

APPEAL NO. 023141
FILED JANUARY 24, 2003

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 November 7, 2002. The hearing officer determined the appellant's (claimant) average weekly wage (AWW) in accordance with what the claimant had been paid for less than 13 weeks of work prior to his injury. He employed a fair, just, and reasonable calculation.

The claimant appeals on a novel legal theory: that because he should have been paid overtime wages under applicable federal law, his AWW should be adjusted accordingly. The carrier is not directly responsive to this but counters that the claimant was not a full-time employee and that the factual decision of the hearing officer should not be reversed.

DECISION

We affirm the hearing officer.

The claimant was a seasonal amusement park worker who was injured when employed just a little over nine weeks at his job. While the claimant showed that he was paid an hourly wage for actual hours worked, he said he was not paid an additional increment for hours worked over 40 hours per week. The hearing officer based his computation of a fair, just, and reasonable wage based upon what was actually paid to the claimant, computed into an AWW, because neither party proved the wages that would have been paid to a same or similar employee.

The claimant has cited no authority for an argument that an alleged breach of the federal Fair Labor Standards Act (FLSA) in some fashion preempts state law computations of AWW for purposes of workers' compensation benefits. The 1989 Act speaks in terms of an AWW calculation for temporary income benefits based upon what is paid to a claimant or to a similarly situated employee.

The Texas Workers' Compensation Commission is without jurisdiction to adjudicate alleged violations of the FLSA, and, absent proof of an award of back wages by the appropriate authority after a formal complaint of an FLSA violation¹, we will not overturn the hearing officer's determination of AWW. No other error having been alleged as to the hearing officer's use of a fair, just, and reasonable standard, we therefore affirm the hearing officer's decision.

¹ See Texas Workers' Compensation Commission Appeal No. 001246, decided July 17, 2000.

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

**FRANK A. MONTEMARANO
5205 NORTH O'CONNER BOULEVARD
IRVING, TEXAS 75039.**

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Edward Vilano
Appeals Judge