the instant case, the hearing officer resolved the conflict in the evidence as to the similarity of work performed by JA and the claimant in accordance with the testimony of Ms. S. Her determination on that matter is supported by sufficient evidence and will not be disturbed on appeal.

The hearing officer also stated that GW worked longer for the employer and had more experience and training than the claimant so he had preference to work overtime. Thus,

the hearing officer concluded that the same or similar employee would be JA since he had worked for the employer a short amount of time, but at least 13 weeks immediately preceding the claimant's date of injury. The hearing officer found that JA was a similar employee and was paid for similar services for the 13 weeks immediately preceding the claimant's injury. The hearing officer then added the wages paid to JA in the 13 weeks immediately preceding the claimant's injury and divided the sum by 13 weeks in arriving at the claimant's AWW of $439.58.

Having reviewed the record, we conclude that the hearing officer's decision is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge