

APPEAL NO. 991795

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 7, 1999, a contested case hearing was held. With regard to the only issue before her, the hearing officer determined that appellant's (claimant) average weekly wage (AWW) was \$447.82 based on the wages of a same or similar employee.

Claimant appeals, contending that the "same or similar employee" does not reflect the hours that she worked (in a prior job and at a job subsequent to her injury); that the calculation of the AWW should be based on a "fair, just and reasonable" standard plus health insurance benefits; that the same or similar employee was not a similar employee; and that her AWW should be \$657.38. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds, reciting facts to support the hearing officer's decision and urges affirmance.

DECISION

Affirmed.

The background facts are not much in dispute. Although there is some confusion whether \_\_\_\_\_ or its parent, \_\_\_\_\_, is the actual employer, for our purposes we will just refer to the employer which has workers' compensation coverage with the carrier. It is undisputed that the employer was a large construction company which, as part of its business, contracted for certain close down or "wrap up" projects. Mr. B testified how many of the employees, including claimant, are hired for a specific project and when that job ends, the employee is laid off until the next project. Frequently, an employee will go directly from one project to the next project so that they are laid off one day "and then hired the next day at a new project."

It is undisputed that claimant was hired as a laborer on a project in November 1997 at \$8.00 an hour; that claimant began work at another project on November 24, 1997, as a utility worker at \$9.00 an hour; that claimant worked another project in January 1998 as a tool room worker at \$10.25 an hour until March 31, 1998; and that claimant began working at another project on April 8, 1998, as a grade I electrician's helper at \$11.64 an hour until she was laid off on June 4, 1998. Claimant was unemployed from June 5, 1998 (and drew two weeks of unemployment benefits) until she was rehired on \_\_\_\_\_, as a grade II electrician's helper at \$10.00 an hour. Claimant testified that she was hired as a grade II electrician's helper because there were no grade I electrician's helper positions available on that job at that time but that she had been promised pay increases and promotions in the future. Claimant was injured the first day on the job on \_\_\_\_\_.

The circumstances and extent of claimant's injury were not developed, but it is undisputed that claimant continued working for the employer on the July 28th project for a period of time and then worked for employer at another project or two. There was

substantial testimony and argument regarding the number of hours worked on the projects after \_\_\_\_\_, but, being after the date of injury, have no bearing on the calculations of the AWW. Claimant testified that she had worked 10½ hours on \_\_\_\_\_ before she was injured and that she had been hired to "work four 10s."

It is undisputed and the hearing officer found that claimant's health insurance benefits of \$56.67 should be factored in when determining the claimant's AWW. Claimant submitted an Employer's Wage Statement (TWCC-3) form showing her wages during the 13 weeks prior to her injury. That included seven weeks where she was working as a grade I electrician's helper on the April 8th to June 4th project. Claimant seeks to use those wages to calculate a fair, just and reasonable AWW dividing that total by seven, and adding the health insurance benefits. Carrier identified a "same or similar" employee who had been hired by the employer on April 27, 1998, as a grade II electrician's helper earning \$10.00 an hour and having the same "class code 1831" as claimant. Claimant contends that employee was not a similar employee because she worked more hours than that employee (at her prior grade I electrician's helper job on the previous project). As carrier pointed out, the problem with claimant's argument is that she had worked only one day for just over 10 hours on \_\_\_\_\_ when she was injured and that she had been hired to work "four 10s" (presumably meaning four 10-hour days a week).

Section 408.041(a) provides for the computation of the AWW of an employee who has worked for the employer for at least 13 consecutive weeks immediately preceding the injury. Section 408.041(b) provides that the AWW of an employee who has worked less than 13 weeks immediately preceding an injury for the employer is determined by the usual wage the employer pays a similar employee for similar services, and that if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration. Section 408.041(c) provides that if the methods in Section 408.041(b) cannot be reasonably applied, the Texas Workers' Compensation Commission (Commission) may determine the AWW by any method the Commission considers fair, just, and reasonable to all parties. *And, see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3 (Rule 128.3). Rule 128.3(f) defines a "similar employee" as a person with training, experience, skills and wages that are comparable to the injured employee and that age, gender, and race shall not be considered. Before a fair, just and reasonable method can be used, there must be a determination that the employee identified by the carrier was not a same or similar employee upon whose earnings the AWW could be based. Mr. B testified that the identified employee was a same or similar employee to claimant with regard to earnings (both earned \$10.00 an hour), job classification and number of hours worked. The identified same or similar employee worked more than 40 hours a week some weeks and less than 40 hours a week other weeks. Claimant alleges she worked more hours a week at a higher wage but it is undisputed that claimant had just been hired, after a six-week or so layoff, on a new project as a grade II electrician's helper earning \$10.00 an hour for essentially a 40-hour week. In considering Rule 128.3(f), the Appeals Panel has stated that although the number of hours worked by a "similar employee" performing similar services need not be identical they must be comparable. Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge