APPEAL NO. 992079

A contested case hearing was held on August 30, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), to resolve the following disputed issue as stated in the benefit review conference (BRC) report: "Is the claimant [respondent] a seasonal employee, and if so, what is the adjusted average weekly wage [AWW] and effective date for adjusting temporary income benefits [TIBS]." The hearing officer concluded that the claimant is not a seasonal employee for purposes of Section 408.043. The appellant (self-insured) requests our review, seeks reversal and the rendition of a new decision, and asserts that two of four factual findings supporting the challenged conclusion are not sufficiently supported by the evidence and that a prior Appeals Panel decision is precedential and must be followed in this case. Claimant's response urges the correctness of the decision and requests our affirmance.

DECISION

Reversed and remanded.

The parties stipulated that on _____, claimant sustained a compensable injury; that the self-insured's Exhibit No. 3, Texas Workforce Commission (TWC) form EES-1, was provided through the TWC as required to request an adjustment of TIBS for seasonal employees; and that the minimum applicable weekly income benefit is $76.00.

Claimant testified that she was employed by the self-insured as a special education teacher for seven years before sustaining a compensable injury on _____, while lifting a student. She said that each year she signed employment contracts with the self-insured which required her to provide services for a certain number of days over a 10-month period, generally the September through May period, the so-called school year, and that her annual salary was paid over a 12-month period. In evidence is claimant's most recent "Certified Classroom Teacher" contract with the self-insured given to her on June 26, 1998. The contract includes terms stating that the "[e]mployee shall be employed on a ten-month basis for the school year 1998-1999, according to the hours and dates set by [self-insured]" and that the self-insured "shall pay Employee in twelve installments an annual salary according to the compensation plan adopted by the Board." Accompanying the contract is an "Annual Notice of Salary and Work Schedule" notifying claimant of salary information for 1998-99. This document states the following: "Number of months employed: 10. Required days of service: 187. Monthly salary: $2,896.67." Annual salary: $34,760.00." Claimant testified that this salary was paid in12 monthly installments. She also stated that teachers formerly had the option of receiving their salary over the approximate 10-month period of their service or over a12-month period but that two years ago the Texas Legislature changed the law to "mandate" that teachers signing single-year contracts, as distinguished from multi-year contracts, receive their salaries over a 12-month period. No further evidence on such legislative mandate was adduced by claimant and the hearing

officer did not take official notice of any statute to this effect or ask claimant to identify the legislation to which she referred.

Claimant further testified that she had no reason to disagree with the self-insured's averment that its 1998-99 school year, during which she was obliged to provide services for 187 days, ended on May 26, 1999, and that the 1999-2000 school year commenced on August 9, 1999. She said that she did not work for any other employer in the 1999 summer period and indicated that she is presently teaching for another employer. Claimant also testified that although she usually did not work during the summer months for any other employer, she would typically be called in to her school from time to time for meetings and to prepare for the new school terms; that the amount of time involved in such activities was six to10 days; and that she received no extra pay for such summer activities.

Subchapter C of the 1989 Act is entitled "Computation of AWW." Section 408.043 is entitled "[AWW] for Seasonal Employee." Section 408.043(a) provides that "[f]or determining the amount of [TIBS] of a seasonal employee, the [AWW] of the employee is computed as provided by Section 408.041 and is adjusted as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that [TIBS] are paid." Section 408.043(d) defines seasonal employee to mean "an employee who, as a regular course of the employee's conduct, engages in seasonal or cyclical employment that does not continue throughout the entire year. [Emphasis supplied.]" Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.5(a) (Rule 128.5(a)) defines seasonal employee as "an employee who as a regular course of conduct engages in seasonal or cyclical employment which may or may not be agricultural in nature, that does not continue throughout the year." Rule 128.5(b) provides that the AWW used to determine TIBS for seasonal employees shall be determined according to the procedure described in Rule 128.3(d) or (e), "subject to the periodic adjustment described in this rule." Rule 128.5(c) provides as follows: "The [AWW] for computing [TIBS] may be increased or decreased to more accurately reflect the seasonal nature of the employment, if such an adjustment would more accurately reflect the wages the employee could reasonably have expected to earn during the period that [TIBS] are paid. Evidence of earnings shall be submitted at the time an adjustment is requested. The evidence should include proof of the employee's earnings in corresponding time periods of previous years. In case of dispute, the commission [Texas Workers' Compensation Commission] shall set a [BRC] to consider whether an adjustment should be made."

Claimant contended, in essence, that because her contract with the self-insured provided for her salary to be paid over a 12-month period pursuant to a recent legislative mandate, rather than over the 10-month period of her service, she was not a seasonal employee but rather a full-time 12-month per year employee, and that her AWW should not be adjusted to reflect lower wages during the summer months any more than it should be adjusted when she is off at Thanksgiving, Christmas or other times of the year. She apparently equated the receipt of her salary over a 12-month period with being employed

over that same period, notwithstanding that her contract and annual notice both state that she was "employed" for 10 months and that she was off work during the summer months unless called to the school for a meeting.

The self-insured contended that the 1989 Act did not exempt schoolteachers from its provisions for seasonal employees. The self-insured further contended that claimant was a seasonal employee because she was employed for just 10 months, not the entire year, and was free to either not work at all or work for another employer during the summer vacation period; and that the mere annualizing of her salary payments for the 10-month period did not establish that she was employed throughout those 12 months because her payments in the summer months were not earned then but had already accrued during the preceding 10-month period.

In Texas Workers' Compensation Commission Appeal No. 92688, decided February 5, 1993, we affirmed the hearing officer's determination that the injured schoolteacher had disability from June 12 through August 12, 1992, and was entitled to TIBS for that period. The hearing officer construed the teacher's contract as paying for her services rendered in the school year ending on June 5, 1992, notwithstanding that she was paid in 12 monthly installments pursuant to her contract with the school district. The hearing officer determined that her salary "had accrued on or before June 5, 1992, the last day of the contract," and thus did not constitute wages for the period she was not employed by the school district. The school district contended that because the teacher continued to receive monthly payments during the summer months after having concluded her teaching duties for the school year, she did not suffer post injury loss of earnings and was not entitled to TIBS. Our decision discussed the Texas Education Code provisions in effect at that time for two statutory schemes for school districts to contract with processional personnel, namely, term contracts and continuing contracts. We then stated that given the separate statutory provisions for teachers' term contracts and continuing contracts of employment, the refusal of the Texas courts to find that teachers with term contracts have a property interest in reemployment, and the plain language of the term contract in that case, we viewed the teacher's employment status or relationship with the employer as having ended on June 5, 1992, notwithstanding that she again commenced employment on August 17, 1992. We emphasized, however, that other cases may well turn on the particular provisions of the employment contract. We also note that Section 21.201, Texas Education Code, defines term contract to mean "any contract of employment for a fixed term between a school district and a teacher" and that Section 21.204, which pertains to term contracts, provides that "[a] teacher does not have a property interest in a contract beyond its term." The Term Contract Nonrenewal Act contained in Sections 21.201 - 211 has been construed in Salinas v. Central Education Agency, 706 S.W.2d 791 (Tex. App.- San Antonio, 3 Dist. 1986).

For further discussion of teachers' wages for purposes of calculating AWW, see our decisions in Texas Workers' Compensation Commission Appeal No. 970626, decided May

16, 1997, and Texas Workers' Compensation Commission Appeal No. 960756, decided May 31, 1996. *And see* Texas Workers' Compensation Commission Appeal No. 960538, decided April 26, 1996.

The carrier further stated that it relies on our decision in Texas Workers' Compensation Commission Appeal No. 93980, decided December 14, 1993, as determinative of the outcome of this case. The disputed issues in Appeal No. 93980 were whether the AWW of the employee, a bus driver for another school district, could be adjusted due to her wage fluctuations as a seasonal employee and, if so, whether overpaid amounts of TIBS could be recouped from future income benefits. The injured employee indicated that she worked for the school district for 17 years on yearly contracts, that she worked only one summer and did volunteer community assistance during the other summers, and that she customarily did not receive her salary over a 12-month period but was paid for the period of time she was under contract. The hearing officer determined that the employee was a seasonal employee and that the school district could not recoup the overpayment of TIBS from future TIBS. The hearing officer's determination that the employee was a seasonal worker was not appealed. The school district appealed the adverse recoupment determination and the Appeals Panel reversed and remanded for consideration of whether any future TIBS due could be reduced "to give effect to the approved seasonal adjustment."

A footnote in our decision in Appeal No. 93980 states as follows: "This finding [that the employee was a seasonal worker] was not appealed. We would note that the finding would appear to have support in Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993, in which the Appeals Panel concluded that disability for a school district employee did not end based upon past work history but that a carrier could seek a seasonal employee's adjustment where past work history indicated a pattern of nonemployment during the summer." In Appeal No. 92649, a majority of the Appeals Panel reversed the hearing officer's decision that the school district employee, employed for the school year (August 1991 - June 4, 1992), had disability from (date of injury), the date of her index finger injury, through June 4, 1992, and rendered a decision that she had disability from (date of injury) until June 16, 1992, the date of maximum medical improvement. The majority decision noted that the carrier argued that the employee was a seasonal worker and that "the 1989 Act provides a way to adjust the payment of TIBS [via adjustment of the AWW] to more accurately reflect loss of earnings related to cyclical employment patterns through adjustment of amount of the benefit paid, and not through the shifting of an injured worker in and out of periods of entitlement. The employee worked during the school years since 1986, was paid only during the contract periods, and never worked during the summer periods. Our decision in Appeal No. 92688, *supra*, stated that we viewed the majority opinion in Appeal No. 92649, *supra*, as precedent for the proposition that a school district employee whose term contract expires at the end of a school term, and who is reemployed the following term under another term contract, does

not "retain employment" with the school district under the expired term contract during the interim period between the contracts and thus can have disability during such period.

In support of the challenged legal conclusion that claimant is not a seasonal employee for purposes of Section 408.043, the hearing officer made the following findings:

FINDINGS OF FACT

2. On _____, the Claimant was employed pursuant to a contract to provide approximately 190 days of service over a span of approximately 10 months.

3. The Claimant's employment contract provided that her remuneration be paid over a 12-month period, as required by state law.

4. The Claimant has historically been employed for 9 to 10 months of each year, being unemployed for 2 to 3 months. [Emphasis supplied.]

5. For the current year, the Claimant would expect to be unemployed from May 26, 1999 to August 8, 1999, earning an [AWW] of $0.00. [Emphasis supplied.]

The self-insured requests review of Findings of Fact Nos. 2 and 3, as well as the dispositive conclusion, and attacks the sufficiency of the evidence to support the Decision and Order. The request for review does not specify the nature of the errors perceived in Findings of Fact Nos. 2 and 3, but more generally attacks the hearing officer's rationale and departure from the precedent in Appeal No. 93980, *supra*. We observe that these findings, facially, appear to support a determination that claimant was a seasonal employee. The self-insured asserts that the issue of whether a school district employee working under a 10-month contract during a 12-month period is a seasonal employee was decided in Appeal No. 93980.

The hearing officer's discussion of the evidence states that none of the cases cited to him by the self-insured, which included and emphasized Appeal No. 93980, were specifically decided on the issue of the identification of seasonal employees, but rather dealt with issues of wage calculation and disability. However, we read Appeal No. 93980 to quite clearly state at the outset that one of the two disputed issues was whether the bus driver was a seasonal employee. Further, since the very purpose of identifying a seasonal employee has to do with the potential adjustment of such employee's AWW, upon which TIBS paid during disability are calculated, it is not surprising that other cases have AWW and disability issues.

The hearing officer goes on to state that the facts in Appeal No. 92688, *supra,* are quite similar to those in the case we consider; that the schoolteacher was also paid over 12 months for working for a lesser period; that the Appeals Panel determined in that case that the schoolteacher was not employed beyond her contract period but rather received payments during the summer months for accrued wages which had been previously earned; and that the outcome in Appeal No. 92688 "would appear to put that Claimant - and this Claimant likewise - squarely in the category of 'seasonal' employees." The hearing officer then goes on to state that there is "one factor present in this case which could possibly distinguish it from the case in Appeal #92688: the Claimant testified that the 12-month payment plan was not the result of a voluntary contract on her part, but of her submission to state law requiring such payment for yearly, as opposed to multi-year, contracts." The hearing officer further states that "the Self-Insured accepted that state law required such a payment plan in the Claimant's case–a situation that apparently did not obtain when Appeal #92688 was decided"; that "the difference is significant, in that in this instance it is state law that required that the Claimant be treated as a year round employee for payment-schedule purposes, and that treatment under law should be consistent." The hearing officer goes on to comment that treating claimant as "a year-round employee here is consistent with the ultimate rationale behind [TIBS] payments," that is, "that [TIBS] payments should approximate the actual paychecks that the recipient would have been receiving, but for the disabling effects of the injury."

We find it necessary to remand this case for further development of the evidence and further consideration because the record does not contain evidence, by way of official notice or hearing officer exhibits, of whatever "state law," statute or statutes, "mandate" that claimant be paid over a 12-month period and which, in effect, change the plain terms of her contract concerning the period of her employment and place her in an employed status after May 24, 1999, simply because she continued to receive monthly salary payments for her professional services previously rendered.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge