APPEAL NO. 960538
FILED APRIL 26, 1996

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 February 29, 1996, to decide the issue of claimant's average weekly wage (AWW). The hearing officer held that the claimant's AWW was $244.11 and the claimant has appealed, contending that this AWW, based upon her wages paid during a 12-month period of time rather than the ten months in which she actually worked, is unconstitutional. The respondent, a self-insured governmental entity (self-insured), contends that the hearing officer's decision should be affirmed.

DECISION

Reversed and remanded.

The facts of this case are essentially undisputed. The claimant, an English as a Second Language (ESL) aide for a school district, was injured on_____. She had worked for the self-insured for the 13 weeks prior to the injury. She worked for 10 months out of the year and said that, until a year or so before the injury, she had been paid on a 10-month basis. However, she said that in order to get cafeteria plan insurance benefits she was required to be paid on a 12-month basis. Ms. J, self-insured's payroll clerk, agreed that this was the case, although she did not know the source of the requirement. Both Ms. J and claimant agreed that the cafeteria plan, in which claimant's insurance premiums were paid from pre-tax dollars, was to claimant's benefit. However, the claimant said she had never been informed as to the consequences from a workers' compensation perspective.

The sole piece of evidence was the Employer's Wage Statement, which claimant said accurately reflected her gross wages. It also showed that the self-insured paid $100 in health insurance premiums each month. Based upon the wage statement, the hearing officer determined claimant's AWW to be $244.11. The claimant contends this amount should be $350.68, which would be derived by calculating her wages based upon a 10-month payment period.

The claimant's sole argument on appeal is that she is a member of a class of workers who suffer discrimination due to the provision of the 1989 Act which calculates compensation based upon an AWW predicated upon the 13 weeks of pay prior to the injury; she submits that this results in the denial of substantial benefits to a class of employees without notice by a governmental employer, which constitutes a deprivation of due process rights of the employee under both the Texas and United Sates Constitutions. She further states that the lowering of benefits to a class of disabled individuals based upon the signing of a contract payment provision without notice of adverse consequences constitutes a violation of the Americans With Disabilities Act, 24 USC. 12011 *et al*, and that such deprivation of benefits, without notice, constituted civil fraud by the employer.

The 1989 Act provides that the AWW for 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 the 13 consecutive weeks immediately preceding the date of the injury by 13. Section 408.041. "Wages" are defined, in pertinent part, to include "all forms of remuneration payable for a given period to an employee for personal services." Section 401.011(43).

In Texas Workers' Compensation Commission Appeal No. 92688, decided February 5, 1993, we considered the issue of whether a teacher was entitled to temporary income benefits (TIBS) for the summer months in which she did not work, but received her salary, pursuant to a 12-month contract of employment. In finding disability and awarding benefits, the hearing officer concluded that the remuneration payable for a given period in wages [as defined by Section 401.011(43)] had accrued on or before the last day of the contract, and that even though the contract mentioned 12 equal monthly payments during the school year, the "given period" for purposes of computing the claimant's post injury "weekly earnings" ended with the contract. Therefore, it was held that any computation of TIBS due claimant should not include any remuneration, regardless of when paid, for the services rendered prior to the end of the contract. In affirming, we stated in part:

> The hearing officer reasoned that although claimant continued to receive equal monthly payments during that period [from June to August], she had already performed all the work she was required to perform under her term employment contract; thus, the salary payments for the term period had already accrued and were merely due and payable for services already rendered.

The Appeals Panel went on to discuss state law regarding teacher contracts, as well as the contractual provision in question, holding that this claimant's employment status ended in June, at the close of the school year. We went on to state:

> We emphasize, however, that a variety of contractual provisions--for both term and continuing contracts--may be agreed to by the contracting parties, and the question whether a school district employee has retained or continued employment during any particular time period may well be determined by the peculiar provisions of the employment contract. Under the facts and circumstances of this case, we find the evidence sufficient to support the hearing officer's finding that claimant was not employed by employer during the period June 6 through August 16, 1992. We believe this is so notwithstanding that in the parties' term contract they agreed that although claimant's obligation to provide services ended on June 5th, commensurate with the expiration of the contract term, claimant's salary for services during the term of the contract was payable in 12 rather than 10 equal installments.

While not directly addressed as an issue in Appeal No. 92688, *supra*, it seems to us that that case sanctions the concept that "wages" can include accrued but deferred amounts paid under the type of contractual arrangements described in these cases. This interpretation finds further support in Texas Workers' Compensation Commission Appeal No. 93980, decided December 14, 1993, in which a carrier sought to adjust the AWW of a school bus driver pursuant to Section 408.043 and Rule 128.5(c), pertaining to seasonal employees. The Appeals Panel in that case noted that the hearing officer's finding that the claimant was a seasonal worker was not appealed, but stated that such finding found support in Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993, which concluded that disability for a school district employee did not end based upon past work history but that a carrier could seek a seasonal adjustment where past work history indicated a pattern of nonemployment during the summer. While the claimant in Appeal No. 93930 customarily did not receive her salary over a 12 month period, the decision did not appear to distinguish between employees who so elect and those who do not.

While Appeal No. 92688, supra, clearly distinguishes those wages that accrue, but are unpaid, during a nine-month period, that case makes clear, however, that this determination must be made on a fact-specific basis. We accordingly believe that this case should be remanded to allow further evidence to be adduced concerning the contractual relationship between the claimant and the self-insured, and a decision on AWW reached pursuant to the nature of that relationship. As to the claimant's other points of appeal, this panel has previously said it has no power to pass upon the constitutionality of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992. Similarly, we lack authority to adjudicate an employee's allegation that her employer has violated federal law.

Based on the foregoing, the hearing officer's decision and order are reversed and remanded for further proceedings. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Elaine M. Chaney
Appeals Judge