

APPEAL NO. 990712

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 8, 1999. The hearing officer determined that the respondent (claimant) did not work for the employer for 13 consecutive weeks prior to his injury and that the evidence was insufficient to establish wages for a similar employee for similar services or to establish wages paid in the vicinity for the same or similar services. Neither party has appealed those determinations and they have become final under the provisions of Section 410.169. The hearing officer determined that, during the 13-week period prior to the injury, the claimant received nine weekly paychecks; divided the \$2,009.59 wages earned during the 13-week period by nine; and found that based upon a fair, just, and reasonable calculation, the claimant's average weekly wage (AWW) is \$223.29. The appellant (carrier) requested review, urged that the hearing officer erred by not dividing the wages earned by the claimant during the 13-week period by 13, and requested that the Appeals Panel reverse the decision of the hearing officer and remand for the hearing officer to determine the claimant's AWW by using the method proposed by it. A response from the claimant has not been received.

DECISION

We affirm.

The claimant testified that he began working for the employer on September 23, 1996, as a variable wage earner and that he worked in that position through December 20, 1996. He said that he was paid an hourly wage that varied depending on the type of work he did and that his wages ranged from \$6.25 an hour for demolition work to \$15.49 for welding. The claimant stated that about 80 percent to 90 percent of the work he did was demolition work. He testified that from December 20, 1996, through January 16, 1997, he performed duties similar to those of Mr. OP, who had been the superintendent of the project and was paid \$7.00 an hour. He said that he began working as a self-employed mechanic; that in February 1997 he received a call from Mr. BP, who worked in the employer's central office in another city; that Mr. BP asked him to oversee the installation of a motorized vent at the pay rate of \$10.00 an hour; that he performed that job over a two or three-day period and worked for 13 hours; that he performed the superintendent duties that Mr. OP had previously performed; that he returned to his self-employment work; that about March 1, 1997, he received a call from Mr. BP and was asked if he was interested in a superintendent's job at \$10.00 an hour; that he began work on March 3, 1997, and worked 37 1/2 hours the first week; and that he was injured on _____. In answers to a question in interrogatories about who he worked for and the rate of pay during 1996 and 1997, the claimant stated that he worked for a school district from August 1991 through October 1996 at \$35,000.00 a year, provided the dates he worked for the employer and the hourly wages, and said that he was self-employed as a mechanic from 1986 to the present and worked full time and part time at varying amounts. There is no indication that the carrier sought clarification from the claimant.

In numerous decisions, including Texas Workers' Compensation Commission Appeal No. 93602, decided August 31, 1993, and Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994, the Appeals Panel has affirmed decisions in which a hearing officer determined the claimant's AWW by dividing the amount of pay received from the employer during the 13-week period immediately preceding the injury by the number of weeks the claimant worked for the employer during that period. The carrier's contention that the hearing officer should have divided the wages for the 13 weeks by 13 because the claimant did not provide specific amounts that he earned as a self-employed mechanic during those 13 weeks is without merit. The hearing officer did not err in the manner in which he used the fair, just, and reasonable method to determine the claimant's AWW.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge