

APPEAL NO. 93930

This appeal arises under 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.*). On September 10, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be considered at the CCH was: "What was the correct amount of Claimant's average weekly wage [AWW]?" The hearing officer determined that the appellant, claimant herein, had an AWW of \$122.45 based upon a fair, just and reasonable basis.

Claimant contends error in that he alleges he was promised 60 hours work a week, that there were other similar employees that worked both the day shift and the night shift, that claimant's request for a subpoena was not granted and claimant requests that we reverse the hearing officer's decision and order a "rehearing" to allow the claimant to present testimony of similar employees. Respondent, County, a self-insured governmental entity, employer herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

It is undisputed that claimant was employed by the employer to perform mosquito control work during the 1991 and 1992 mosquito season. It was the unrefuted testimony from employer that the mosquito season was roughly from mid-April until mid-October. It is undisputed and not at issue that claimant was injured in some manner on or about July 8, 1992, that claimant had not been employed by the employer for the 13 weeks prior to the injury, and that some amount of temporary income benefits (TIBS) were due.

The entire issue is claimant's AWW. Claimant testified that when he was hired in 1992 he was promised 60 hours work a week and that he would be paid \$6.00 per hour for day shift work and \$9.00 per hour for night shift work. In fact, during the 1991 and 1992 seasons claimant never worked 60 hours in a week and work weeks varied between 32 hours or so during a busy time to 12 or 13 hours a week during slower times with an average of 23 hours a week. Claimant testified, and it is unrefuted, that if it was raining or excessively windy the workers could not spray. Claimant agreed that on days where the weather conditions prevented spraying for mosquitoes he was paid two hours "show up time." Claimant provided the names of several other employees who allegedly were similar employees and had worked for more than 13 weeks. Claimant also alleged that he had been told he would be hired on a full-time basis in 1992.

Employer called (Mr. C) as a witness. Mr. C was employer's Director of Mosquito Control. He specifically denied claimant had been promised 60 hours work a week, or that there were other similar employees performing similar services for the 13 weeks prior to claimant's date of injury. Mr. C pointed out that the concept of "show up time" was inconsistent with claimant's allegations that he was promised 60 hours a week regardless. Mr. C did say one employee, although officially listed as part time, actually worked full time.

However, Mr. C testified this individual was also an accomplished mechanic who worked for employer as a mechanic during the off-season and during the mosquito season did spraying duties as well as mechanic duties, consequently he did not perform services similar to claimant. Mr. C also testified that at the beginning of the 1992 season he was under the impression, and so informed his "seasonal" employees, that if an employee worked more than eight hours a day they would be entitled to time and a half overtime. Mr. C testified after the first week employer's payroll department advised Mr. C that his impression was incorrect and that part-time seasonal employees must accrue 40 hours during a work week in order to qualify for overtime. According to Mr. C, because he had advised the employees incorrectly, the employer agreed to payment as promised for work already performed but that all employees were advised of the correct policy.

Uncontested documentary evidence in the form of Internal Revenue Service W-2 forms showed in 1991 claimant earned \$2,760.00 for 25 weeks' work and in 1992 claimant earned \$1,347.00 for 11 weeks' work, through July 15th.

The hearing officer indicated in her discussion that claimant was not promised 60 hours of work per week ". . . nor did Claimant have any reasonable expectation of working this number of hours per week on a regular basis." The hearing officer therefore determined that claimant had not worked for the employer 13 continuous weeks prior to the date of injury, that no employees provided similar services for the employer for the 13 continuous weeks prior to July 8, 1992, and that a fair, just and reasonable computation of claimant's AWW was to use the \$1,374.00 actually earned divided by the 11 weeks actually worked to yield an AWW of \$122.45.

Claimant appealed on three grounds: 1. That contrary to the hearing officer's determination he had been promised 60 hours work per week and that TIBS should be computed as if he was working 60 hours per week; 2. That contrary to the hearing officer's determination there was a similar employee that worked both the day and night shift for the 13 continuous weeks prior to July 8th; and, 3. Claimant was wrongfully denied a subpoena for a witness who would testify regarding similar employees to claimant.

The pertinent portion of the 1989 Act is Sections 408.041 and .042 of the TEX. LAB. CODE, and provide:

Sec. 408.041. AVERAGE WEEKLY WAGE. (a) Except as otherwise provided by this subtitle, the [AWW] of an employee who has worked for the employer for at least the 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.

(b)The [AWW] of an employee whose wage at the time of injury has not been fixed or cannot be determined or who has

worked for the employer for less than the 13 weeks immediately preceding the injury

equals:

- (1) the usual wage that the employer pays a similar employee for similar services; or
- (2) if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration.
- (c) If Subsection (a) or (b) cannot reasonably be applied because the employee's employment has been irregular or because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, the commission may determine the employee's [AWW] by any method that the commission considers fair, just, and reasonable to all parties and consistent with the methods established under this section. (V.A.C.S. Arts. 8308-4.10(a), (b), (g).)

Sec. 408.042. AVERAGE WEEKLY WAGE FOR PART-TIME EMPLOYEE. (a) The [AWW] of a part-time employee who limits the employee's work to less than full-time hours or a full-time workweek as a regular course of that employee's conduct is computed as provided by Section 408.041.

* * * *

In that claimant had only worked for the employer 11 consecutive weeks immediately preceding the injury subsection 408.041(a) would not apply.

Claimant alleges that there are similar employees performing similar services for the employer and does give some names. Mr. C denies that these employees have been employed longer than claimant. Mr. C does concede one employee does spraying and some similar duties as that of the claimant in the mosquito season but testified he was not a similar employee because he also performed mechanic's duties. The hearing officer found that there were no similar employees performing similar services and that determination is supported by sufficient evidence in the form of Mr. C's testimony and various time and payroll records.

Regarding claimant's contention that he had been promised 60 hours of work per week, and that TIBS should be based on the promised work on a fair, just and reasonable basis, resolution of that issue is based on whether one believes the claimant or Mr. C, as well as supporting documentary evidence that claimant regularly had not worked 60 hours a week and apparently had not protested that this was contrary to the alleged promise made to him when he was hired in 1992. The hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence presented at the hearing. Section 410.165(a). The hearing officer could have believed claimant, or as she obviously did, could have believed Mr. C and the inferences created by the documentary evidence. When

the claimant's testimony is that of an interested party, his testimony only raises an issue of fact, Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ) and the trier of fact has the responsibility to judge the credibility of the claimant and the weight to be given his testimony in the light of other evidence in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer may believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, no writ). The hearing officer's finding is supported by sufficient evidence.

Lastly, claimant alleges he was wrongfully denied a subpoena for a witness who would verify some of claimant's allegations. We note that this contention is first raised on appeal. Nowhere during the CCH before the hearing officer was a contention or request raised that claimant desired the presence and testimony of a particular witness, nor does claimant in the appeal identify the witness. Pursuant to Section 410.203 the Appeals Panel will consider only the record developed at the CCH, the written appeal and response filed with the panel. We have early held that we will not consider issues first raised on appeal. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992; and Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. In that claimant had not raised the issue with the hearing officer, we will not review it now.

Upon review of the record submitted, we find sufficient evidence to support the hearing officer's determinations that a fair, just and reasonable AWW is computed by taking claimant's actual earnings in 1992, dividing those earnings, including "show up time," by the 11 weeks actually worked to arrive at an AWW of \$122.45. We find no reversible error and we will not disturb the hearing officer's findings unless they are so

against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings Estate, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986). We do not so find and consequently the decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge