

APPEAL NO. 030007  
FILED FEBRUARY 21, 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 December 5, 2002. The hearing officer determined that the respondent (claimant) is a seasonal employee and that the appellant (self-insured) is entitled to adjust the claimant's average weekly wage (AWW) for the period beginning June 1 through August 11, 2002, based upon the number of hours that the claimant would have worked as shown by the hours worked by a same or similar employee during that period. The self-insured appeals this decision. The appeal file contains no response from the claimant.

DECISION

Affirmed.

The evidence reflects that the claimant was employed, on a noncontractual basis, by the school district as a bus driver and had worked for approximately seven years prior to her injury on \_\_\_\_\_. Due to the injury, the claimant did not return to work during the remaining portion of the school year, which ended on May 31, 2002. Although the evidence reflects that the claimant had worked reduced hours every summer that she had been employed by the school district, during the summer period in question, which was from June 1 through August 11, 2002, the claimant was not able to work due to the compensable injury. The self-insured argued that irrespective of the compensable injury, the claimant would not have been offered employment during the summer in question. For this reason, the self-insured asserts that it should be allowed to adjust the claimant's AWW to zero.

The hearing officer resolved the issues presented to her by determining that the claimant was a seasonal employee and that the self-insured is entitled to adjust the claimant's AWW during the summer period in question. Section 408.0446, effective December 1, 2001, provides that for injuries sustained by school district employees on or after the effective date, the AWW will be computed as follows:

- (a) For determining the amount of temporary income benefits [TIBs] of a school district employee under Chapter 504, the [AWW] 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.
- (b) An insurance carrier may adjust a school district employee's [AWW] as often as necessary to reflect the wages the employee

***reasonably could expect to earn*** during the period for which [TIBs] are paid. In adjusting a school district employee's [AWW] under this subsection, the insurance carrier may consider any evidence of the employee's reasonable expectation of earnings. [Emphasis added.]

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.7 (Rule 128.7), effective May 16, 2002, provides that for injuries sustained by school district employees on or after December 1, 2001:

- (d) The AWW for computing [TIBs] may be increased or decreased to more accurately reflect wages the school district employee reasonably could expect to earn during the period for which [TIBs] are paid.
  - (1) An insurance carrier (carrier) may adjust the AWW based on evidence of earnings.
  - (2) A school district employee may request adjustments by submitting evidence of earnings to the carrier.
  - (3) For a period a school district employee would not have earned wages, the AWW may be adjusted to zero and no minimum benefit payment may be required.

The aforementioned provisions apply specifically to school district employees who sustain compensable injuries on or after December 1, 2001. Prior to the enactment of Section 408.0446, in order to determine if a carrier was entitled to adjust the AWW of a school district employee who sustained an injury prior to December 1, 2001, it was necessary to rely on Section 408.043 and Rule 128.5, which relate to seasonal employees. While it was not necessary to make a determination in this case as to whether the claimant was a seasonal employee, it is clear from the hearing officer's decision that despite referring to the claimant as a seasonal employee, the hearing officer applied the correct statute and rule relating to school district employees. As such, we perceive no reversible error in the hearing officer's references to the claimant as a seasonal employee.

With regard to the claimant's AWW during the summer break, the hearing officer was not persuaded that the claimant would not have been employed by the school district during the summer and determined that the carrier is "entitled to reduce the Claimant's [AWW], based upon the reduction in her [AWW] that would have occurred during the period beginning June 1, 2002, and ending August 11, 2002," based upon the number of hours that she would have worked, as shown by the hours worked by a same or similar employee during that period. Section 408.0446(b) provides that when adjusting a school district employee's AWW, the carrier may consider **any** evidence of the employee's reasonable expectation of earnings. Under the particular facts of this case, we perceive no error in the hearing officer's determination that the claimant's

AWW for the summer break should be calculated based on the wages of a same or similar employee during the same period. Nothing in our review of the record indicates that the hearing officer's decision 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). We note that in the event that the claimant believes that the AWW computed by the self-insured does not reflect the true AWW, she may request a benefit review conference as provided by Rule 128.7.

The hearing officer's decision and order is 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

**CR  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Chris Cowan  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Robert W. Potts  
Appeals Judge