

APPEAL NO. 001778

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 June 28, 2000. With respect to the issue before her, the hearing officer determined that the appellant's (claimant) average weekly wage (AWW) is \$309.44. In his appeal, the claimant cites Texas Workers' Compensation Commission Appeal No. 982740, decided January 8, 1999, and argues that a fair just and reasonable method should be used to calculate his AWW in accordance with Section 408.041(c) because his employment in the 13-week period preceding his injury was irregular. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____. At that time, the claimant was working for the employer, a temporary agency. Because only the issue of the claimant's AWW is before us on appeal, our factual recitation will be limited to those facts most germane to that issue. The claimant was employed by the employer during the 13 weeks immediately preceding his compensable injury. The wage statement reflects that the claimant's AWW is \$309.44, if it is calculated in accordance with Section 408.041(a), such that the sum of the total wages paid in the 13 weeks is divided by 13. The claimant contends that his AWW should be \$502.84, which is calculated by dividing the sum of his total wages by eight, the number of weeks in the 13-week period immediately preceding his compensable injury that wages were actually paid.

The claimant testified that he called in each week for job assignments and that in the five weeks where he was paid no wages, the employer did not have an assignment for him. Records from the employer indicate that in four of the five weeks at issue, the claimant either did not call the employer to indicate that he was available to work or he called in late in the day or the week such that an assignment could not be made. In addition, the claimant testified that he worked for another employer in the weeks where work was not available from this employer, which was a factor emphasized in Appeal No. 982740, *supra*, in support of the use of a fair, just, and reasonable method to calculate AWW. However, the claimant could not recall dates that he worked for his other employer and did not produce any records to corroborate his testimony.

The hearing officer determined that the claimant's case was factually dissimilar to Appeal No. 982740 and that it "would not be appropriate" to apply a fair, just, and reasonable method to calculate the claimant's AWW because of the "lack of evidence regarding the other employment and the Claimant's inactivity during the weeks not worked." We cannot agree that the hearing officer erred in determining that Appeal No. 982740 did not necessitate that the claimant's AWW in this case be calculated using a fair,

just, and reasonable method. Subsection (c) of Section 408.041 states that a fair, just, and reasonable method will be used to calculate AWW “[i]f Subsection (a) or (b) cannot reasonably be applied because the employee’s employment has been irregular” By using the term “cannot reasonably be applied” the statute is contemplating that the adjustment in the calculation of AWW will be applied where the irregularity of employment results from the nature of the work, as opposed to the circumstance here, where the evidence supports, and the hearing officer found, that the irregularity of the claimant’s employment in the 13-week period was a result of his not having made himself available for assignments. We cannot agree that the hearing officer erred in considering that factor in determining that subsection (c) is inapplicable in this instance and that the method to be used in calculating the claimant’s AWW is the method contained in subsection (a). Accordingly, no basis exists for us to disturb her determination that the claimant’s AWW is \$309.44.

The hearing officer’s decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge