APPEAL NO. 031003
FILED JUNE 10, 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 March 27, 2003. The hearing officer resolved the disputed issue by deciding that the appellant (self-insured) is entitled to adjust the respondent's (claimant) average weekly wage (AWW) to reflect the seasonal nature of the claimant's employment from May 23 through August 25, 2002, to $330.66. The self-insured appealed, arguing that the hearing officer's determination is error as a matter of law. The claimant responded, urging affirmance.

DECISION

Affirmed.

The facts of this case are largely undisputed. The claimant was employed, on a noncontractual basis, as a bus driver for the self-insured on the date of her compensable injury, which was _____. The evidence reflected that the claimant chose to spread her paychecks over a 10-month period rather than a 12-month period. The claimant testified that she had worked for other school districts in previous years driving a bus and had always worked during the summer months. The evidence reflected that the claimant signed up to work during the summer months for the self-insured, but was not hired to do so.

At issue was whether the self-insured could adjust the AWW for the summer period from May 23 through August 25, 2002. The self-insured argues that the hearing officer's reliance on Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.5(c) (Rule 128.5(c)), applicable only to seasonal employees, constitutes error as a matter of law. The self-insured argues that Rule 128.5(c) is in conflict with the clear meaning of Section 408.0446(b) and Rule 128.7(d).

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.]

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.

We cannot agree that the hearing officer's discussion of Rule 128.5 in the Statement of the Evidence portion of the Decision and Order indicates that she relied on Rule 128.5, rather than Rule 128.7 and Section 408.0446 in making her determination. The discussion clearly indicates that the hearing officer applied the correct statute and rule relating to school district employees but simply discussed Rule 128.5 by analogy to determine what evidence to consider in determining the wages the claimant could reasonably expect to earn for the time period at issue. In Texas Workers' Compensation Commission Appeal No. 022860-s, decided January 3, 2003, Section 408.0446 and Rule 128.7 were the applicable provisions at issue. In Appeal No. 022860-s, the case was remanded for a determination of what the claimant could reasonably have been expected to earn during the summer vacation if she had not been injured and it was held that "an analysis of what a school district employee could reasonably expect to earn over the summer should be made with reference to the work history of that employee and not with reference to the expectation of payment from the school district over a 12-month period." There was evidence that the claimant's work history included work during the summer months in previous years. Additionally, the claimant testified that if not for her injury, if she had not been chosen to drive the school bus for the summer for the self-insured that she would have looked for other work during the summer months. The hearing officer was persuaded that the claimant had a reasonable expectation of earning $4,629.28 from May 23 through August 25, 2002. There is sufficient evidence in the record to support that finding. 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 affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **a governmental entity self-insured either individually or collectively through DEEP EAST TEXAS SELF INSURANCE FUND** and the name and address of its registered agent for service of process is

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

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Robert W. Potts
Appeals Judge