

APPEAL NO. 982734

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 28, 1998. He (the hearing officer) determined that the appellant's (claimant) average weekly wage (AWW) was \$190.96 on a fair, just, and reasonable basis, which coincided with his actual wages during the 13 weeks preceding _____, the date of injury, divided by 13. The claimant appeals this determination, arguing that the hearing officer erred in considering the claimant's employment "irregular due to the weather" and that the claimant's AWW wage should be based on a 40-hour week. The respondent (carrier) replies that the decision is correct and should be affirmed because there was no reason why the AWW should not have been determined on the basis of actual wages.

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DECISION

Affirmed.

The claimant worked painting water towers. He began this employment in October 1994 and was injured on _____. He testified that he could only work "according to the weather," that is, when it was not raining or too windy. The carrier submitted an Employer's Wage Statement (TWCC-3) which reflects that he worked during each of the 13 weeks preceding the injury, but his hours varied from a low of four in one week to a high of 40 in only one of the 13 weeks.

Section 408.041(a) provides that the AWW for an employee who has worked for the employer for at least the 13 consecutive weeks immediately preceding an injury shall be the sum of these wages divided by 13. An alternative way for calculating AWW is provided in subsection (b) based on usual wages for a similar employee. Finally, subsection (c) provides that if subsection (a) or (b) "cannot reasonably be applied" because the employment has been irregular or because there was lost time in the 13 weeks preceding the injury because of, among other things, "weather, or another cause beyond the control of the employee," the AWW may be determined by any method considered "fair, just, and reasonable to all parties and consistent with the methods established under this section."¹

The carrier's position was that because the employee worked during the 13 weeks immediately preceding the injury, his AWW should be calculated by simply dividing those wages by 13. The claimant countered that his work hours depended on the weather, which was beyond his control. The hearing officer commented in his discussion of the evidence that the claimant's "wage was extremely irregular by its nature." In so doing, he considered the claimant's irregular hours inherent in the nature of his employment and that the

¹The parties stipulated that the claimant was not a seasonal employee under Section 408.043.

claimant was not often expected to work a 40-hour week because the weather would inevitably and predictably limit the number of work hours per week. He therefore resorted, at the urging of the claimant, to a calculation of AWW on a fair, just, and reasonable basis, but in so doing arrived at the same result that simply dividing the actual wages by 13 would have produced.

In Texas Workers' Compensation Commission Appeal No. 971239, decided August 15, 1997, the Appeals Panel affirmed the determination of a hearing officer to base AWW on the actual 13 week earnings, rather than a "fair, just, and reasonable" method when the evidence showed that the claimant's hours were "variable as a normal course of business." In Texas Workers' Compensation Commission Appeal No. 950383, decided April 24, 1995, we commented that subsection (c) is to be used to determine AWW when the actual wages are not representative of the claimant's "true earnings" due to factors beyond the claimant's control. In the case we now consider, the hearing officer's use of subsection (c) produced an AWW identical with what it would have been under subsection (a). Because subsection (a) is to be used unless it cannot reasonably be applied and a determination under subsection (c) must be reasonable, we question why the hearing officer resorted to subsection (c). In any case, the critical issue to us is whether there was sufficient evidence to support the determination of the hearing officer that the irregularity in the claimant's work brought about by the weather was inherent in his employment or, as in Appeal No. 950383, *supra*, whether the employment was "irregular by its nature." The only evidence about the nature of the employment came from the claimant who testified that he could only paint water towers in favorable weather conditions and that he was only hired to paint water towers. We believe that this testimony was sufficient to support the conclusion that the work was "extremely irregular by its nature." Because the job was defined in this manner, the irregular hours were not "beyond the control" of the claimant as that phrase is used in subsection (c).

For these reasons and because the result would be the same in this case whether AWW was determined under subsection (a) or (c), we find no error in the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge