APPEAL NO. 992884

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 19, 1999, a contested case hearing (CCH) was held. The stated issue was whether the appellant (claimant) was a seasonal employee, and, if so, the amount of his adjusted average weekly wage (AWW) and the effective date for adjusting temporary income benefits (TIBS).

The hearing officer held that the claimant was a seasonal worker, and that he could "reasonably have expected to earn zero wages per week during the [TIBS] period for the calendar months January, February, March, July, August, September, October, November and December." She set aside a benefit review officer interlocutory order that had provided for payment of minimum TIBS.

The claimant appeals and argues that he is not a seasonal worker pursuant to Section 406.161(5) of the 1989 Act. The claimant further argues he does not meet the requirements of a "seasonal worker" under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.5(a) (Rule 128.5(a)). He argues that the evidence showed an intent to work during the months that the hearing officer found he could "reasonably expect to earn zero wages." He argues that he was unable to work due only to his work-related injury (disability was not, however, a stated issue before the hearing officer). The claimant asks that an order be entered finding that his AWW was $1,000.00 per week, and that he had disability from July 1, 1999, through the date of the CCH. The respondent (carrier) responds that Section 406.161(5) does not apply, and that claimant instead falls "squarely" under the definition set forth in Section 408.043(d), by virtue of his "employment history."

DECISION

Reversed and rendered.

First, we must observe that the matter of disability, as defined in Section 401.011(16), was not an issue put before the hearing officer to decide, nor was the amount of his AWW if he were not a seasonal worker. Both the hearing officer and this Appeals Panel can only decide the issue brought by the parties for resolution. Section 410.151(b).

Second, Section 406.161(5) does not apply to this case. That section is the definition which applies to the subchapter of the Act having to do with coverage of farm and ranch employees. The definition of "seasonal employee" which applies here is Section 408.043(d), which defines a seasonal employee as:

> (d) . . . an employee who, as a regular course of the employee's conduct, engages in seasonal or cyclical employment that does not continue throughout the entire year.

The claimant was injured on _____; he hurt his left knee and was ultimately diagnosed with a torn meniscus, for which he had surgery on July 1st. At the time of his injury, the claimant was employed as a professional football player by the (employer), which was part of the Regional Football League. He was employed by contract, with the contract period to last from April 13 through June 30, 1999. Claimant had not previously been employed by the employer, nor was there evidence of any intent or obligation to be employed by the employer after the end of the contract term. He was paid $1,000.00 per week.

The claimant testified that he had been building up his own real estate investment business since February 1999, and had the expectation of being able to do this beginning in January 2000. He continued to play in games for the employer through the end of his contract, although he said his knee injury caused limitations in his range of motion.

The only information about his work history for the time period preceding April 13, 1999, was that he had been unemployed since approximately November 1996. He was employed by the (foreign league) from 1993 through 1996, and prior to that by the (Team P) from 1988 (when he graduated from college) until 1992. He was asked if he knew when a season ran in the foreign league, and he said from June through November. However, he was not asked what his periods of employment or wages were in the foreign league, nor was any information brought out about the nature or duration of employment by Team P.

He said that due to his injury and surgery, he was precluded from working (for a time period whose duration was not further developed), and because of his surgery would not have been able to seek employment with sports leagues whose seasons began after that of the employer. He agreed that under his contract, the employer would not have paid him past June 30th.

Section 408.041 is the statute that governs computation of AWW unless it is shown that an injured worker comes within one of the particular situations set out in Sections 408.042 - 408.0445. The carrier, who seeks to have an adjustment made to the AWW of a "seasonal worker," has the burden of proof. Evidence must be submitted which shows proof of the employee's earnings in corresponding time periods of previous years. Rule 128.5(c). From this evidence, an adjustment is made for wages that the employee could "reasonably have expected" to earn during the TIBS period under review. However, for the adjustment to apply, the worker for whom the adjustment is sought must be shown to be an employee who, "as a <u>regular</u> 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 need for such a course of conduct to be "regular" mirrors the statutory language.

BLACK'S LAW DICTIONARY, SIXTH EDITION (1991), defines "regular" as follows:

> Conformable to law. Steady or uniform in course, practice, or occurrence, not subject to unexplained or irrational behavior. Usual, customary, normal, or general . . . antonym of "casual" or "occasional."

We believe 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. As the carrier itself cites, the Appeals Panel has held, in Texas Workers' Compensation Commission Appeal No. 93015, decided February 24, 1993, that what a seasonal employee could reasonably have expected to earn is to be based upon what he has earned in the past, not based on a prospect of future employment "in which the employee has never engaged." Of greater import here is Texas Workers' Compensation Commission Appeal No. 93335, decided June 17, 1993, where the Appeals Panel held that a worker's status as a "seasonal employee" is determined with reference to past history of employment, not only the job undertaken for the specific employer, and whether seasonal employment has been undertaken as a "regular course of conduct." A worker does not become a seasonal worker simply because he agreed to work during a fixed term that is called a "season." That must be established through reference to the past work history of the employee.

The claimant here was never before employed by the employer. Having a similarly titled position for other employers in the past does not mean that his terms or contracts of employment were identical with that of the employer. There is no evidence in this case of a pattern of previous seasonal, cyclical employment by the claimant that established him as a "seasonal" worker or would allow the hearing officer to project what the claimant could have reasonably expected to earn, or not earn, and when. Indeed, his immediate past history for more than two years was unemployment. The hearing officer's findings in this regard have no basis in anything but speculation and surmise about what claimant's wage history might be, not what it has been. The decision of the hearing officer is against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

The statute which controls computation of AWW is therefore Section 408.041. We reverse the hearing officer's decision and order which held that the claimant was a seasonal employee and that his AWW could be adjusted down to zero, and we render a decision that the claimant is not a seasonal employee, and his AWW should therefore be computed in accordance with Section 408.041. The carrier is ordered to pay TIBS for any period of disability under the 1989 Act, until the claimant reaches maximum medical improvement and/or disability ends.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge