APPEAL NO. 93015

On December 2, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue at the hearing was whether the appellant (herein the claimant) was a seasonal worker, and, if so, how does this affect his compensation rate. The hearing officer determined that the claimant was a seasonal employee as that term is defined in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.10(d). However, the hearing officer also determined that no adjustment to the claimant's average weekly wage (AWW) was warranted. The hearing officer based the claimant's AWW on the wages of a similar employee as reflected in a wage statement filed by the claimant's employer.

The claimant contends that the hearing officer erred in failing to find that he was entitled to an upward adjustment in his AWW to reflect increased wages he reasonably could have been expected to receive. The cross-appellant (herein the carrier) contends that the hearing officer erred in failing to find that the claimant's AWW should be adjusted downward in certain months based on his historical earnings for those months. Each party filed a response to the other party's request for review.

DECISION

The hearing officer's decision is reversed and a new decision is rendered that the claimant's AWW is adjusted to reflect the decreased wages the claimant could reasonably have expected to earn in the months of May, June, July, and December during the period that TIBS are paid.

This case involves the computation of the AWW of a seasonal employee for the purpose of determining temporary income benefits (TIBS).

The claimant, who is 35 years of age, injured his back on (date of injury), while working for the employer, (employer). He testified that his job with the employer was supposed to last for two or three months and that he was injured after he had worked for the employer for about a month and a half. The Disputed Issue form from the benefit review conference (BRC) indicates that the claimant began working for the employer on September 10, 1991; however, the Employer's Wage Statement (TWCC-3) indicates that his "employment date" was August 7, 1991. There was no evidence as to what the claimant did for the employer, but it appears that the employer is in the canning business.

The claimant said that from January 1991 through about July 1991, he trained to be an industrial sewing machine mechanic (hereafter mechanic) at a community college. He received the training through an entity called (MET), which is funded under the Job Training Partnership Act by the U.S. Department of Labor to serve farm workers. He attended classes four days a week, eight hours a day, and graduated from the program with a diploma.

The claimant further testified that prior to his MET training he had primarily worked in agricultural type work and that his work had been seasonal. He said his intention upon completing his MET training was to get a full time job as a mechanic, and that upon graduating he had been offered a job as a mechanic at a factory, but was unable to accept the position because he did not have transportation. He was also unable to use bus service to get to the job because of the job's early morning starting time. He could not recall the name of the factory where he had been offered a mechanic job. He said he started working for the employer so that he could save money to buy a car so that he would have transportation to get to mechanic jobs, and that it was his intention after working for the employer to work as a mechanic. He also testified that he thinks there is mechanic work available in the city of (city), Texas (where the claimant resides), based upon what he was told by his friends and his teacher from the training program. He also said that his teacher has placed most of the graduates from the training program. He said that he was only able to save about $100 while working for the employer and that that amount was not half of what he needed to buy an old car, which he said would cost about $500. He testified that he didn't think he would have been able to save enough money to buy a car if he had worked for the employer for the few months he was supposed to have worked. He also testified that he would not be able to work as a mechanic without a car. However, he also said that he knew a coworker who was a mechanic and who had a car, and that he had planned to go with that coworker to other cities as self-employed mechanics and get work. He said he didn't go with this coworker to other cities after graduating from mechanic training because he, the claimant, thought it would be better to get experience in a factory and be more stable.

Ms N testified for the claimant. She presently works for an organization that provides social services and advocacy for agricultural workers, but had worked for MET for 10 years and was familiar with that entity's programs. She said that the goal of MET is to provide training for farm workers so that they can have full time jobs and get out of poverty. She said that MET pays for the training and provides the farm worker with a stipend while training. In order to be eligible for the program, a person must have worked 50 percent of their time, and earned 50 percent of their income, in farm work in one 12 month period out of the previous 24 months. She said that the claimant met the eligibility requirements for the program. After the farm worker is trained, a job developer helps get the farm worker a job in the type of work he or she was trained for. She testified that MET develops training programs based on market studies of what jobs are available in an area, and that mechanic training was given in (city) because of the garment industry in that area. She further testified that in order for a MET program to continue it must place 85 percent of all its graduates, but that did not mean that 85 percent of graduates who trained for a particular type of job had to be placed in jobs. She said that she is familiar with the garment industry in (city) and that there is work available for mechanics in (city). She gave examples of two companies that had recently hired several hundred garment industry workers in (city). She said that she felt that the claimant could get a job as a

mechanic in (city). She testified that the current starting wage for a mechanic in (city) is $7.00 per hour, and that an experienced mechanic can make $14.00 per hour. She further testified that she does not consider a mechanic job to be seasonal work.

The carrier introduced into evidence an Employer's Wage Statement which indicated that the claimant's status was "seasonal" and which set forth the weekly gross pay for a "similar employee" for the 13 weeks immediately preceding the claimant's date of injury. An AWW computed from that wage statement is $249.64.

The claimant introduced into evidence an exhibit which the parties stipulated showed what the claimant would have testified to concerning his earnings for 1989, 1990, and 1991. There are numerous employers listed. By the names of some of the employers, it appears that the claimant worked on farms and for farm contractors, and that he worked for a landscaper, a roofer, a construction company, a moving company, and the employer in this case, a canning company. Some of the employer names do not indicate the type of work done by the particular employer. The following information was provided on the claimant's exhibit (the ditto (") symbols are those shown on the exhibit; cents amounts shown on the exhibit are not shown here):

1989

	Employer	Amount
January	[A]	$1680
February	"	
March	[B]	960
April	"	
May		
June	[C]	40
July		
August	[gives stub numbers]	360
September	[D]	577
October	[E]	1500
November	"	1053
December	[F]	38

1990

January		
February		
March	[G]	600
April	[H]	960
May	[I]	62

June	[J]	10
July	[K]	30
August	[L]	800
September	[L]	48
October	[M]	59
November	[N]	750
December	[N]	99
1991		
January	[O]	36
February	MET, Inc. (school)	
March	"	
April	"	
May	"	
June	"	
July		
August		
September	[the employer]	453
October	[the employer]	661
November		
December		

The claimant did not provide any testimony concerning his earnings exhibit. His representative said that the $661 shown for October 1991 was the total amount of wages paid to date by the employer and was not just for October 1991.

Article 8308-4.10 pertains to the computation of an employee's AWW. Pertinent subsections of that article state as follows:

(a)Except as otherwise provided by this section, if the employee has worked for the employer for at least 13 consecutive weeks immediately preceding the injury, the average weekly wage of an employee shall be computed as of the date of the injury and equals the sum of the wages paid in the 13 consecutive weeks immediately preceding the injury divided by 13.

(b)If the employee has worked for the employer for fewer than 13 weeks immediately preceding the injury or if the wage at the time of injury has not been fixed or cannot be determined, the average weekly wage equals the usual wage that the employer pays a similar employee for similar services. If no such employee exists, then the

average weekly wage equals the usual wage paid in that vicinity for the same or similar services provided for remuneration.

(d)In this subsection, "seasonal employee" means an employee who, as a regular course of that employee's conduct, engages in seasonal or cyclical employment that does not continue throughout the entire year. The average weekly wage of a seasonal employee shall be computed for the purpose of determining temporary income benefits as provided in Subsections (a) and (b) of this section, adjusted as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid. The average weekly wage of a seasonal employee shall be computed for the purpose of determining impairment income benefits, supplemental income benefits, lifetime income benefits, or death benefits by dividing the amount of total wages earned by the employee during the 12 months immediately preceding the injury by 50. If, for good and sufficient reason as determined by the Commission, it is impractical to compute the average weekly wage for a seasonal employee as provided by this subsection, the Commission shall compute the average weekly wage as of the time of the injury in a manner that is fair and just to both parties.

Rule 128.5 is entitled "Average Weekly Wage Calculation For Seasonal Employees" and provides as follows:

(a)A "seasonal employee" is 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.

(b)The average weekly wage used to determine temporary income benefits for seasonal employees shall be determined according to the procedure described in Sec. 128.3(d) or (e) of this title (relating to Average Weekly Wage Calculation For Full-time Employees, and For Temporary Income Benefits For All Employees), subject to the periodic adjustment described in this rule. [note: Rule 128.3(d) provides for the computation of AWW for an employee who has worked for the 13 weeks preceding the date of injury, and Rule 128.3(e) provides for the computation of AWW for an employee who has worked for less than 13 weeks prior to the date of injury, in which

case the wages paid by the employer to a similar employee providing similar services but who earned wages for 13 weeks are used to compute AWW.]

(c)The average weekly wage for computing temporary income benefits may be increased or decreased to more accurately reflect the seasonal nature of the employment, if such an adjustment would more accurately reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid. Evidence of earnings shall be submitted at the time an adjustment is requested. The evidence should include proof of the employee's earnings in corresponding time periods of previous years. In case of dispute, the Commission shall set a benefit review conference to consider whether an adjustment should be made.

(d)[Pertains to death benefits and income benefits other than TIBS.]

The hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

No. 4.On (date of injury), claimant suffered a compensable injury in the course and scope of his employment at [the employer].

No. 5.As a regular course of conduct, claimant engaged in seasonal employment, specifically agricultural labor and canning, which does not continue throughout the year.

No. 6.Although claimant has been trained as a sewing machine mechanic, a job which is full time employment and not seasonal employment, he has never been employed as a sewing machine mechanic.

No. 7.Adjustments in TIBS of seasonal employees may be made as necessary to reflect the wages the employee could reasonably have expected to earn during the period as a seasonal employee.

No. 8.Although claimant was a seasonal employee, his wages for the two years prior to his injury as reflected in claimant's exhibit 5, did not fluctuate significantly throughout the year.

No. 9.Claimant had not worked for 13 weeks prior to his injury; however, the wages of a similar employee are accurately reflected in the TWCC-3 prepared by employer (carrier's exhibit 1) and claimant's AWW shall be computed based upon the wages reflected therein, pursuant to the provisions of 28 TAC 128.3 and 128.5.

CONCLUSIONS OF LAW

No. 2.On (date of injury), claimant was a seasonal employee as that term is defined in Article 8308-4.10(d), and had been a seasonal employee for at least two and a half years prior to that time.

No. 3.No adjustment to claimant's AWW is warranted to more accurately reflect the wages claimant could reasonably have expected to earn during the period that TIBS are paid.

No. 4.Claimant's compensation rate shall be $187.23 according to carrier's exhibit 1, the TWCC-3 filed by claimant's employer. [Note: The AWW computed from the employer's wage statement was $249.64; the claimant earns less than $8.50 per hour, thus his TIBS rate is 75 percent of the difference between his AWW and his weekly earnings after the injury. With no post injury earnings, the claimant's weekly TIBS rate is 75 percent of $249.64, which is where the $187.23 amount comes from.]

On appeal, neither party contests the hearing officer's finding and conclusion that the claimant was a seasonal employee, therefore we accept such finding and conclusion as correct for purposes of this decision.

The claimant contends that the hearing officer erred in failing to determine that he would have been able to work as a mechanic if he had not been injured while working for the employer, and that he would have received at least $7.00 per hour for this work. The claimant further contends that the hearing officer erred in not upwardly adjusting the claimant's benefits under Article 8308-4.10(d) to reflect his expected increased earnings from working as a mechanic. In our opinion, whether or not the claimant would have been able to work as a mechanic at $7.00 per hour, is not relevant to a determination of whether the claimant's average weekly wage should be adjusted under the seasonal employee provisions of Article 8308-4.10(d) and Rule 128.5. Article 8308-4.10(d)

provides for adjustment as often as necessary to reflect the wages the employee could reasonably have been expected to earn during the period TIBS are paid. Rule 128.5, which implements Article 8308-4.10(d), provides that the AWW of a seasonal employee may be increased or decreased to reflect the seasonal nature of the employment, if such an adjustment would more accurately reflect the wages the employee could reasonably be expected to earn, and calls for proof of the employee's earnings in corresponding time periods of previous years when an adjustment is requested. The Commission has authority under Article 8308-2.09(a) to adopt rules as necessary for the implementation and enforcement of the 1989 Act. In asking for proof of the employee's earnings in corresponding time periods of previous years, we think it is clear that Rule 128.5 intends that what an employee could reasonably have expected to earn during the period that TIBS are paid is to be based on what the employee earned in the past, and does not, contrary to the claimant's contention, intend an adjustment of AWW based on the prospect of future employment in which the employee has never engaged. Consequently, we find no merit in the claimant's appeal of the hearing officer's decision.

The carrier contends in its cross-appeal that the hearing officer erred in finding that the claimant's wages for the two years prior to his injury did not fluctuate significantly throughout the year, and in concluding that no adjustment is warranted to more accurately reflect the wages the claimant could reasonably have expected to earn during the periods that TIBS are paid. The carrier contends that there were significant fluctuations in the claimant's wages during prior years; that the claimant's AWW should be adjusted to reflect the wages the claimant could reasonably have expected to earn; and further contends that the hearing officer erred in failing to make "an adjustment downward to the minimum income benefit rate for the months of January, February, May, June, July, and December for the period of time for which any income benefits are due."

In this case, the claimant did not work for the employer for 13 weeks prior to his injury. Consequently, under Article 8308-4.10(b) and (d), the hearing officer was justified in initially computing the claimant's AWW based on the wages the employer paid to a similar employee for the 13 weeks immediately preceding the claimant's injury. The question then became whether an adjustment to that AWW should be made to reflect the wages the claimant could reasonably have expected to earn during the period TIBS are paid. Unless the evidence supporting the hearing officer's finding is so weak or the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, we do not set aside the finding. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e).

In reviewing the claimant's record of earnings in previous years, we note that in closing argument the claimant's attorney implied that the $1680 shown as earnings for January 1989 were in fact total earnings for the months of January and February 1989 while the claimant was working for employer A. The carrier urges the same view of the evidence on appeal. This being the case, a significant part of the claimant's earnings for 1989 were earned in January and February of 1989, although he had no earnings in January and February of 1990. The small amount the claimant made in January 1991 and the lack of any earnings in February 1991 can be attributed to his classroom training. Considering the claimant's record of earnings in January and February 1989, the evidence was not such as would compel the hearing officer to find that the claimant could reasonably have expected to earn only minimal earnings for the months of January and February during the period that TIBS are paid as contended by the carrier.

In considering the claimant's record of earnings during the months of May, June, July, and December, we do not think that much, if any, emphasis should be placed on his lack of earnings in these months during 1991, for the reason that he testified that he was in school for three of these months, and his lack of earnings in December may be attributable to his injury, and not to seasonal employment. However, for the same months in 1989 and 1990, the claimant earned very little, with the largest amount being $99 in December 1990. The claimant testified that he was a seasonal employee and gave no indication that his diminished earnings during the months of May, June, July, and December of 1989 and 1990 were attributable to anything other than seasonal employment. This being the case, it is our opinion that the great weight of the evidence was contrary to the hearing officer's finding that the claimant's earnings did not fluctuate significantly with respect to the months of May, June, July, and December. The claimant's record of earnings for these months in 1989 and 1990 establishes a pattern of diminished earnings due to seasonal employment, and in our opinion the hearing officer should have found that the claimant's AWW should be adjusted in the months of May, June, July, and December to more accurately reflect the wages the claimant could reasonably have expected to earn (as shown by his record of earnings in corresponding time periods of previous years) during the period that TIBS are paid. Any such adjustment is, of course, subject to the minimum weekly benefit in effect on the date of the injury as provided by Article 8308-4.12. Considering the very limited earnings of the claimant during the months of May, June, July, and December, he would be entitled to the minimum weekly benefit as provided in Article 8308-4.12 for these months during the period TIBS are paid.

The hearing officer's decision is reversed and a new decision is rendered that the claimant's AWW, as determined by the employer's wage statement showing wages paid to a similar employee (carrier exhibit no. 1), for the months of May, June, July, and December during the period that TIBS are paid is to be decreased to more accurately reflect the wages the claimant could reasonably have expected to earn during those

months, which decrease will result in the claimant receiving minimum weekly TIBS during those months.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge