APPEAL NO. 931032

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing was held on October 11, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at this hearing was the correct average weekly wage (AWW) which the hearing officer determined to be $95.75 calculated according to a method considered by him to be "fair, just and reasonable."

The appellant (claimant) appeals this decision arguing that the AWW should be calculated on the total wages paid by all three of the claimant's employers and that it is not fair, just or reasonable to determine her AWW "by utilizing the four month period after she was injured." Alternatively, the claimant "takes issue" with the findings of the hearing officer "that there is no same or similar persons performing the same services at a wage rate equivalent to that of the Claimant" whose wages could be used to calculate the claimant's AWW.

DECISION

We affirm.

The claimant worked as a certified nurse's aide and a home health care provider for three separate employers. She injured her back on (date of injury), in the course and scope of her employment with (employer).[1] The parties stipulated that she worked part time for this employer. The hearing officer determined that only the wages from this employer could be used to calculate AWW which he found to be $95.75. The claimant argues on appeal that even though she was a part-time worker, she was a full-time wage earner and that her AWW should be calculated on the total wages she received from all three of her employers. She contends that her correct AWW is approximately $437.00. The carrier, citing previous Appeals Panel decisions, contends that under the 1989 Act, unlike its predecessor, an injured employee cannot aggregate collateral income from various employers to arrive at a correct AWW. The claimant recognizes the existence of these decisions, but argues that they are an incorrect interpretation of the 1989 Act and serve to defeat its underlying goal of compensating injured workers.

While we have sympathy for the predicament of the claimant in this case, we believe that previous decisions of the Appeals Panel, most recently in Texas Workers' Compensation Commission Appeal No. 93894, decided November 18, 1993, state the correct interpretation of the 1989 Act. Thus, for purposes of payment of Temporary Income Benefits (TIBS), we continue to hold that concurrent employment wages may not be used in the calculation of AWW and that only the wages from the employment in the course and scope of which the injury occurred may be used for this purpose. Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991; and Texas

[1] Other aspects of this case concerning whether the injury was in the course and scope of employment, good cause for untimely reporting the injury and the identity of the employer were addressed in Texas Workers' Compensation Commission Appeal No. 93033, decided March 1, 1993 (unpublished). The claimant testified that she was only able to work up to March 1992 before her injury forced her to stop working.

Workers' Compensation Commission Appeal No. 92296, decided August 11, 1992. *See also*, Texas Workers' Compensation Commission Appeal No. 92485, decided October 23, 1992, which dealt directly with the calculation of AWW for a home health care aide.

The evidence at the hearing established, and the parties agreed, that the claimant had not worked for 13 weeks preceding her injury. In addition, the hearing officer determined that, because of the nature of the claimant's work wherein she was on-call as needed, could pick and choose among individual job assignments and was paid varying amounts depending on the nature of the cases she was assigned and her wage agreements with her various employers, there was no similar employee performing similar services for the employer nor was there a usual wage paid in the vicinity for the same or similar services. Section 408.041(b) and Section 408.042. The hearing officer therefor calculated the claimant's AWW wage by a method he deemed "fair, just and reasonable." Section 408.041(c). *See also* Texas Workers' Compensation Commission Appeal No. 93602, decided August 31, 1993, and cases cited therein, for the proposition that the "fair, just and reasonable" method for calculating AWW wage can only be utilized if the "usual methods for calculating the AWW" cannot reasonably be applied.

The hearing officer determined that "the four months [claimant] worked between October [1991] and January [1992] provide a basis for establishing a fair and reasonable [AWW]." He then averaged the claimant's weekly wage from the employer for this period of time and determined a correct AWW of $95.75. On appeal, the claimant argues that it was not fair, just or reasonable to determine the AWW by utilizing the four month period after the injury. Claimant contends that the fair, just and reasonable manner would have been to use the claimant's weekly pay beginning from her first day of employment in August 1991 and continuing for 13 weeks. This in effect would have placed her injury about midway through the period and AWW would not have been calculated solely on the period of employment after the injury when her work may have been adversely affected by the injury.

We have held that the selection of a "fair, just and reasonable" method for determining AWW is left to the sound discretion of the hearing officer, based "on due consideration of all the facts and circumstances present in the case." Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993. Just as a calculation of AWW from the first day of employment could have penalized the claimant because she was new and less experienced at her job, so could a calculation based on a period of time in which she began to experience increased pain from her injury. In this latter regard, we observe that she continued working for up to two more months after the period selected for calculating AWW and the claimant's own selection of an appropriate period for the calculation of AWW included a substantial period of post-injury work. Furthermore, we note that had the hearing officer included in his calculations the only pre-injury wages in evidence, the AWW would have been somewhat lower. *See* Appeal No. 92485, *supra*, which limited the period to a pre-injury wage. As we have noted, a just and fair wage "is not a matter of mathematical calculation," Barrientos v. Texas Employers Insurance Association, 507 S.W.2d 900 (Tex. Civ. App.-Amarillo 1974, writ ref'd n.r.e.), cited in No. 93386, *supra*.

Although there may be other just, fair and reasonable methods of calculating AWW in this case, we conclude as a matter of law that the hearing officer did not abuse his discretion and that he gave due consideration to all the facts and circumstances of this case in selecting the period after the claimant's injury for calculating AWW and that the method he selected was fair, just and reasonable.

Alternatively, the claimant urges on appeal that the hearing officer erred in finding that the "methods ordinarily applied for calculating [AWW] cannot be applied reasonably" to the claimant and that there are "similar persons performing the same services at a wage rate equivalent to Claimant."

Whether a claimant's employment is so irregular that the normal methods of determining AWW would be unreasonable is a question of fact for the hearing officer to decide. *See* Texas Workers' Compensation Commission Appeal No. 93235, decided May 12, 1993. As noted above, the unrefuted evidence at the hearing, primarily the testimony of the claimant, disclosed that she could select as many hours per week to work as she wanted from a mix of employers depending on the individual jobs available to them. The jobs, in turn, paid at varying rates depending on the nature of the job and the source of funds for payment. An appeals level body is not a fact finder, and does not normally substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). In light of the claimant's testimony and given the lack of other evidence from the employer about the existence of similar jobs and similar wages, we find sufficient basis in the record to support the findings of the hearing officer that there was "no same or similar person performing the same services at a wage equivalent to the Claimant's" and that "[t]he methods ordinarily applied for calculating [AWW] cannot be applied reasonably to [the claimant]." *See* Texas Workers' Compensation Commission Appeal No. 93235, decided May 12, 1993.

Accordingly, we affirm the decision and order of the hearing officer.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge