APPEAL NO. 94065

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 on November 4, 1993, in (city), Texas, (hearing officer) presiding. With regard to the single issue of what is the claimant's average weekly wage (AWW), the hearing officer determined that there was no same or similar employee performing the same services at the wage equivalent to claimant; he therefore used a method he considered fair, just, and reasonable to arrive at an AWW of $84.62. The claimant appeals this decision, contending that the hearing officer's decision was based upon wages of an employee whom the hearing officer determined was not a same or similar employee; he argues that it would be more fair, just, and reasonable to rely upon his own wage experience for the previous year. He also contends that the method used by the benefit review officer to calculate AWW should be used. The carrier responds that claimant's appeal is untimely and should not be considered; it also states that the hearing officer's determination is fully supported by the evidence in the record.

DECISION

Determining that the claimant's appeal was not timely filed and that the jurisdiction of the Appeals Panel has not been properly invoked, the hearing officer's decision has become final pursuant to Section 410.169.

Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was mailed to the claimant on December 6, 1993, with a cover letter dated December 3, 1993.

Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a) (Rule 143.3(a)). In addition, Rule 143.3(c) provides that a request for review shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and (2) received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision.

Rule 102.5(h) provides that "for purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed." Pursuant to Rule 102.5(h), receipt of the hearing officer's decision by the claimant is deemed to have occurred five days after December 6th, or December 11, 1993. Adding the 15 days in which to appeal, the filing deadline and last day in which to invoke the jurisdiction of the Appeals Panel would be December 27, 1993. (The last day of the period, December 26th, having fallen on a Sunday, the period is extended to the next day. *See* Rule 102.3(a)(3).)

Claimant avers in his appeal that he signed and mailed such document on December 14, 1993, and the inside address indicates it was correctly addressed to the Commission's (city) office; however, it is date-stamped as received by the Commission on January 18, 1994. The envelope attached to the appeal is an official envelope of the U.S. Postal Service; while no evidence is available to support this, we presume that claimant's letter became separated from its envelope or that the envelope was somehow damaged or destroyed.

Despite the possibility that claimant's appeal may have arrived much later than it was mailed due to other than his own actions, we nevertheless find the appeal untimely, based upon the reasoning of the Texas Supreme Court in the case of Ward v. Charter Oak Fire Insurance Company, 579 S.W.2d 909 (Tex. 1979). In that case the claimant had timely deposited in the U.S. mail her notice of intention to appeal from a ruling of the Commission's predecessor, the Industrial Accident Board, as was required by the prior workers' compensation statute (Section 5, Article 8307, Texas Revised Civil Statutes). However, the post office returned the envelope to the claimant for additional postage when, in fact, no additional postage was due. The same day, the claimant remailed her notice, which was received by the Board two days after the expiration of the statutory filing period.

In its decision the court noted that the law previously had been strictly construed by the courts to mean that the notice provision was not complied with, even when a filing was timely mailed, where it arrived late because of the U.S. Post Office, or because the last day fell on a legal holiday. The rationale underlying such construction, the court said, was that the post office is the agent of the party that selects the mail as the vehicle of delivery; therefore, any delay resulting from the post office's negligence is attributable to the sender. Determining that this would lead to a "harsh and inequitable" result in this case, however, the court articulated the rule that such notice would be deemed timely filed where sent by first class U.S. mail in an envelope or wrapper properly addressed and stamped and mailed one day or more before the expiration of the statutory period and received by the Board not more than 10 days after the expiration of that period. The court noted that this construction of the statute conformed to the notice provisions of Rule 5 of the Texas Rules of Civil Procedure.

While the prior statute does not apply to injuries occurring on or after January 1, 1991, the rationale of *Ward* is still instructive in this case. Even where untimely receipt was not due to any fault of a claimant, *Ward* nevertheless did not envision an open-ended period within which a mishandled filing would be accepted. Similar to the standard set forth in that case (and to Rule 5 of the Rules of Civil Procedure), Rule 143.3(c) deems timely a request mailed on or before the 15th day after the decision is reached, but received by the Commission no later than the 20th day after such date. Pursuant to Rule 143.3(c), claimant's appeal was mailed before the 15th day after presumed receipt but was not received by the Commission by the 20th day afterwards. Even absent Rule 143.3(c), the same result would be reached using the equitable standard of *Ward*, as the appeal was not received on or within 10 days after the expiration of the statutory period. Therefore, under the rules of the Commission, the claimant's appeal in this case was untimely. *Compare*

Texas Workers' Compensation Commission Appeal No. 931172, decided January 18, 1994.[1]

Although not required to do so, we have reviewed the evidence in this case and find no basis by which we would have overturned the hearing officer's decision. Under the 1989 Act, the AWW for an employee who has worked for an employer for the 13 consecutive weeks preceding the injury is determined by dividing the sum of the wages paid in that period by 13. If an employee, such as claimant, has not worked for an employer for the preceding 13-week period, that employee's AWW is determined by reference to the usual wage that the employer pays a similar employee for similar services. Section 408.041(a) and (b). The act further provides that if these methods cannot reasonably be applied due to, among other things, the irregularity of the employee's employment, the Commission may determine the AWW by any method the Commission considers fair, just, and reasonable to all parties consistent with the methods established by the statute. Section 408.041(c). The same procedures apply to an individual who is a part-time employee. Section 408.042.

In this case the unrefuted facts were that (employer) is in the business of setting up trade shows around the state and that it employs workers on an as-needed basis to set up and then dismantle exhibits. (Mr. M), one of employer's managers, testified that employer basically hires from a pool of individuals who have worked for them for many years, and that those with greatest seniority and the most experience are hired first. If more workers are needed, the employer brings in people from outside sources, sometimes on a word-of-mouth basis. He said that all employees work on a temporary, part-time basis, including employer's managers, although where applicable they are paid overtime and double time on Sundays and holidays.

Claimant, who heard about this job from a friend, was hired at $11.00 an hour ($16.00 per hour overtime, and $22.00 per hour double time) to build displays at a convention center in May of 1993. He suffered an injury to his Achilles tendon on May 14th, his first day on the job, after one and one-half hours of work. Claimant stated that he understood that employer's work was part time and sporadic, that he knew the job would last just a couple of days and he was not told the number of hours he would be working, and that he intended to work at other jobs to supplement the income he earned from this job. He introduced into evidence signed statements from individuals for whom he had done work in the past year or two as examples of his previous income. At the hearing he was seeking an AWW of $300.00; he stated that he believed it was possible to earn this amount working for employer. (He was also receiving benefits pursuant to an interlocutory order signed by a benefit review officer based on an AWW of $275.00, derived from multiplying claimant's hourly wage of $11.00 by 25 hours per week.) With regard to the project for which claimant had been hired, however, Mr. M testified that the employer paid an approximate total of 120 hours over four days (divided between several employees) for the project, and that on the day claimant was injured the employer paid a total of 48 hours "straight time" and 19 hours

[1]Because the claimant's appeal did not serve the carrier, there is nothing to show as a point of reference when a properly handled appeal might have been received.

overtime, divided among nine employees. He said it was possible someone could earn $300.00 per week but that it would be infrequent and probably would occur only once or twice a year for one of the highest paid workers.

Another of employer's managers, (Mr. D), testified that he works on a part-time basis, averaging around 20 to 25 hours per week, and that he has another outside job; that he employs three lead men who average around 10 to 15 hours per week; that claimant was hired as a laborer and that laborers probably average three to four hours per week over a year's time. Mr. D said that over the past three months he has set up approximately eight to 10 shows, most of which had required only himself and one other employee. He also said that during the same period he got beyond his list of regular employees only once, and that since the previous May he probably would have called claimant twice for jobs that would have required between 10 and 15 hours apiece.

A wage statement using another laborer as a same or similar employee showed that employee worked 10½ hours for the 13-week period, for a total gross pay of $129.25. Another wage statement for one of the lead men, (Mr. PD), gave his gross pay as $1,100.00 for the same period, which included five weeks in which that individual did not work.

The hearing officer determined that "the conditions under which these casual laborers worked make it impossible to find a same or similar employee."' Despite that, the hearing officer in using the fair, just, and reasonable method of determining AWW used the gross pay of Mr. PD as a basis by which to establish claimant's AWW. The Appeals Panel has previously held that the question of "similarity" was for the hearing officer as trier of fact to resolve, and that where irregularity of employment was an industry standard it was appropriate for a hearing officer to use the fair, just, and reasonable method where sufficient evidence supported the hearing officer's determination that no similar employee existed. *See* Texas Workers' Compensation Commission Appeal No. 92238, decided July 22, 1992. Likewise, due to the unusual circumstances of this case, we are convinced by review of the record that the hearing officer's decision was supported by the evidence and appears even to have been in favor of claimant due to the number of hours Mr. PD worked.

Claimant's financial circumstances subsequent to his compensable injury are less attributable to the decision of the hearing officer than to the infrequent, but unfortunate, circumstances that arise when an employee who works two or more part-time jobs suffers an injury on one job which thereafter prevents him from working at all. We have previously held that the provision in the 1989 Act which states that the employee must have worked "for the employer" for at least 13 consecutive weeks prior to the injury evidences a clear legislative intent not to authorize consideration of the wages of concurrent employments in the calculation of AWW under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991. While the result may appear harsh in a case such as this one, it has been stated that "[t]he new method is designed to compute the [AWW] fairly based upon the actual average weekly earnings of the claimant employee." 1 Montford, Barber & Duncan, A Guide to Texas Workers' Comp Reform, Vol I, p. 4-63 (1991).

Based on the foregoing, we determine that claimant's appeal was untimely and the jurisdiction of the Appeals Panel was not properly invoked; therefore, the decision of the hearing officer has become final pursuant to Section 410.169 and Rule 142.16(f).

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge