APPEAL NO. 971082

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 January 21, 1997. The record closed on May 18, 1997, apparently after the hearing officer received a letter from the carrier's attorney providing additional information on the average weekly wage (AWW) issue. With respect to the issues before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 12th and 13th compensable quarters and that the claimant's AWW, as a seasonal employee, is $174.00. In its appeal, the appellant (carrier) does not challenge the hearing officer's factual determination that the claimant is a seasonal employee within the meaning of Section 408.043(d); however, it asserts that the hearing officer erred in using a fair and just method to calculate the claimant's AWW. The appeals file does not contain a response from the claimant. The carrier did not appeal the hearing officer's determinations that the claimant is entitled to SIBS for the 12th and 13th compensable quarters and those determinations have become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

There is no dispute that the claimant was a seasonal employee within the meaning of Section 408.043(d) at the time of her compensable injury on _____. The claimant testified that, at the time of her injury, she was working her fifth season canning chiles and that each season her employment with the employer lasted about three months. In a letter of May 6, 1997, the attorney for the carrier responded to a request from the hearing officer for additional information on the AWW issue. Specifically, that letter stated that the claimant generally worked 40 hours per week during the canning season and that in 1991 she was paid $4.35 per hour. In addition, that letter stated that the claimant worked from August 16 to October 25, 1991, when she was laid off and that her total earnings with the employer in 1991 were $1,774.80. The Employer's Wage Statement (TWCC-3) for 1992, shows that the claimant's earnings with the employer prior to her injury in 1992 were $290.59. Thus, the claimant's total wages from the employer in 1991 and 1992 were $2,065.30.

Section 408.043(b) governs the calculation of AWW for a seasonal employee for purposes of impairment income benefits (IIBS), SIBS, lifetime income benefits (LIBS), and death benefits. It provides:

> For determining the amount of impairment income benefits, supplemental income benefits, lifetime income benefits, or death benefits of a seasonal employee, the average weekly wage of the employee is computed by dividing the amount of the total wages earned by the employee during the 12 months immediately preceding the date of the injury by 50.

Section 408.043(c) provides that if the Texas Workers' Compensation Commission (Commission) determines "for good reason" that computing the AWW for a seasonal

employee in accordance with this section is "impractical," "the commission shall compute the average weekly wage in a manner that is fair and just to both parties."

The hearing officer employed a fair and just method to determine that the claimant's AWW in this instance is $174.00 ($4.35 per hour times 40 hours per week). On the issue of why it was impractical to use the method prescribed in Section 408.043(b) to calculate the claimant's AWW for purposes of IIBS, SIBS, LIBS or death benefits, the hearing officer made the following finding of fact:

> 13. The Claimant did not work on a yearly basis with the employer which makes it impracticable [sic] to use any other method to calculate the Claimant's average weekly wage.

While we acknowledge that Section 408.043(c) permits the use of a fair and just method to calculate a seasonal employee's AWW, we note that the use of that method is limited to those circumstances where the Commission determines "for good reason" that use of the prescribed method to calculate AWW is "impractical." In this instance, the hearing officer essentially cites the definition of a seasonal employee and uses that as the basis for his determination that the claimant's AWW in this case cannot be calculated in accordance with the statutory provision. If the hearing officer's rationale for why he could not calculate the AWW under Section 408.043(b) were to be accepted, then it would seem that a seasonal employee's AWW would never be calculated in the manner provided for doing so. We do not believe that the reason articulated by the hearing officer for not calculating the claimant's AWW in accordance with Section 408.043(b) is sufficient to permit his use of a fair and just method to compute the AWW. Therefore, we reverse the hearing officer's AWW determination and remand the case for reconsideration of the AWW issue in accordance with Section 408.043.

The carrier asks that we render that the claimant's AWW is $41.30, which is calculated by dividing the claimant's total wages from the employer in 1991 and 1992, $2,065.30, by 50. We are unable to do so, because we disagree with the carrier's assertion that a seasonal employee's AWW for purposes of IIBS, SIBS, LIBS or death benefits is limited to the wages that the employee earns from the employer where the injury occurred in the 12 months preceding the date of injury. To the contrary, we believe that the language of the statute which speaks in terms of the employee's "total wages" in that period indicates that any wages that the seasonal employee earned from other employers is also considered in calculating AWW under Section 408.043(b). We have previously determined that concurrent employment is not considered in calculating an injured employee's AWW under Section 408.041. *See* Texas Workers' Compensation Commission Appeal No. 962217, decided December 4, 1996, and the cases cited therein. However, as we specifically noted in Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, our determination in that regard was dependent upon a change in statutory language from the prior law to Section 408.041. That is, Appeal No. 91059 emphasized that the omission of the phrase "whether for the same employer or not" and the substitution of the phrase "the employer" in the AWW provision was indicative of a "clear legislative intent to not authorize consideration of concurrent employments in calculation of average weekly wage under the 1989 Act." After carefully reviewing Section 408.043(b), we find no such indication of legislative intent to preclude consideration of

wages earned by the seasonal employee from employers other than the employer where the injury occurs. To the contrary, we believe that the use of the phrase total wages, without a qualifier limiting it to the total wages earned with the employer at the time of the injury, indicates that all of the seasonal employee's wages in the 12-month period preceding the injury are to be considered in calculating the AWW for purposes of IIBS, SIBS, LIBS or death benefits, even those wages earned from other employers.

In this instance, the claimant testified that, when she was not working for the employer where she was injured, she cleaned homes. She stated that she made less money performing that work than she did when she worked for the employer. However, the record is devoid of evidence as to her actual earnings from that work in the 12 months prior to her date of injury. On remand, the hearing officer must determine the claimant's total wages in the 12 months prior to her injury, irrespective of source, and divide that figure by 50 to determine her AWW figure for IIBS and SIBS. If the hearing officer determines that it is impractical for him to calculate the AWW in this manner, he must articulate the reason why he cannot do so bearing in mind that his decision to turn to a fair and just method will be reviewed to determine if he had a "good reason" for doing so. Merely citing what is essentially the definition of a seasonal worker does not establish "good reason."

The hearing officer's determination that the claimant's AWW is $174.00 is reversed and the case is remanded for further consideration of the AWW issue. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Alan C. Ernst
Appeals Judge