APPEAL NO. 941713

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 29, 1994, to determine whether the claimant had disability from September 13, 1993, to January 19, 1994, resulting from an injury sustained on (date of injury), and what is claimant's average weekly wage (AWW). (A third issue, whether the left shoulder is part of the compensable injury, was stipulated to by the parties.) In addition, the hearing officer declined to add another issue requested by the claimant, whether the carrier failed to comply with Rule 124.4 [Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE ' 124.4] by failing to notify claimant and the Texas Workers' Compensation Commission (Commission) that temporary income benefits (TIBS) would be terminated during claimant's incarceration, thereby entitling claimant to TIBS for that period; however, the hearing officer stated in her decision that the issue was "fully litigated" by the parties at the hearing.

The hearing officer determined that the claimant did not have disability for the period in question due to his incarceration, and that his AWW was $420.00 per week as based upon a fair, just, and reasonable standard of calculation. The carrier appeals the latter determination, contending that the hearing officer applied an incorrect legal standard in reaching this decision. It also appeals the hearing officer's finding of fact and conclusion of law relative to the carrier's failure to file a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) notifying the claimant and the Commission that it was terminating TIBS. The appeals file does not contain a response by the claimant.

DECISION

We affirm the hearing officer's decision and order, with modifications.

It was not disputed that the claimant, a truck driver for (employer) was injured in the course and scope of his employment on (date of injury). At the time of his injury, he had not been working for employer for the previous 13 weeks. The claimant said he had been required to go through training for a week or two, for which he was paid $300.00 per week; according to a letter from his attorney, during the period in which he was driving for employer he averaged $89.30 a day. The Employer's wage statement for claimant shows that he worked from August 15 to August 21, 1992, and from August 22 to August 28, 1992, and received $300.00 each week but did not include any other amounts. The claimant believed his AWW should be higher based upon the following reasoning: he was hired at a total rate of 21 cents per mile and guaranteed a minimum of 2,000 miles per week and the claimant, who had been a truck driver since 1989, stated that in his experience 2,000 miles a week was a low figure. He also said that as a driver he would be entitled to other remuneration, including holiday pay and a fee for extra stops. He believed his AWW should be $446.50.

The employer had submitted a wage statement for (Mr. A), whom it identified as a similar employee performing similar services as claimant. According to the statement, Mr.

A's AWW was $243.46. The claimant contended that Mr. A was not a same or similar employee, based on a number of factors. First, because of his experience as a truck driver, claimant said that Mr. A's wages showed that he was not as experienced as claimant, although he acknowledged that he did not know Mr. A and was only speculating as to the nature of his job. Secondly, he contended there was a conflict between the wages listed on Mr. A's wage statement and payroll records for that employee. As an example, for the period ending August 28, 1992, the payroll records listed Mr. A's gross pay as $725.04, while the wage statement gave the amount as $514.74; for the period ending September 4, 1993, the payroll records gave the wage as $579.68, while the wage statement listed $424.58 for the same period.

Carrier's adjuster, Ms. J, testified that the wage statements had been prepared by Ms. M, of employer's risk management department. (Ms. M was not present at the hearing and did not offer written testimony.) Ms. J said that while she did not know what criteria Ms. M used in selecting Mr. A, she had no reason to believe that Mr. A was not a same or similar employee on the date of injury. (She also stated that she knew Mr. A to be a long-haul truck driver.) Ms. J also reviewed the wage statement and the payroll records and said she still believed that the wage statement was correct.

The carrier introduced into evidence an undated Form TWCC-21 which indicated claimant's TIBS were being terminated effective September 18, 1993, due to the fact claimant was in jail. Ms. J said these forms were prepared by a unit separate from the one in which she worked, and that while this particular form did not show it was sent to claimant or date-stamped as received by the Commission, she presumed that that had been done pursuant to usual procedures. The hearing officer, following a check of the claim file, took official notice of the absence of such TWCC-21 from the Commission file.

The carrier appeals the following findings and conclusions of the hearing officer:

FINDINGS OF FACT

7. The wage statement of the alleged same or similar employee is inherently unreliable and there is no evidence to support the conclusion that [Mr. A] is a same or similar employee to Claimant.

8. A fair, just, and reasonable standard for calculating the claimant's average weekly wage is to use his guaranteed 2000 miles per week x 21 cents per mile for an [sic] fair, just, and reasonable average weekly wage of $420.00 per week.

9. The carrier failed to file a TWCC-21 notifying the claimant and the commission that it was terminating temporary income benefits during claimant's period of incarceration.

CONCLUSIONS OF LAW

4. The appropriate method for determining average weekly wage in the present case is the use of the fair, just, and reasonable standard as the claimant did not work for employer for 13 weeks and the employer and carrier have failed to provide a same or similar employee.

5. The fair, just, and reasonable average weekly wage is $420.00 per week.

6. The carrier failed to comply with Rule 124.4 in that it failed to file a TWCC-21 notifying the Commission and the claimant of its termination of temporary income benefits during his period of incarceration. However, such failure to comply with Rule 124.4 does not entitle claimant to temporary income benefits during the period in question.

The appropriate portion of the 1989 Act provides that the AWW of an employee who has not worked for the employer for at least the 13 consecutive weeks immediately preceding the date of 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.

The Act goes on to provide that if the above method cannot reasonable be applied "because the employee's employment has been irregular or because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, the Commission may determine the employee's average weekly wage by any method that the Commission considers fair, just, and reasonable to all parties and consistent with the methods established under this section." Sections 408.041(b) and (c).

In addition, Rule 128.3(f) provides as follows:

(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.

In its appeal the carrier contends that the statute requires that the claimant establish by a preponderance of the evidence that a same or similar employee did not exist on the date of his injury before the fair, just, and reasonable standard could be used to determine his AWW. The claimant, the carrier argues, did not meet this burden, as he testified that he did not know Mr. A nor have any personal knowledge as to his experience or qualifications as a truck driver. In addition, it says, claimant did not introduce any evidence that a same or similar employee did not exist on the date of injury.

We have previously held that the wage statement of another employee identified by the employer as same or similar is not conclusive if a dispute arises over the similarity of the employee so identified. Texas Workers' Compensation Commission Appeal No. 92238, decided July 22, 1992. It has also been held that before the "just and fair" wage rate could be resorted to, the claimant had to have shown that the wage that the employer pays a similar employee for similar purposes does not apply. *See* Texas Employers Insurance Association v. Shannon, 462 S.W.2d 559 (Tex. 1970).

Previous Appeals Panel decisions, while not involving the precise factual situation presented in this case, have addressed evidence provided by a claimant as to the suitability of the same or similar employee provided by the employer through the carrier. In Appeal No. 92238, *supra*, the Appeals Panel affirmed the hearing officer's rejection of the employer's wage statement based upon the parties' dispute over whether the hours of that employee were similar; the panel held that the question of "similarity" was for the trier of fact to resolve. In Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991, the Appeals Panel affirmed the hearing officer's determination of AWW based on a fair, just, and reasonable standard where the employer's wage statement for a same or similar employee was based upon weeks which were outside the 13-week period immediately preceding the injury.

The carrier in this case contends that the claimant's testimony as to Mr. A's experience was essentially flawed because claimant acknowledged he did not have first hand knowledge of Mr. A's experience or qualifications. We note, however, the hearing officer's AWW finding did not appear to be based upon whether Mr. A had comparable training, experience, and skills, but rather on her determination that the wage statement was "inherently unreliable," presumably due to the discrepancy between Mr. A's wages as listed on the wage statement and those contained in employer's payroll records. We observe that there was no attempt made by the carrier to reconcile the figures, other than the statement of Ms. J (who did not participate in the selection of this employee or the preparation of the wage statement), without explanation, that the figures on the wage statement were correct. Pursuant to the evidence presented we believe that the hearing officer could have found that the single wage statement provided by the carrier was unreliable, and was thus not compelled to rely upon it in determining claimant's AWW.

The carrier also contends that the hearing officer erred in her Conclusion of Law No. 4 where she states that the fair, just, and reasonable standard of determining AWW was

appropriate because the claimant did not work for the employer for 13 weeks and because "the employer and carrier have failed to provide a same or similar employee." The carrier alleges error as a matter of law, noting that case law imposes a burden upon the claimant to establish his wage rate and states that the claimant in this case "made no attempt to prove a same or similar employee did not exist." Carrier notes that Rule 128.2(b) requires an employer to file a signed wage statement with the carrier and the injured employee within certain stated time limits and provides that where the claimant is not a 13-week employee the employer "shall identify a similar employee performing similar services, as those terms are defined in ' 128.3 of this title . . . and list the wages of that similar employee for the 13 weeks prior to the date of the injury;" however, it argues that the employer complied with the rule in this case and therefore its wage statement should not have been disregarded.

If the claimant had come forward with no evidence to demonstrate that Mr. A was not a same or similar employee, he would not have met his burden and undoubtedly the hearing officer would have accepted the employer's wage statement. While not explicitly stated as a criterion in the statute or rule, it is nevertheless axiomatic that the wage statement of a same or similar employee must accurately reflect that employee's gross wages for the period in question. In this case, the claimant introduced evidence in the form of employer's payroll records which raised an issue of fact as to whether the wage statement was accurate. Further, there was no evidence presented to rationalize the difference between the two documents, other than Ms. J's bare assertion that the wage statement was correct. The hearing officer, as sole fact finder, was entitled to determine that the evidence did not support a finding that Mr. A was a same or similar employee and, that being the case, was entitled to go forward with determining claimant's AWW based on a fair, just, and reasonable standard. Upon our review of the record, the hearing officer's determination on this issue was supported by the evidence and was not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Carrier's final argument is that the hearing officer erred in ruling on whether the carrier failed to comply with Rule 124.4, which requires the carrier to notify the Commission and the claimant of any termination of income benefits. While the hearing officer, who refused initially to add this issue at the hearing, correctly noted in her decision that both parties presented evidence concerning whether the carrier complied with this rule, we agree with the hearing officer's original position at the hearing that this issue was more properly the subject of a compliance hearing under the Administrative Procedure Act. (She also correctly noted, as is contained in her conclusion of law, that any such failure by the carrier to comply with the rule would not entitle the claimant to TIBS during the period in question.) Based upon the foregoing reasoning, we believe it was not appropriate for the hearing officer to have reached Finding of Fact No. 9 and Conclusion of Law No. 6, and these are hereby stricken.

The hearing officer's decision and order are accordingly affirmed, as modified herein.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge