APPEAL NO. 011200
FILED JULY 11, 2001

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 April 25, 2001. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) average weekly wage (AWW) is $202.63 and that he has not had disability, as a result of his _____, compensable injury, from January 2, 2001, through the date of the hearing. In his appeal, the claimant asserts error in both determinations. 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 _____. The claimant's employer submitted an Employer's Wage Statement (TWCC-3), which reflects that in six of the 13 weeks preceding the date of injury, the claimant received zero wages. For five of the six weeks the claimant had zero wages, he was on an employer-approved leave of absence. The claimant had requested the leave of absence in order to make himself available for his court appearances associated with two DWI arrests and being in arrears on his child support. During the weeks that the claimant had zero wages, the employer continued to provide group health insurance at a value of $16.00 per week. The hearing officer determined that the claimant's AWW is $202.63, which was calculated using the sum of the $2,426.21 in gross wages for the 13-week period plus $208.00 for 13 weeks of fringe benefits, and dividing by 13.

The hearing officer did not err in determining that the claimant's AWW is $202.63. The claimant argues that the fair, just, and reasonable method of Section 408.041(c) should have been applied in this case. Section 408.041(a) provides for calculating the AWW for an employee who works for the 13 weeks immediately preceding the date of injury by dividing the sum of the wages paid in those weeks by 13. Subsection (b) states that if the AWW cannot be calculated in accordance with Subsection (a) then a same or similar method should be used to calculate AWW. Subsection (c) provides that "[i]f Subsection (a) or (b) cannot reasonably be applied because the employee's employment has been irregular or 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 commission may determine the employee's [AWW] by any method that the [Texas Workers' Compensation Commission] commission considers fair, just, and reasonable to all parties and consistent with the methods established under this section." Based upon this language, it is apparent that before the fair, just, and reasonable method for calculating AWW is triggered, the hearing officer must determine that neither subsection (a) nor (b) can reasonably be applied <u>because</u> the employee's employment is irregular or because the employee has lost time due to a cause beyond the employee's control. The hearing officer determined in this case that the

claimant's employment was not irregular and we cannot agree that he erred in making that determination. In Texas Workers' Compensation Commission Appeal No. 001778, decided September 14, 2000, we noted that "[b]y 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. . . . " The hearing officer determined, and the evidence supports, that the irregularity in the claimant's employment was due to his turning down work other than aircraft work, which would have provided him the opportunity to work 40 hours per week. The hearing officer was acting within his province as the fact finder in determining that the nature of the work performed by the claimant for the employer did not result in irregularity in the claimant's employment; thus, the fair, just, and reasonable adjustment was not triggered under the irregular employment portion of Section 408.041(c).

The question remains if the hearing officer erred in determining that the claimant did not miss time from work in the 13-week period immediately preceding his injury for a cause beyond his control. On cross-examination, the claimant acknowledged that he missed work during the period of his leave of absence as a result of his actions of driving while intoxicated and failing to keep current in his child support obligations. In light of that testimony, we find no merit in the assertion that the hearing officer's determination that the claimant did not miss work due to a cause beyond his control is so against the great weight of the evidence as to compel its reversal 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). Accordingly, that requirement for triggering that fair, just, and reasonable method for calculating AWW was also not present in this case and it could not be properly employed.

Because we have determined that the requirements for employing the fair, just, and reasonable method were not satisfied here, there remain only two available methods for calculating the claimant's AWW, those found in subsections (a) and (b) of Section 408.041. There was no evidence of a same or similar employee in the record. As such, the hearing officer could not calculate the AWW in accordance with subsection (b) and the only remaining method to calculate AWW was the one found in subsection (a). The hearing officer used that method and determined that the claimant's AWW is $202.63 and our review of the record does not reveal that he erred in having done so.

The claimant also asserts error in the hearing officer's determination that he did not have disability, as a result of his compensable injury, from January 30, 2001, through the date of the hearing. Disability presents a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93761, decided October 4, 1993. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). There was conflicting evidence on the issue of disability and it was a matter for the hearing officer to resolve the conflicts and to determine what facts had been established. Our review of the record does not demonstrate that the hearing officer's disability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that

determination on appeal. Cain, *supra*; In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge