APPEAL NO. 991759

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) on remand from Texas Workers' Compensation Commission Appeal No. 990757, decided May 21, 1999, was held on August 2, 1999. The single issue on remand at the CCH was the appellant's (claimant) average weekly wage (AWW), the decision on the remaining issues at the original CCH having been affirmed in Appeal No. 990757 and not readdressed herein. The hearing officer determined that the claimant's AWW was $430.50, based upon the just, fair, and reasonable method of calculation. Section 408.041(c); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(g) (Rule 128.3(g)). The claimant appeals reurging his disagreement with the issues previously affirmed and urging error on the part of the hearing officer in using the just, fair, and reasonable method since there were two similar employees and, alternatively, urging error in excluding wages due to causes beyond the control of the claimant. Respondent (carrier) argues that the decision of the hearing officer is fully supported by the evidence and law and asks that the decision be affirmed.

DECISION

Affirmed.

The factual background is set forth in our prior decision and will not be repeated here. As indicated, the hearing officer arrived at the AWW using the just, fair, and reasonable method contrary to the position of the claimant, at both the CCH and on appeal, that the similar employee standard as provided in Section 408.041(b); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(e) (Rule 128.3(e)) should have been used. The claimant urges that his AWW should be determined by the wages of two other full-time cement finishers who were similar employees. There was evidence introduced at the CCH on remand that the claimant was hired as a cement finisher on an as-needed basis since the employer had two full-time finishers on the particular project, and that during the 13 weeks leading up to the injury, the claimant did not work at all for four weeks. Although the claimant stated he was hired on as a "regular," he indicated that he performed other labor tasks that the two finishers did not perform. He stated that he believed the other two finishers worked 40-hour weeks for the complete 13 weeks, although, he, the claimant, did not work for some four weeks. He stated sometimes (no further specifics) he did not work because of weather.

Under these circumstances, the hearing officer calculated the AWW on the just, fair, and reasonable method, and we conclude this was appropriate and in compliance with the statute and rules on calculating AWW. Rather than take the erratic 13-week period preceding the injury and dividing by 13, which would result in a lower rate, and rejecting the similar employee method, which we conclude is not against the great weight or preponderance of the evidence, the hearing officer calculated the AWW by taking out the four weeks of no work, adding the total wages for the remaining nine weeks and dividing by nine to reach the result of an AWW of $430.50. We find this method a just, fair, and

reasonable calculation, to be supported by the evidence and to be in compliance with the statutory and regulatory procedures. Texas Workers' Compensation Commission Appeal No. 93602, decided August 31, 1993. Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge