APPEAL NO. 991423

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 15, 1999. The single issue at the CCH was the average weekly wage (AWW). The hearing officer, applying a fair, just, and reasonable standard in determining the AWW, found it to be $453.70. The appellant (claimant) disagrees with the AWW finding and, in his appeal, states he was guaranteed a 40-hour week when he was employed and that the figure of $474.20 by his ombudsman was the good figure which he desires the decision to reflect. However, he later indicates he wants the Appeals Panel to decide his AWW to be $480.00. The respondent (carrier), in a Carrier's Response to Claimant's Request for Review, which was not timely filed for purposes of an appeal, argues that the AWW should be either $421.85 or $360.69 based on one of two possible same or similar employees.

DECISION

Affirmed.

The claimant, who basically installed drywall for the employer, testified that he was guaranteed a 40-hour week when he started work for the employer. At the time of his injury, he had not worked for 13 weeks but had worked approximately 10 and one-half weeks. It is clear that he was paid at the rate of $12.00 per hour. Mr. W testified for the employer and stated that they had a few hundred part-time employees like the claimant. He stated there was no guarantee as to hours per week and that it would be ludicrous in their particular line of construction work. He said there were many variables as to the number of hours worked in a week such as weather, delays for other construction matters, etc., although the standard work week would be 40 hours. Mr. W presented the Texas Workers' Compensation Commission with a wage statement of a same or similar employee and was asked for a second same or similar employee. Both had worked for 13 weeks but neither at 40 hours per week and Mr. W stated this was not atypical. The AWW for the two same or similar employees was, respectively, $421.85 and $360.69. The claimant's earnings were presented to the hearing officer. Claimant's position was alternately that his AWW should be $480.00 at a $12.00 rate for a 40-hour week, or that his AWW should be $474.20 based on the figure in the benefit review conference report. That figure was stated to be based on a fair, just, and reasonable basis by leaving out the first week's earnings since he did not start until mid week.

The hearing officer found Mr. W's testimony more persuasive regarding the matter of neither the claimant nor other similar employees being guaranteed 40 hours per week. The hearing officer also found that although the two employees submitted as same or similar were similar in terms of job duties, job classification, and hourly wages, neither was the same or similar with regard to the hours worked. Finding AWW not determinable on the basis of either a full 13-week work period or a same or similar employee from the evidence presented, the hearing officer determined that the AWW should be based on a fair, just, and reasonable standard as provided in Section 408.041(c). In doing so, the hearing officer

took the wages for the actual days worked, divided by the actual days worked, and multiplied by five, resulting in a weekly wage of $453.70, which he determined to be the AWW.

While evidence was presented concerning the wages of two other employees who were offered as same or similar employees and which could support a finding that the same or similar employee provisions of Section 408.041(b), were satisfied, the determination of a same or similar employee is a factual issue for the determination of the hearing officer. Texas Workers' Compensation Commission Appeal No. 941713, decided February 7, 1995; Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993. We cannot conclude from our review of the evidence that the finding of the hearing officer that a same or similar employee was not shown because of the lack of comparable hours was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. With that finding affirmed, it was appropriate to resort to the fair, just, and reasonable method. Texas Workers' Compensation Commission Appeal No. 93602, decided August 31, 1993.

The decision and order of the hearing officer are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge