

APPEAL NO. 021699
FILED ON JULY 31, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 30, 2002. The appellant (claimant) appeals, contending that the hearing officer erred in his determination that the claimant's average weekly wage (AWW) is \$413.77. The respondent (carrier) filed a response, urging affirmance.

DECISION

We reverse and render.

The evidence is largely undisputed. The claimant was initially employed as a part-time schoolteacher for the spring semester, January 2 to May 30, 2001. The claimant took the option of having her salary paid over the spring semester in addition to the summer vacation so that she would receive pay over the summer vacation. The claimant did not go to the school or work during the summer vacation. The carrier contended that the claimant's AWW for the part-time contract was \$368.59, the amount paid over the spring semester and summer vacation. In mid-May 2001, the claimant accepted a full-time position as an English teacher with the employer. She received a substantial pay raise and her new contract began _____. She elected to be paid over 12 months to include the summer vacation even though she was only going to work 10 months.

Two weeks after beginning the full-time position, _____, the claimant sustained a compensable injury. The carrier, contending that there was no break in employment, calculated the claimant's AWW based on the amount of wages that the claimant received each week for the 13 weeks prior to the injury. The previous 13 weeks of the claimant's pay include 11 weeks of pay from the part-time contract and 2 weeks from the new full-time contract.

According to Section 408.041(a) if an employee worked for the employer for 13 weeks prior to the injury, the AWW is computed by dividing the amount actually earned by 13. However, the claimant argued at the CCH that her AWW should be computed under Section 408.041(c) which provides that if Section 408.041 (a) or (b) cannot be reasonably applied, then the employee's AWW be determined by "any method the commission considers fair, just, and reasonable to all parties and consistent with the methods established under this section." The hearing officer erred by not calculating the claimant's AWW pursuant to the "fair, just, and reasonable" method articulated by Section 408.041(c), for the reasons discussed below.

The claimant contends that she essentially changed jobs when she began working full-time under the new contract with a new rate of pay, even though she continued working for the same employer. We agree. In Texas Workers'

Compensation Commission Appeal No. 001269, decided July 12, 2000, the claimant had changed her job status from full-time to part-time. The Appeals Panel determined that the claimant had a change in her “fundamental work relationship” and stated that it was “inappropriate to consider her wages as a full-time employee in determining her AWW as a part-time employee. Although that case involved a change from full-time to part-time employment, the same principal applied in that case applies to the case before us and the hearing officer erred by considering the part-time wages to calculate AWW for a full-time employee.

The claimant also contends that her AWW should be calculated based on wages earned, not paid. Although at the time of the claimant’s injury there was no statute in effect clarifying calculations of AWW for schoolteachers (that may elect to be paid over 12 months, rather than the 10-month school year), the legislature has since made their intent known by enacting Section 408.0446.¹ Consequently, to determine the “fair, just, and reasonable” calculation of the claimant’s AWW we look for guidance to Section 408.0446(a), which provides as follows:

For determining the amount of temporary income benefits of a **school district employee**... the average weekly wage is computed on the basis of wages earned in a week rather than on the basis of wages paid in a week. The wages earned in any given week are equal to the amount that would be deducted from an employee’s salary if the employee were absent from work for one week and the employee did not have personal leave available to compensate the employee for lost wages for that week. (Emphasis added).

We note that the claimant’s full-time contract indicates that her salary shall be \$34,559 per year and that in the event that she is absent from duty without available leave, her salary shall be deducted at the rate of 1/250 for each day missed. There is nothing in the record to indicate that the claimant was hired to work anything other than an ordinary 5-day workweek for teachers; consequently, based on a 5-day workweek, the claimant’s AWW is \$691.18.² Accordingly, we reverse the hearing officer’s determination and render a new decision that the claimant’s AWW pursuant to the “fair, just, and reasonable method” is \$691.18.

¹ The effective date for § 408.0446 is for injuries that occur after December 1, 2001.

² 5-days /250 X \$34,559

The true corporate name of the insurance carrier is **COMBINED SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST PAUL
DALLAS, TEXAS 75201.**

Roy L. Warren
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge