APPEAL NO. 030164-s
FILED MARCH 3, 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 (CCH) was held on December 2, 2002. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) was employed by a non-claim employer, but is not entitled to increased income benefits pursuant to Section 408.042, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(h) (Rule 128.1(h)) because the claimant neither earned any wages from a non-claim employer and a non-claim employer did not pay the claimant any wages in the 13 consecutive weeks preceding the claimant's compensable bilateral hind foot injury on _____; and that the claimant's average weekly wage (AWW) is $186.55. The claimant appealed, arguing that the hearing officer failed to consider the claimant's additional wages as a seasonal employee and adjust his AWW as provided by the 1989 Act and Rules. The respondent (carrier) responded, urging affirmance and arguing that the claimant waived the right to raise the issue of seasonal or cyclical worker because it was not raised at the CCH.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable "bilateral hind foot injury" on _____. The claimant testified that he was working for the employer removing ceiling tiles while standing on a 12-foot ladder, when he was shocked by a live wire and thrown to the ground. Correspondence from the non-claim employer stated that the claimant has been employed with the non-claim employer since his original date of hire on June 4, 2001, as an "on-call" supervisor. The non-claim employer also stated that such supervisor works as work/projects become available and that the claimant's last date of actual work for the non-claim employer was March 15, 2002.

Rule 128.1(h) provides that for employees injured on or after July 1, 2002, who are employed by more than one employer on the date of injury and the employee submits the wage information from the other employer(s) in the form and manner prescribed by Rule 122.5, the carrier shall calculate the AWW using wages from all the employers. Rule 128.1(h)(2) further provides that the portion of the employee's AWW based upon employment with each "Non-Claim Employer" shall be calculated in accordance with Rule 128.3 except that the employee's wages from the non-claim employer(s) shall only include those wages that are reportable for federal income tax purposes. The hearing officer found that the claimant was employed by a non-claim employer but that the claimant is not entitled to an increase in income benefits because the claimant did not earn or receive wages from the non-claim employer in the 13 consecutive weeks preceding the claimant's compensable injury of _____. There is sufficient evidence to support these determinations.

The evidence reflected that the claimant received wages from the employer for 11 weeks immediately preceding his compensable injury. The number of hours worked by the claimant in each week varied from 8 hours to over 52 hours. No evidence of wages that a same or similar employee would have made while working for the employer in the 13 weeks preceding his compensable injury was provided at the CCH. The hearing officer determined that it is fair, just, and reasonable to the claimant and the carrier to determine the claimant's AWW by dividing gross wages paid by the employer over the 11 weeks immediately preceding the compensable injury.

The burden is on a claimant to establish the amount of his AWW. Texas Workers' Compensation Commission Appeal No. 94734, decided July 6, 1994, *citing* Texas Employer's Insurance Association v. Bragg, 670 S.W.2d 712 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.). 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).

While the issue of whether the claimant was a seasonal employee was mentioned at the CCH, it was not addressed by the hearing officer as a specific issue and was not listed as an issue to be decided at the CCH. Both parties agreed on the disputed issues to be heard at the CCH. Rule 128.1(g) provides that additional adjustments to the AWW may be made in specific circumstances for seasonal employees. Rule 128.5(a) defines a seasonal employee as an employee who as a regular course of conduct engages in seasonal or cyclical employment which may or may not be agricultural in nature, that does not continue throughout the year. The evidence was that the claimant's employment for the non-claim employer was sporadic and random. The claimant testified that he sometimes had no notice before he leaves to perform a job for the non-claim employer and the non-claim employer stated that the claimant works as projects become available. The evidence reflected that the claimant was paid by the non-claim employer only when work was performed. He was not paid for being "on call." However, even if the claimant could be found to be a seasonal employee, the claimant failed to meet his burden to show entitlement to an increase in his AWW. Rule 128.5(c) provides that evidence of earnings shall be submitted at the time an adjustment is requested and that the evidence should include proof of the employee's earnings in corresponding time periods of previous years. The claimant did submit two Employer's Wage Statements (TWCC-3) from the non-claim employer covering the time periods June 3, 2001, to July 19, 2002. However, the evidence did not establish that the claimant had any expectation of earnings for the time period at issue. The Appeals Panel has previously held that the need to produce historical wage information on which a finding can be based of what the worker "reasonably could have expected" to earn, along with the use of the word "regular," indicates that the worker must have a demonstrated historical pattern or practice of engaging in seasonal and cyclical work. Texas Worker's Compensation Commission Appeal No. 992884, decided February 7, 2000.

We affirm the decision and order of the hearing officer.

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

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Chris Cowan
Appeals Judge