

APPEAL NO. 950383

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 23, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer to consider the single issue of respondent's (claimant) average weekly wage (AWW). The hearing officer determined that during the 13-week period preceding his compensable injury, claimant lost time from work for reasons beyond his control; thus, pursuant to Section 408.041(c), the hearing officer calculated claimant's AWW as \$841.85, using a fair, just and reasonable method of calculation. In its appeal, appellant (carrier) argues that claimant did not fall within the exception of Section 408.041(c) and that claimant's AWW is \$536.62 in accordance with the wages reflected on his wage statement for the 13-week period preceding his compensable injury. Claimant's response urges affirmance.

DECISION

We affirm.

It is undisputed that on (date of injury), claimant sustained an injury in the course and scope of his employment as a driver/salesman for (employer), when he stepped on a rock as he exited a tractor-trailer and twisted his left knee. Claimant testified that he had been employed with the employer since October 1988, working out of employer's (city) terminal. Claimant is a member of the Teamsters Union and under the terms of the labor contract between the union and the employer, claimant is paid \$17.43 per hour and time and a half for any time worked over eight hours per day. In addition, the contract also grants that the claimant will be paid for 40 hours per week.

On April 5, 1994, the union went on strike against employer. The strike continued until May 2, 1994. By letter dated May 3, 1994, claimant was placed on layoff status "due to a decline in business." When a driver is placed on layoff status he loses the guarantee of 40 hour per week. That is, when a driver is on layoff he is called to work on a given day, he is guaranteed to be paid for at least 8 hours on that day, but he was not automatically paid for 40 hours per week. Claimant remained on layoff until the week of July 10, 1994. Thus, he was on layoff for nine of the 13 weeks preceding his compensable injury of (date of injury).

Claimant testified that he was placed on layoff status on two occasions prior to May 1994. Specifically, he stated that he was on layoff for one week in the fall of 1992 and three to four weeks in October 1993. (Mr. B), the terminal manager at employer's (city) facility, testified that claimant's second layoff period occurred in January 1994. Mr. B further stated that as terminal manager he decides when to place employees' on layoff status. He said that he has the authority to do so when there is a drop in revenues and tonnages. He testified that the decision of who is placed on layoff is premised on the employees place on the seniority roster as is the decision of when a driver will be recalled to full-time duty. He also stated that claimant was laid off in May 1994, because the strike had resulted in a loss

of business and that he continued on layoff until freight levels returned to pre-strike levels in July 1994. In addition, Mr. B acknowledged that in weeks one through nine in the 13-week period reflected on claimant's wage statement, claimant worked less than 40 hours per week. He also stated that he assigned the number of hours claimant worked in those nine weeks and that claimant could not control the number of hours he worked therein. Finally, Mr. C noted that claimant had come to him in those nine weeks and had asked to work additional hours, including a request to perform duties not typically included within claimant's job responsibilities.

In this instance, the hearing officer determined that claimant fell within the exception to the 13-week formula generally used to calculate AWW, because claimant "lost time from work during the 13-week period immediately preceding his injury because he had been placed in an involuntary layoff status by EMPLOYER during part of that period (which meant he was no longer guaranteed at least 40 hours per week while in the layoff status)." Thus, pursuant to Section 408.041(c), the hearing officer calculated claimant's AWW using a fair, just and reasonable formula. Specifically, the hearing officer determined claimant's AWW by adding claimant's wages in weeks 10 through 13 of claimant's wage statement and dividing that figure by four.

In its appeal, carrier argues that the hearing officer erred in so calculating AWW, because claimant did not fall within the provisions of Section 408.041(c). In Texas Workers' Compensation Commission Appeal No. 92292, decided August 18, 1992, we stated that under the 1989 Act:

AWW 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. One exception to this rule is that if the above-cited method cannot be applied reasonably due to the irregularity of employment or if the employee has lost time from work during the 13-week period due to illness, weather, or other cause beyond his control, the Commission may determine the employee's AWW by any method it considers fair, just, and reasonable to all parties and consistent with the methods established [in Section 408.041].

Carrier relies on our decision in Texas Workers' Compensation Commission Appeal No. 93766, decided October 11, 1993, in making its argument that it cannot be fairly said that claimant "lost time from work" within the meaning of the 1989 Act. Carrier argues that in this instance, claimant is arguing, as had the claimant in Appeal No. 93766, that his wages in the 13-week period preceding the compensable injury were not representative of his normal wages, because he was on layoff status and was no longer guaranteed 40 hours per week. Carrier argues that because claimant was placed on layoff status because of a decline in business, the fluctuation in his wages was similar to that of the commission worker in Appeal No. 93766, where the Appeals Panel held in apply Section 408.041(a) that there is no exception to the general method of calculating AWW for workers on commission or for the situation where the wages in the 13-week period do not "truly reflect the injured

employee's wages over the course of a year." The language of Section 408.041(c) specifically provides an exception to the usual method of calculating AWW where the employee loses time from work for a cause beyond the employee's control. In Appeal No. 93766 there was no evidence that the employee missed any time from work in the applicable period, but in this instance it is undisputed that claimant did in fact lose time from work because he did not work the 40 hours per week he would have worked had he not been of layoff status in nine of the 13 weeks at issue. Thus, this case is factually dissimilar to Appeal No. 93766, because there is uncontroverted evidence that claimant actually did miss time from work in the period.

Carrier next argues that to the extent that claimant missed work, it cannot be fairly argued that he did so because of a cause beyond his control. Carrier argues that the statute contemplates that the employee has work available but is unable to accomplish it because of "the kinds of `acts of God' illustrated by illness and weather." We cannot agree with carrier's interpretation of Section 408.041(c) that Section only includes "acts of God." Instead, we believe that the hearing officer correctly interpreted phrase "cause beyond the control of the employee" to expand to a circumstance where, as here, an employee is placed on involuntary layoff and consequently loses a guaranteed minimum number of hours of work per week. Therefore, we find no error in the hearing officer's determination that claimant's AWW could not properly be determined in this instance using the 13-week method.

As we have previously noted, when the hearing officer determines that the usual AWW calculation method cannot be applied in a given case he has discretion to apply any fair, just and reasonable method in arriving at AWW and we review the method used under an abuse of discretion standard. See Texas Workers' Compensation Commission Appeal No. 941292, decided November 9, 1994 and cases cited therein. In this instance the hearing officer excluded the nine weeks where claimant did not work the guaranteed 40 hours per week. Our review indicates that the hearing officer's method of calculating AWW was fair, just and reasonable and was consistent with the methods established in Section 408.041 to calculate AWW. Therefore, he did not abuse his discretion in so calculating AWW and we affirm the determination that claimant's AWW is \$841.85.

The decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge