APPEAL NO. 022715
FILED NOVEMBER 26, 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 was held on September 25, 2002. The hearing officer determined that the respondent (claimant) is not a seasonal employee; that her average weekly wage (AWW) is $648.24; and that the appellant (self-insured) is not entitled to an adjustment of temporary income benefits (TIBs) for the summer period, May 25, 2002, through August 11, 2002, of the 2001/2002 school year. The self-insured appealed the determination that the claimant is not a seasonal employee and that it is not entitled to an adjustment of TIBs. The claimant responded, urging affirmance.

DECISION

Affirmed.

The facts of this case are largely undisputed. The claimant was employed as a schoolteacher by the self-insured on the date of her compensable injury, which was _____. The claimant finished the school year then did not return to work. She had been so employed only the year of injury, under a probationary annual contract which stated that it created no expectation of future employment. According to a salary scale in evidence, the claimant was paid 24 equal amounts over a 12-month period beginning on July 31, 1999, and ending on July 15, 2000. The claimant testified that she was required to be paid over a 12-month period by the self-insured. The claimant further testified that for several years prior to becoming employed with the self-insured, she was a full-time student and not working. The claimant testified that while she did not intend to work during the summer breaks, she did intend to continue teaching on into the future.

At issue was whether the self-insured could adjust the AWW for the summer period from May 25 through August 11, 2002, under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §128.5(c) (Rule 128.5(c)). The hearing officer looked at the claimant's previous employment history and determined that the claimant did not meet the definition of being a seasonal employee; in other words, she had not been proven to have engaged in seasonal or cyclical work "as a regular course of conduct." He cites Texas Workers' Compensation Commission Appeal No. 001922, decided September 21, 2000, as support for the holding that it is the past work history of the injured worker, rather than the nature of the job held at the time of injury, that determines whether an injured worker qualifies as a "seasonal" worker. He held that the claimant herein did not qualify as a seasonal worker as defined in Rule 128.5(a). We agree that his reliance on this case and his factual determination were both sound.

It is arguable whether a teacher under a one-year contract, with hopes of being retained by the school district, truly qualifies as a "seasonal worker" as intended in

Section 408.042(d), in that the "employment" relationship under such a contract continues throughout the year, whether or not actual teaching is being done in part of that time frame. *See also* dissenting opinion, Texas Workers' Compensation Commission Appeal No. 992829, decided February 2, 2000. We would note that BLACK'S LAW DICTIONARY (seventh edition, 1999) defines seasonal employment as "[a]n occupation possible only during limited parts of the year, such as a summer-camp counselor, baseball-park vendor, or a shopping-mall Santa." Clearly, a professional employee of a school district is not the equivalent of any of these enumerated examples.

However, that being said, we note that Section 408.0446 and implementing administrative Rule 128.7, governing computation of AWW for school district employees and effective for injuries on or after December 1, 2001, takes a seasonal employee-like approach to computing AWW and adjusting it for purposes of TIBs. Some Appeals Panel decisions have in the past affirmed such adjustments being made. We will not at this juncture flatly declare that a teacher injured prior to December 1, 2001, may never be considered a seasonal employee, regardless of the facts of that particular employment. Likewise, we will apply Appeal No. 001922, *supra*, and decline to hold that going into the teaching profession is inherently equivalent to seasonal employee status. Whether an employee is a seasonal employee is a determination of fact.

Because Section 408.0446 was not in effect for the claimant's date of injury, the hearing officer was free to exercise his powers of fact finding to determine whether the requisite proof of seasonal employee status was made in accordance with Rule 128.5(a) and (c), which clearly requires evidence of employment history and earnings, not speculation, upon which to base an adjustment to AWW. His decision that the claimant in this case was not a seasonal worker, and that therefore no adjustment was in order, is sufficiently supported by the record in this case, and is not against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Veronica Lopez
Appeals Judge

_____
Robert W. Potts
Appeals Judge