

APPEAL NO. 001798

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 July 11, 2000. With regard to the issue before her, the hearing officer determined that the appellant's (claimant) correct average weekly wage (AWW) is \$115.50. The claimant appealed, contending that her AWW was greater than \$115.50; that an employee identified as a similar employee was, in fact, not similar; that the records submitted by the employer were inaccurate; and that a fair, just, and reasonable wage based on her testimony should be assessed. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor that her AWW was either \$420.00, or at least \$240.00. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and rendered.

The claimant began employment with (employer) on June 4 or 5, 1997 (all dates are 1997 unless otherwise noted). The claimant was injured in a motor vehicle accident (MVA) on _____ and continued working until June 11. The claimant was paid for 18 hours of work (from June 5 through June 7) at \$6.00 an hour, or \$108.00. The claimant testified that when she was hired, she was told that she would be working 40 hours a week at \$6.00 an hour plus 3 or 4 hours a day overtime at \$9.00 an hour. The claimant disputes the accuracy of the employer's records. The claimant contends that her AWW should be determined on the "fair, just, and reasonable" standard in Section 408.041(c) based on the promised \$420.00 a week wage (40 hours at \$6.00 an hour and 20 hours overtime at \$9.00 an hour).

Apparently, the MVA gave rise to a third-party claim and at some point the claimant, the claimant's attorney at the time, and the carrier informally agreed to an AWW of \$240.00 based on 40 hours a week at \$6.00 an hour. That third-party claim has been settled and the claimant now contends her AWW is \$420.00. The claimant requested and received the payroll information and records of two other same or similar (coworker) employees. One of those, Ms. M records are in evidence and show that Ms. M worked 232.5 hours earning \$1,386.00 for the 12 weeks prior to the claimant's injury for an AWW of \$115.50. The claimant contends these records are not accurate because the claimant "knew" Ms. M had worked more hours and that the records do not reflect the substantial overtime that the claimant was promised and expected to work.

The carrier pointed out that there was no testimony or statement from Ms. M contrary to the employer's payroll records, that the claimant had identified Ms. M as a same or similar employee, that the claimant's sister and niece had worked for the employer but there was no evidence from them as to the amount of hours worked and that there are no records or evidence to support the claimant's claim for an AWW of \$420.00. The hearing officer, in disputed findings, determined:

FINDINGS OF FACT

3. The hourly rate of pay was \$6.00 for [Ms. M] and the Claimant.
4. [Ms. M] was a same and similar employee to Claimant as they performed the same work for the same wages and with the same hours to be worked. There was no indication that training or experience was a factor in any employee's wages for this employer.
5. Based on the TWCC 3 [Employer's Wage Statement], [Ms. M's AWW] was \$115.50 which was supported by payroll sheets and checks.
6. The employer was only in business for 12 weeks prior to the Claimant's date of injury.
7. Based on the availability of a same and similar employee, i.e., [Ms. M], the [AWW] must be determined using [Ms. M's] earnings 12 weeks prior to the date of injury under Section 408.081(b)(1).
8. The correct [AWW] for the Claimant is \$115.50.

There was only a brief comment based on hearsay which was repeated and disputed by the Claimant that the employer had only been in business for 12 weeks prior to the claimant's date of injury. We reform the hearing officer's decision by deleting Finding of Fact No. 6 as not being supported by the evidence.

Section 408.041 provides, in part, that if a claimant had worked for the employer for less than 13 weeks immediately preceding the injury, the claimant's AWW equals the usual wage that the employer pays a similar employee for similar services; if a similar employee does not exist, the usual wage paid in the vicinity for the same or similar services; and if neither of the two can be used, the Texas Workers' Compensation Commission (Commission) may determine the claimant's AWW by any method the Commission considers fair, just, and reasonable. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(e) (Rule 128.3(e)) implements the statutory provisions and provides that a similar employee is one "who performs similar services, but who earned wages for at least 13 weeks" and when a similar employee is identified "the wages paid to that person for the 13 weeks immediately preceding the injury" are used. While Ms. M may have performed similar services, the evidence is not clear that she worked for the 13 weeks immediately preceding the injury and the wage statement only covers the 12 weeks immediately preceding the injury. The hearing officer, in Finding of Fact No. 7, states that she believes that the AWW "must be determined" using Ms. M's earnings. We hold that is incorrect as a matter of law since Ms. M's wages for the 13 weeks prior to the injury are not in evidence and we consequently reverse that finding of fact. In this case, very clearly the claimant had not been employed by the employer for the 13 weeks immediately preceding the injury.

Ms. M's wages not having been documented for the prior 13 weeks, we hereby render a new decision based on a fair, just, and reasonable standard, using Ms. M's documented wage statement as being the only wage statement, which covered more than a few days, to render a new decision that the claimant's AWW is \$115.50. Just because the claimant testified that she expected to earn \$420.00 a week based on 40 hours at \$6.00 an hour plus 20 hours of overtime does not mandate that we must accept that testimony and figure as fact. Similarly, whether the employer's payroll and wage figures were accurate or not was a factual determination for the hearing officer to resolve.

We reverse the hearing officer's decision that Ms. M was a same or similar employee and that the AWW must be determined using Ms. M's earnings and render a new decision that the claimant's AWW is \$115.50 based on a fair, just, and reasonable standard using the only documented wage statement covering more than a few days.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Gary L. Kilgore
Appeals Judge