APPEAL NO. 002390

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 September 19, 2000. The issues at the CCH were whether the respondent (claimant) was a seasonal employee as defined in Section 408.043 and what was the claimant's average weekly wage (AWW). The hearing officer determined that the claimant was not a seasonal worker and that his AWW was $505.50. The appellant (carrier) appealed the adverse determinations, contending that the claimant met the definition of "seasonal worker" and that the wages earned should have been divided by 13 rather than the 5 weeks used by the hearing officer, or that the wage and salary of a same or similar employee should have been used to calculate the AWW of the claimant. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he began working for the employer on November 13, 1998, on a baling press which required him to work 7 days a week for 12 hours a day at $5.45 per hour. No other benefits were paid. The claimant testified that he had not previously worked for the employer and had been off work between July 5, 1996, and _____, due to an injury received while working for a slaughterhouse company where he had worked full time on a yearly basis since January 1992. Prior to the slaughterhouse he had a yearly full-time job for a seed company. The claimant denied working at any other seasonal-type job prior to his working for the employer. The claimant stated that he knew the work for the employer would end at the conclusion of the cotton season, but that after the cotton season was over he would probably accept full-time employment with the employer in another capacity. The claimant asserted that his AWW should be $577.92.

Mr. R testified that he was the general manager for the employer. He explained that the claimant was hired as a seasonal worker to work in the bale press during the cotton season from mid-November 1998 through the first week in January 1999. Mr. R testified that the claimant was paid $5.15 per hour and time and a half for work over 40 hours. Mr. R testified that the claimant worked for several more weeks after the claimant was injured. Mr. R testified that he did not offer the claimant full-time employment and that subsequent employment would have been discussed at the conclusion of the season.

Section 408.043(a) provides that "[f]or determining the amount of temporary income benefits [TIBs] of a seasonal employee, the [AWW] of the employee is computed as provided by Section 408.041 and is adjusted as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that [TIBs] are paid." Section 408.043(d) defines "seasonal employee" as "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." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.5(a) (Rule 128.5(a)) further defines a "seasonal employee" as "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 definition of a "seasonal worker" applied by the carrier pursuant to Section 406.161(5) does not apply to this case. This section is the definition which applies to the subchapter of the 1989 Act having to do with coverage of farm and ranch employees.

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 - 408.044. The carrier, who seeks to have an adjustment made to the AWW of the claimant, had the burden to prove that the claimant was a seasonal employee. Evidence must be submitted which shows proof of the employee's earnings in corresponding time periods of previous years. The Appeals Panel has previously held 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. Texas Worker's Compensation Commission Appeal No. 992884, decided February 7, 2000. 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. Texas Workers' Compensation Commission Appeal No. 93015, decided February 24, 1993. 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. Appeal No. 992884, *supra*.

The hearing officer determined that the claimant was not a seasonal employee because his regular course of conduct for the last 10 years had been full-time employment. The claimant had never previously been employed by the employer or any other employer at similar work and his immediate past work history for more than 2 years was unemployment. There is sufficient evidence to support the hearing officer's determination that the claimant was not a seasonal employee and our review of the record does not demonstrate that the determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Section 408.041(a) states that except as otherwise provided, the AWW of an employee who has worked for the employer for at least 13 consecutive weeks immediately preceding an injury is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13. If, at the time of injury the wage has not been fixed, the wage cannot be determined, or the employee has worked less than 13 weeks then the employee's AWW equals the usual wage that the employer pays a similar employee for similar services, or if a similar employee does not

exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration. Section 408.041(b)(1) and (2).

The hearing officer found that the only evidence presented concerning wages of similar employees was that seasonal employees received an hourly wage similar to the claimant's. Neither party offered a wage statement or other evidence of a similar employee who earned wages for at least 13 weeks. The hearing officer found that a fair, just and reasonable wage for the claimant was $505.50 which was obtained by dividing the gross wages of $2,527.53 earned in the 5 weeks immediately preceding the date of injury by 5. Section 408.041(c) provides that if subsection (a) or (b) cannot reasonably be applied because of irregularity of employment or causes beyond the control of the employee, a fair, just and reasonable method may be used to compute the AWW. Under the circumstances of this case we do not find that the hearing officer abused her discretion in applying the fair, just and reasonable method or by dividing the total gross wages by the number of weeks worked prior to the date of injury. Since we find evidence sufficient to support the determination of the hearing officer, we will not substitute our judgment for hers. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); Pool*, supra*.

The hearing officer's decision and order are affirmed.

_____
Kathleen C. Decker
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Judy L. Stephens
Appeals Judge