

APPEAL NO. 010476

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on February 13, 2001, the hearing officer resolved the sole disputed issue by determining that the respondent's (claimant) average weekly wage (AWW) is \$762.71. The appellant (carrier) has appealed, asserting that the hearing officer erred in excluding from the claimant's AWW calculation the two weeks in the 13-week period preceding the date of injury during which the Thanksgiving and Christmas holidays fell. The claimant urges that the hearing officer correctly averaged the remaining 11 weeks in the 13-week period because the employer neither paid her nor allowed her to work during these holidays.

DECISION

Affirmed.

Section 408.041(a) provides that, except as otherwise provided for in this statute, "the [AWW] of an employee who has worked for the employer for at least the 13 consecutive weeks immediately preceding an injury is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13." Section 408.041(c) provides, in pertinent part, that if Section 408.041(a) cannot reasonably be applied because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, the Texas Workers' Compensation Commission (Commission) may determine the employee's AWW by any method the Commission considers fair, just, and reasonable to all parties and consistent with the methods established under this section. The parties stipulated that the claimant sustained a compensable injury on or about _____, while employed by (employer). The claimant testified that at the time of her injury she worked full-time as an electrician; that she was paid \$16.25 per hour and worked a "40 plus" week, normally including Saturdays; that she was neither paid nor given the option of working during the 1999 Thanksgiving and Christmas holidays; and that the wage information on the Employer's Wage Statement (TWCC-3) is correct.

The claimant contended that the 6th and 10th weeks of the 13-week period preceding her injury date should be excluded from the AWW calculation because she earned less in those weeks due to the employer's not providing holiday pay and not giving her the option to work. She urged the hearing officer to calculate her AWW by averaging her wages during the remaining 11 weeks. The carrier continues to contend, in essence, that the Commission rules do not specifically provide for excluding weeks with unpaid holidays from the 13-week period.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(g) (Rule 128.3(g)) provides as follows:

If the methods set forth in this rule cannot be applied reasonably due to the irregularity of the employment or, if the employee has lost time from work, without remuneration, during the said 13-week period due to illness, weather, or other cause beyond the control of the employee, the Commission may determine the employee's [AWW] by any method that it considers fair, just, and reasonable to all parties and consistent with the methods established under this section.

Accepting the claimant's position, the hearing officer found that since the claimant lost time from work during the 13-week period immediately preceding the injury "because of the employer's shut down, which was beyond the control of the employee, the [AWW] must be determined by a method which is fair, just, and reasonable." The hearing officer went on to find that the most accurate method of determining the claimant's AWW is "to omit the weeks in which the employment was reduced by the employer's holiday shutdown" and divide the remaining earnings by the 11 remaining weeks, which yields an AWW of \$762.71.

The Appeals Panel has had occasion to consider the application of the fair, just, and reasonable method of AWW calculation in other circumstances where the employee lost time for reasons beyond his or her control. See, e.g., Texas Workers' Compensation Commission Appeal No. 950383, decided April 24, 1995; Texas Workers' Compensation Commission Appeal No. 951685, decided November 27, 1995; and Texas Workers' Compensation Commission Appeal No. 981775, decided September 17, 1998.

We are satisfied that the challenged determination is not against the great weight of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the decision and order of the hearing officer.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge