

APPEAL NO. 92073
FILED APRIL 6, 1992

On January 23, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. The hearing officer determined that the respondent, the claimant in this appeal, should have his average weekly wage (AWW) recalculated in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-4.10 (Vernon's Supp. 1992) (1989 Act), and his temporary income benefit (TIBS) adjusted accordingly. At the time of his injury on (date of injury), the claimant was employed part-time as a customer service representative for (employer).

The carrier argues that the decision was erroneous because it was based on a paycheck stub from the claimant which had not been exchanged prior to the hearing, and upon hearsay testimony from a person who had not been designated in response to interrogatories as a person having knowledge of relevant facts. Carrier further argues that claimant did not meet his burden by bringing forward evidence to refute the employer's wage statement which was filed to reflect the wages paid to a "same or similar" employee.

DECISION

We affirm the decision of the hearing officer to the extent that he has found that claimant's AWW was not properly calculated. We note that the hearing officer has erred in admitting a pay stub that had not been exchanged prior to the hearing, absent a showing, and a finding, of good cause. However, admission of this document was harmless error in that the testimony of the claimant established that the employer had failed to select a "same or similar" employee as that term is defined in Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE Section 128.3(f), as well as Art. 8308-4.10(h) of the 1989 Act.

The claimant was hired to work as a customer service representative for the employer, beginning April 29, 1991. He understood when he was hired that he would work between 30-33 hours per week, at \$5.25 per hour, and that 33 hours would be the maximum because employees who worked more were considered to be full-time, rather than part-time, employees. Claimant testified that the name of the person who hired him was Mr. S, the assistant manager, and that this is the person with whom he discussed his employment. Claimant injured his neck and back on (date of injury), two weeks after he started work. He stated that in the preceding two weeks, he actually worked four days a week, eight hours a day. He offered a paycheck stub into evidence, admitted over objection from the carrier, which showed that he was paid at the rate stated, and had been compensated for 62.75 hours. Prior to the document being admitted, the claimant testified as to the matters shown on the document relating to hours worked and the wage rate, as well as his gross weekly pay (\$329.44) for each of these prior two weeks. Claimant testified that, to his knowledge, part-time workers for employer worked schedules that varied from 20-33 hours per week.

Carrier offered no live testimony from any employees of the employer. Primarily, carrier urged that the wage statement submitted by the employer was, essentially, valid as a statement of wage of a same or similar employee. That wage statement shows, on its

face, that the employee selected, a Mr. G, worked an average of 21.37 hours, with only two weeks close to 32 hours that claimant testified he worked for the two weeks of his employment (28 hours one week, 33.25 the second). For these higher two weeks, Mr. G worked a five day week. A letter from the manager of employer states that this employee had a similar job title and was paid at a similar rate to that of claimant, and that both employees worked part-time, but there is no assertion in the letter as to similarity of work schedule. Claimant offered documents that accompanied payments of compensation, showing that claimant was paid TIBS of \$157.50 for each of the first two weeks, adjusted downward to \$84.13 per week for the first 26 weeks, and thereafter to \$78.52.

Because the claimant was a part-time worker, his AWW for purposes of computing the correct payment of TIBS is derived according to the 1989 Act, Art. 4.10(c), which refers back to subsection (a) and (b) of the statute. Because claimant was employed for less than 13 weeks prior to his injury, Art. 8308-4.10(b) controls. This statute requires first resort to the usual wage that the employer pays a similar employee for similar services. If there is no similar employee within the service of the employer, then the AWW equates to the usual wage paid in that vicinity for the same or similar services. Art. 8308-4.10(h) clearly states that the determination whether employees, services, or employment are the same or similar shall consider, among other factors, "the number of hours normally worked."

The rules of the Commission are to similar effect. Rule 128.4(a) and Rule 128.3 control the calculation of AWW for part-time employees. For an employee who has worked fewer than 13 weeks, the employer is required, under Rule 128.2(b)(4), to furnish a wage statement which identifies wages paid to a similar employee performing similar services, as those terms are defined in Rule 128.3(f). Rule 128.3(f)(2) specifically states that similar services are those which are, among other things, "comparable to the number of hours normally worked" by the injured employee. Thus, while the hours need not be identical, they must at least be comparable. Whether another employee is engaged in the same or similar work as the injured employee is a fact question for the trier of fact. Transamerica Insurance Company of Texas v. Green, 797 S.W.2d 171 (Tex. Civ. App.-Corpus Christi 1990, no writ).

Carrier's appeal is based upon its contention that the decision is based upon two pieces of inadmissible evidence: claimant's testimony about what he was told by Mr. S when he was hired, and claimant's paycheck stub. Carrier argues that testimony about statements made by Mr. S should not be admitted because Mr. S was not disclosed as a person having knowledge of relevant facts in claimant's responses to interrogatories, and that the paycheck stub should have been excluded because it was not exchanged, as required by Art. 8308-6.33(d) of the 1989 Act. Carrier further argues that no evidence was offered to rebut the employer's wage statement, and, consequently, it should have been accepted by the hearing officer.

Although carrier asserts that it objected to testimony about statements made by Mr. S, the record does not support this. Claimant testified fully on direct about the terms under

which he was hired, with no objection from carrier. Although carrier cross-examined claimant on the omission of Mr. S's name from an interrogatory, it still did not assert a protest to consideration of such statements until closing argument. The interrogatories and responses were not put into the record. Consequently, objection to testimony about Mr. S was waived. Insofar as claimant has offered hearsay statements of Mr. S into evidence, we would note that conformity to the legal rules of evidence is not necessary, Art. 8308-6.34(e). Carrier's contention regarding the inadmissibility of Mr. S's statements as testimony by the claimant is rejected.

Carrier is correct in its assertion that the paycheck stub should have been exchanged. Clearly, it was a document which should have been exchanged under Art. 8308-6.33(d)(5), and, in the absence of a finding of good cause by the hearing officer, should have been refused admittance, under Art. 8308-6.33(e). See *also* Texas Workers' Compensation Commission Appeal No. 91064, decided December 12, 1991. However, it does not likewise follow that the hearing officer must exclude a claimant from testifying about hours worked and wages received. Claimant's initial recollection, given without objection, was that he worked 32 hours each week. His subsequent recollection, refreshed by viewing his paycheck stub, modified that slightly downward. There was sufficient evidence contained in the record, without the paycheck stub, to support the findings of the hearing officer.

The hearing officer was not bound to accept as conclusive everything within the wage statement which he determined did not reflect reported wages of a same or similar employee, as that term is defined by the statute and the rules. See Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991. The hearing officer is the sole judge of the weight, materiality, relevance, and credibility accorded to the evidence. Art. 8308-6.34(e). We will not set aside his decision unless it is against the great weight and preponderance of the evidence so as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 1`82 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.). Although carrier argues that the wage statement was uncontroverted, this was not true; it was clearly put into question on the issue of comparability of hours by the testimony of claimant. What was not controverted was the claimant's assertion that he actually worked in excess of 30 hours in the two weeks preceding his injury. The hearing officer's Findings of Fact No. 9 and 10 refute the carrier's contention that the statement was wholly ignored. Indeed, the fact that the Mr. G made the same hourly pay as claimant was noted by the hearing officer, and apparently used as a basis for revising claimant's AWW upward.

While the hearing officer arguably need not have resorted to a "fair and reasonable" standard for computing AWW, this method of computation is not directly complained of on appeal, we will not address it here.

As there is sufficient probative evidence to support the decision of the hearing officer as to the adjustment made to AWW for the claimant, and admission of the pay check stub

does not constitute reversible error, the decision is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge