APPEAL NO. 93203

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On February 7, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be decided was: "what is the claimant's average weekly wage?" The hearing officer determined that the appellant (claimant herein) failed to prove that the employee designated by the employer was not a "same or similar" employee and arrived at an average weekly wage (AWW) of $527.96. Claimant contends that the hearing officer misapplied the facts and the law presented at the hearing and requests that we reverse the hearing officer's decision and render a decision that his AWW was $633.71. Respondent (carrier herein) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant began employment with (employer) as a "motorman" on a drilling rig sometime in January (either the 15th or the 28th) 1991. On or about (date of injury) claimant suffered some type of compensable injury. The circumstances of the accident and the nature of the injury were not at issue and no evidence was presented in that regard. Because claimant had been employed by the employer for fewer than 13 weeks immediately preceding the injury, the only issue was the proper method of computing claimant's AWW. It was claimant's position, and testimony, that there was not a "same or similar" employee who had worked for the employer for 13 consecutive weeks immediately preceding (date of injury), and that claimant's AWW should be computed by extrapolating claimant's wage as a "fair, just and reasonable" method pursuant to Article 8308-4.10(g). The carrier argued that there was a "same or similar" employee who had been employed in the same time frame and that claimant's AWW should be computed based on the wages paid to the "same or similar" employee pursuant to Article 8308-4.10(b). To that end, carrier introduced an Employer's Wage Statement (TWCC-3) showing an (Mr. C) as a similar employee who had worked for the employer for the 13 weeks prior to the date of injury. Claimant did not know Mr. C and there was no evidence regarding what Mr. C did, or what his training, background or experience might be. The TWCC-3 does contain an Employer Certification that the statement is complete and accurate. Claimant argues, both at the CCH and on appeal, that experienced hands were kept on the rig until it was "running and proven," and that because he was an experienced hand, he worked more hours per week than Mr. C; therefore Mr. C is not in fact a "same or similar" employee. Claimant testified that generally he worked seven days on and then seven days off. Claimant's TWCC-3 shows that he worked 72 hours a week each of the first two weeks and then worked 84 hours every two weeks thereafter. Claimant testified that "it's not all that uncommon . . . to work those three weeks until the rig is proven . . . you don't just put anybody out there on a rig that's not proven. . . ." Mr. C's TWCC-3 shows he worked 84 hours a week every two weeks at apparently the same rate of pay claimant was receiving.

The hearing officer found Mr. C to be a "same or similar" employee and determined claimant's AWW by using Mr. C's wages for the 13 weeks prior to the injury. Claimant appealed, claiming because he had more training and skill, he had worked the rig in question for three weeks "until the rig was standing and proven in the field." Claimant argues Mr. C, as the similar employee, ". . . was not trained in any other skills aside from normal floor work . . . [or] in any capacity beyond daily roughneck routine. . . ." A review of the record would indicate there was no evidence regarding these statements in the record and that they are speculation by claimant submitted the first time on appeal. Claimant also argues how he "has been used . . . to troubleshoot problems. . . ." on other jobs. That information was not brought out at the hearing nor is it particularly relevant to the present case.

The carrier responds by stating certain of claimant's information was "new testimony" introduced for the first time on appeal. We will consider only the record developed at the CCH. Article 8308-6.42(a). The carrier goes on to state: "The evidence at the hearing was clear the claimant and the similar employee [Mr. C] had the same job title, performed exactly the same type work, and had the same training, background, and experience." We disagree. The record is silent regarding what Mr. C's job title was, what work he did or what kind of training, background or experience he may have had. Although the hearing officer attempted to ascertain this information, he was unable to do so. The only thing that is clear is that claimant and Mr. C were apparently paid the same hourly wage.

Case law under the prior Workers' Compensation Act is clear that the burden of proof is on the claimant to offer legal and competent evidence to establish his AWW. Texas Employers' Insurance Assoc. v. Bragg, 670 S.W.2d 712 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.). Before a workers' compensation claimant could resort to Article 8309, § 1 (repealed; now Article 8308-4.10(g)) which pertained to "just and fair" wage rate, claimant had the burden of showing that his AWW could not be computed under other subsections. Texas Employers' Insurance Assoc. v. Shannon, 462 S.W.2d 559 (Tex. 1970). The hearing officer correctly stated that claimant had the burden of showing that under the provisions of Article 8308-4.10(b) ". . . the wage that the employer pays a similar employee for similar services. . . ." do not apply before the provisions of section 4.10(g) may be used. The evidence regarding what Mr. C did, his job title or whether he even worked on an oil rig is very sparse. In fact, the only evidence regarding Mr. C is that on the TWCC-3 where the employer completed block 10 which requires the employer to ". . . identify a similar employee performing similar services, and list the wages of that similar employee for the 13 weeks prior to the date of injury." Mr. C is named with his social security number. Claimant speculates that because the more experienced employees are "kept until the rig was standing and proven" shows he had greater training, experience and skills than Mr. C. However, it is equally possible to speculate that Mr. C's rig was already "standing and proven" as a reason why Mr. C kept more regular hours. There is a dearth of evidence as to what Mr. C was doing, or what his training, experience and skills were, other than the TWCC-3 certification filed by employer.

The hearing officer inferring that the hours claimant worked during the first two weeks "were an exception and did not qualify as the number of hours normally worked," determined the hours worked by the claimant were comparable to the hours worked by Mr. C. The hearing officer apparently based this finding on testimony by claimant that he initially worked three weeks in a row because they were "actually putting up a rig" and "had to stay until the rig was proven." The hearing officer concluded that claimant "failed to prove, by a preponderance of the evidence, that [Mr. C] was not a `same or similar' employee."

Based on the Employers Wage Statement certification that Mr. C was a similar employee performing similar services as the claimant during the time in question, and claimant's testimony that the extra hours worked were required to put up and stay with a rig until it was standing and proven, there was sufficient evidence in the record to support the hearing officer's finding and conclusion that the hours worked by claimant were comparable to the hours worked by Mr. C and that claimant had not established that Mr. C was not a similar employee.

We will set aside a hearing officer's decision only where the evidence supporting the decision is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot, as a matter of law, so find.

The decision and order of the hearing officer are accordingly affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge