APPEAL NO. 992948

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 9, 1999. With respect to the single issue before her, the hearing officer determined that the respondent (claimant) was not a seasonal employee. In its appeal, the appellant (self-insured) contends that the hearing officer erred in making that determination, arguing that the claimant "produced insufficient evidence that she actually worked and earned wages during the corresponding periods in the prior years." (Emphasis in original.) The appeals file does not contain a response to the self-insured's appeal from the claimant.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, in the course and scope of her employment as a teacher's assistant with the (employer). The claimant testified that she works with special education students and that she was injured when she attempted to restrain a high school student. The parties stipulated that the school year with the employer ran from August 8, 1998, to May 26, 1999, and that the claimant's wages were paid over a 12-month period. The claimant stated that she began working for the employer at the beginning of the school year in 1997. She acknowledged that she did not work in the summer of 1997, immediately preceding her employment with the employer. She stated that from July 1990 to the time that she resigned to take a position with the employer, she worked for a different school district. She testified that with the exception of the summer of 1997, she worked during the summers after she began working for the other school district in 1990. Specifically, she testified that she worked for that school district, the employer, a country club, or a catering business owned by a friend. The claimant submitted records from the employer indicating that she worked there in the summer of 1993. Records from the country club indicate that she worked there in the summer months of 1995 and 1996. Records from the school district for whom the claimant previously worked demonstrate that she worked in the summers of 1994, 1995, and 1996. The claimant testified that, had she not been off work because of her compensable injury, she would have worked in the summer of 1999.

Section 408.043(a) provides that "[f]or determining the amount of temporary income benefits [TIBS] of a seasonal employee, the average weekly wage 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 as "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." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 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."

The hearing officer determined that the claimant was not a seasonal employee because she did not as a regular course of conduct engage in seasonal or cyclical employment that did not continue throughout the year. The self-insured argues that the claimant did not present sufficient evidence to sustain her burden of proving that, as a regular course of conduct, she did not engage in seasonal or cyclical employment. We find no merit in this assertion. The claimant testified that, with the exception of the summer of 1997, she worked in the summers either for the school district for whom she previously worked or for one or more other employers. In addition, the claimant presented evidence from those employers showing that she worked in the summers of 1993, 1994, 1995, and 1996. While the record reflects that the claimant worked less frequently during the summer than she did during the course of the school year, we cannot agree that it demonstrates that her employment was seasonal or cyclical such that it did not continue throughout the entire year. There is sufficient evidence to support the hearing officer's determination that the claimant was not a seasonal employee and nothing in our review of the record demonstrates that that determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge