APPEAL NO. 001922

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 26, 2000. The issues at the CCH were whether the claimant was a seasonal employee, whether the carrier was entitled to adjust the claimant's average weekly wage(AWW), and the effective dates for adjusting the AWW. The hearing officer determined that the claimant was a seasonal employee, that his adjusted AWW was $80.00, and that the carrier was entitled to adjust the AWW beginning on March 13, 2000. The claimant appealed the hearing officer's determinations that he was a seasonal employee, that the carrier was entitled to adjust the AWW, the adjusted AWW, and the period of the adjustment. The claimant asserts that the decision of the hearing officer is manifestly unjust and that it is contrary to the great weight and preponderance of the evidence. Additionally, the claimant contends that the carrier either waived the right to request an adjustment of the AWW or is estopped from doing so. The respondent (carrier) responded that the determinations of the hearing officer were supported by sufficient evidence and should be affirmed.

DECISION

We reverse and render.

The issue presented, and agreed to by the parties, was whether the claimant was a seasonal employee thereby allowing the carrier to adjust the claimant's AWW to reflect the earnings the claimant could have anticipated during the period for the payment of temporary income benefits (TIBs) and/or allowing for a computation of an AWW for the payment of impairment income, supplemental income, lifetime income, or death benefits. In determining that the claimant was a seasonal employee and the carrier was entitled to adjust the claimant's AWW, the hearing officer made two fundamental errors. First, she determined that the claimant was a seasonal employee by reference to the employer's business cycle rather than the claimant's regular course of conduct. Second, she determined the claimant's adjusted AWW, during the period for the payment of TIBs, by what she described as the "required" method of dividing the claimant's total wages over the last year by 50, the method required by Rule 128.56(d)(1) for the computation of an AWW for a seasonal employee for the payment of income benefits other than TIBs and death benefits.

The claimant argued that the carrier had waived the right to reduce income benefits for a seasonal worker, or was estopped from doing so in this case, because the carrier had not attempted to seek an adjustment of the claimant's AWW until it sent the claimant notice of its intent to request permission from the Commission to adjust the claimant's TIBs due to a seasonal change in wages. The claimant's assertion of waiver and/or estoppel was not brought forward at either the Benefit Review Conference or the CCH, and was waived by the failure to assert it below.

A comprehensive discussion of the determination of seasonal employees and the manner in which their AWW is computed and may be adjusted is found in Texas Workers' Compensation Commission Appeal No. 992884, decided February 7, 2000. In that case, the Appeals Panel stated:

> 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 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." The need for such a course of conduct to be "regular" mirrors the statutory language.
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> BLACK'S LAW DICTIONARY, SIXTH EDITION (1991), defines "regular" as follows:
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> > 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."
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> 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 only evidence available to the hearing officer that could have tended to establish that the claimant had a demonstrated historical pattern or practice of engaging in seasonal and cyclical work is the claimant's testimony that he had worked agricultural seasons picking peaches in California and apples in Arizona sometime before 1994. The claimant testified that he has had no steady job since 1994 when he worked for two quarters for one employer. The claimant testified that he would do some car detailing and had worked in a restaurant after his two quarters of employment in 1994, but that his primary vocation was preaching the gospel, a vocation for which no earnings were shown.

There was sufficient evidence from which the hearing officer could, and did, deduce that the employer engaged in a regular practice of hiring seasonal workers and that the employer's hiring practices were tied to an agricultural season. The employer's regular practices, however, are of no moment in determining whether an employee of that employer was a seasonal worker. The employee's practice of engaging in seasonal and cyclical work, if any, is the determinative factor. Since the carrier had the burden to prove that the claimant, as a regular course of conduct, engaged in seasonal or cyclical employment and there is no evidence to support a finding that the claimant did so, the hearing officer's determination that the claimant was a seasonal worker is without foundation and must fail.

Since we reverse the hearing officer's determination that the claimant was a seasonal worker, and any adjustment in an injured employee's AWW in this context depends upon a determination that the employee is a seasonal worker, the hearing officer's decision that the claimant's adjusted AWW is $80.00 and that the claimant's TIBs should be adjusted beginning on March 13, 2000 are also reversed.

The decision and order that claimant is a seasonal worker, that the claimant's adjusted AWW is $80.00, and that the claimant's TIBs should be adjusted beginning on March 13, 2000 are reversed and a new decision that the claimant is not a seasonal worker and the carrier is not entitled to adjust the claimant's AWW is rendered.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge