

APPEAL NO. 011 202
FILED JULY 09, 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 May 8, 2001. The hearing officer determined that the appellant's (claimant) average weekly wage (AWW) is \$381.79, using a fair, just, and reasonable method of calculation. The claimant appealed the hearing officer's determination, asserting that the hearing officer should have used a different figure when calculating the claimant's AWW. The respondent (carrier) urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant's AWW is \$381.79. The hearing officer used the fair, just, and reasonable method provided for in Section 408.041(c) and in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(g) (Rule 128.3(g)) to calculate the claimant's AWW. The hearing officer divided \$1,145.38 (the claimant's gross earnings for the two-week pay period immediately prior to the date of injury) by three (the number of weeks the claimant worked for the employer prior to the injury) to arrive at the AWW. The claimant asserts on appeal that the hearing officer should have divided \$1,317.51 (the claimant's total gross earnings for the two weeks and two days worked prior to the date of injury) by three for an AWW of \$439.17. The hearing officer determined that the method adopted was fair, just, and reasonable because the claimant worked an unusually high amount of overtime immediately prior to the date of injury and it was unlikely that the claimant would have continued to work so much overtime after the injury date. This determination is supported by the evidence and is not appealed by the claimant. Upon review of the record, we cannot conclude that the hearing officer's AWW determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Nor do we conclude that the hearing officer abused his discretion in adopting the above-referenced methodology for calculating the claimant's AWW.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge