APPEAL NO. 92238

On February 13, March 5, and April 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The record was further held open until April 30, 1992, to obtain more records in this hearing. The hearing officer thereafter determined that the average weekly wage for purposes of calculating the income benefits due to the respondent herein, (claimant), should be $170.00 per week.

It was stipulated that respondent was injured in the course and scope of employment as a temporary laborer for (employer) on May 16, 1991, stationed at (client company). The appellant paid weekly benefits to respondent at the minimum benefit amount calculated under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-4.12 (Vernon's Supp. 1992) (1989 Act), based upon the employer's wage statement filed for a similar employee performing similar services.

The appellant asks that the decision be reviewed and reversed, arguing, essentially, that the decision of the hearing officer was against the great weight and preponderance of the credible evidence presented at the hearings with respect to various statements, findings, and conclusions in the hearing decision. It argues that respondent did not carry his burden to prove that he worked a 40 hour week at the time of his injury, and asks that the average weekly wage used by the appellant be determined to be the correct one. There was no response filed.

DECISION

After reviewing the record, we affirm the determination of the hearing officer, with modification to make clear that the appellant is liable for interest on amounts of additional benefits due to the respondent. 1989 Act, Article 8308-4.13.

Respondent's testimony, noted by the hearing officer as credible, was that he worked at the client company for some three months prior to his date of injury. He was aware that employer acquired the client company account from another temporary labor service, (temporary labor service), sometime in March 1991. He stated that from February through May, he worked five days a week, eight hours per day, for the client company, initially on its morning shift, then switching in late March to the afternoon shift. He stated that he was "on the ticket" each day for this client company and pointed out that his employer regarded him as a good worker (a fact not disputed by the employer's witnesses, and corroborated by statements on its supplemental report of injury). Respondent stated that he would show up at the work hall of employer before the shift in question, that his name would be called to work at client company, and that he would be transported in a van to that location. The van driver would log in a ticket of workers going to client company. The shift was eight hours. The ticket verifying hours would be completed by the client company, returned to the van driver, who would drive the workers back to the hall. Then, the van driver turned in the tickets. A "voucher" would be prepared and given to each worker, who would then turn in the voucher at a window for cash payment on a daily basis. Respondent testified that the

voucher did not indicate any withholding for social security or taxes. In addition to the amount paid pursuant to the voucher, workers received a $3.00 cash advance at the beginning of the shift. Respondent was not given any receipts or paperwork reflecting the amounts paid to him. He stated that after his injury, he was given "light duty" office work at the employer's premises, until he was physically unable to continue. Respondent stated on rebuttal that (Mr. WC) was not the person who usually dispatched him to client company.

Mr. WC, a dispatcher for the employer, testified that he recalled respondent more clearly than the hundreds of other laborers because respondent was an Anglo. He stated that he was familiar with respondent only from March 7th on, because this was the week that employer acquired client company's account from (temporary labor service). He testified that respondent worked for client company one or two days a week, over a long period of time, and that whenever he showed up, he was sent there to work. He stated that respondent was paid minimum wage for his work. Mr. WC agreed that the employer would not have offered light duty to a laborer that only showed up for work only a few times per month.

Notwithstanding, Mr. WC also surmised that a W-2 form he produced, which showed only $199.98 in wages paid by employer to the respondent for 1991, accurately reflected respondent's work for employer. He stated at first that the W-2 did not include light duty, then stated unequivocally that it did. Underlying documents eventually admitted show that this figure was based on one day in the first week of March, on the May date of injury, and on a few days subsequent to the injury working for client company. (The uncontroverted light duty worked by respondent is not accounted for in the evidence submitted by appellant.)

When asked, Mr. WC verified that the wages shown on the wage statement accurately reflected wages paid from March 7th. Appellant's attorney then called to his attention that the statement reflected wages paid to M. (A); Mr. WC responded "oh." He did not explain why (A) was selected as a similar employee performing similar services. Under cross-examination, Mr. WC acknowledged that (A) was not shown on the billing statement of workers sent to client company during the week of March 4th, when the wage statement shows he worked. Mr. WC replied that (A) may have worked for "any one of 200" client companies during that week. Mr. WC testified that different positions could require different working hours and pay scales. Aside from these brief statements, the record is devoid of any explanation supporting employer's selection of (A) as a similar employee.

Mr. WC's testimony, as well as the testimony of (Mr. S), his supervisor, indicated that the unskilled workers worked on a daily basis and that the number of days worked by laborers depended upon how many times those persons reported to the hall for assignment. This is supported by a billing statement to the client company for the week of March 4th, which shows that employer's laborers worked anywhere in the range of a single day to five days, for eight hour shifts. During this week, respondent is shown as having worked for one day. Mr. S (who disclaimed personal knowledge of respondent) stated that although

there may have been laborers who worked a running, daily ticket for client company, that it was still a "new day every day" for all laborers, given the nature of employer's business, and that no jobs were full-time, because there was no requirement to show up for work each day. Thus, although the wage statement indicates that respondent was "part-time," it is apparent that employer would have so designated any of its employees who worked 40 hours a week.

Despite repeated requests, and subpoenas, the employer did not produce the vouchers that would have been "cashed" by appellant. Neither was an earlier employment application that both parties testified about ever produced. Mr. WC indicated that his branch office records sometimes contained documents not at the central office. During the extensive and repetitive testimony concerning the employer's record keeping and operations, it became apparent that the end-product generated was only as good as the information put into the computer by a number of people.

We note that the resolution of the fairly straight-forward issue of average weekly wage in this case was unduly prolonged. The benefit review conference report of a December 18, 1991 proceeding indicates that "carrier has no information other than wage statement provided by employer. Carrier has requested numerous times appropriate wage information from the employer and has received no response . . ." Thereafter, the first session of the contested case hearing was held February 13, 1992. At the conclusion of this hearing, after an off-the-record discussion, the hearing officer continued the hearing in order to obtain records by subpoena from employer and client company. The hearing was continued until March 5, 1992. Appellant then produced some records (although less than the testimony of its witnesses indicated were in existence) and a witness. Although the hearing was closed at the conclusion of this session, and the record held open to receive subpoenaed documents (payroll records that appellant's attorney asserted that she still had not seen), the hearing was reconvened by agreement on April 23, 1992, and cumulative testimony was taken again. After the record was held open a week, the record closed. Respondent expressed understandable frustration with this process.

In this case, the employer's records were clearly beyond the possession or control of the respondent. The Texas Insurance Code, Article 5.65B(a), states: "a policyholder shall make full disclosure to its insurance company of the information concerning its true ownership, change of ownership, operations, or payroll and any of its records pertaining to workers' compensation insurance." This appears to put the carrier in control of records material to its case. There is no indication in the record that appellant's attorney diligently attempted to invoke required cooperation from its insured and was thwarted. While a hearing officer has an obligation to fully develop facts in the record, Article 8308-6.34(b), we would caution that this does not compel indulgence of the delay by a party, in this case the appellant, in obtaining material records.

Because appellant contended that respondent worked for less than 13 weeks, the standard for computing an average weekly wage for purposes of the temporary income

benefit is ultimately that set forth in the 1989 Act, Article 4.10(b), whether the respondent is characterized as full or part time. *See also* Article 8308-4.10(c). Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.2(b)(4) (Rule 128.4) puts the responsibility on the employer to identify a "similar employee performing similar services." The wage statement of another employee identified by employer as same and similar is not conclusive if a dispute arises over the similarity of the employee so identified. *See* Texas Workers' Compensation Commission Appeal No. 92073 (Docket No. redacted) decided April 6, 1992.

Rule 128.3 states:

(1)a "similar employee" is a person with training, experience, and skills that are comparable to the injured employee. Age, gender, and race shall not be considered;

(2)"similar services" are tasks performed or services rendered that are comparable in nature to, and in the same class as, those performed by the injured employee, and that are comparable in the number of hours normally worked.

Rule 128.3(g) and Article 8308-4.10(g) further provide that if the usual methods for calculating average weekly wage cannot be applied reasonably "due to the irregularity of employment or if the employee has lost time from work during the said 13 week period due to illness, weather, or other cause beyond the control of the employee . . ." then the commission may use a fair, just, and reasonable method to compute average weekly wage. The hearing officer essentially applied the fair, just, and reasonable method when she rejected the wage statement tendered by the employer and used the $170.00 average weekly wage paid to same or similar employees who worked 40 hours a week at minimum wage.

The parties were at loggerheads over whether the hours worked by (A) were "similar." The question of "similarity" was for the trier of fact to resolve. *See* Powell v. City Insurance Co., 713 S.W.2d 793 (Tex. App.-Eastland 1986, writ ref'd n.r.e). Under the facts brought forth at the hearing, indicating that the industry standard is irregular employment, and the failure of the appellant to prove that (A), as opposed to another employee working five days per week, was a similar employee performing similar services as defined in Rule 128.3, the hearing officer was justified in determining, from the evidence presented, that a same or similar employee to the respondent would be one who worked 40 hours a week for the client company. There is sufficient evidence, bolstered by the detailed testimony of the respondent, from which the hearing officer could determine that the respondent worked far more than the five days in three months indicated in the slips that were produced.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Article 8308-

6.34(e). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). It is the job of the trier of fact to resolve the inconsistent testimony that is present in this record and to assess the credibility of the witnesses.

The decision of the hearing officer is affirmed. We would note, for clarification, that pursuant to Article 8308-4.13, interest is due on the amount of additional income benefits due to respondent as a result of the adjusted average weekly wage, at the rate provided in accordance with Article 8308-1.04, and the order of the hearing officer is so modified.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge