APPEAL NO. 94143

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 6, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) had an average weekly wage (AWW) of $749.16 with a compensation rate of $438.00. Appellant (carrier) asserts that claimant should not have been allowed to introduce any evidence because claimant did not comply with discovery requirements and did not honor either a subpoena or an order issued by the Texas Workers' Compensation Commission (Commission). Appellant further states that certain amounts should be deducted from payments to claimant and since claimant is self-employed, it needed thorough information on which to determine what amount paid to claimant was wages and what was not. The appellate file does not contain a reply from claimant.

DECISION

We affirm.

The only issue before this hearing was what was the correct AWW. Claimant drove a truck and had a workers' compensation policy for himself and those he hired to help him move merchandise. The carrier contends that payments to claimant for particular jobs included amounts other than his "wages." Carrier also asserts that it obtained a subpoena for production of claimant's tax records, which would help it determine what claimant's AWW was. The hearing officer referred to having ordered claimant to produce documents on September 30, 1993. Carrier introduced no exhibits, however, and the only hearing officer exhibits were a copy of the benefit review conference (BRC) report and a copy of an interlocutory order for payment of benefits. No subpoena, order of the Commission, or request for interrogatories made by carrier is contained in the record as an exhibit or through notice taken by the hearing officer.

When claimant sought to introduce documents, carrier objected, asserting that claimant had not provided tax and other information necessary to it in determining an accurate AWW; carrier argued that since claimant had not produced all material requested, he should not be allowed to introduce any evidence. Claimant argued on this question at the hearing that the carrier had a copy of everything he sought to introduce. Carrier pointed out the late exchange of Claimant's Exhibit No. 4, and it was not admitted into evidence. All other claimant's exhibits were admitted over carrier's objection, which related to lack of tax and other information from claimant, preventing it from adequately cross-examining or countering the evidence that claimant was providing.

Section 410.160 states that parties shall exchange, within a certain time, medical reports and information as to expert testimony, medical records, witness statements, names and addresses of persons who have relevant knowledge of facts, and photographs and other documents a party intends to introduce. Next, Section 410.161 provides that a party may not introduce evidence that it failed to exchange. Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) contains the same list of evidence for exchange as appears

in Section 410.160. It provides for no additional sanction should exchange not occur, but does refer to the use of a subpoena. Rule 142.12(g) provides an administrative penalty for failure to comply with a subpoena and allows suit in a district court to enforce the subpoena. Rule 142.1 calls for enforcement of subpoenas through the Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a, (effective September 1, 1993, codified as the Administrative Procedure Act (APA), TEX. GOV'T CODE ANN. § 2001 (Vernon 1994)). Neither the 1989 Act nor Commission rules provide a specific remedy against a party who fails to comply with discovery, including an order of the Commission, except that information not exchanged will not be admitted because of such failure. The hearing officer may "take other action" as set forth in Rule 142.2(14) in appropriate circumstances. (Since claimant does not attack the order to produce documents, it will not be reviewed; to assure availability to the Appeals Panel, motions and orders that affect the outcome of a hearing should be noticed or made exhibits to the hearing.)

While the claimant's refusal to provide information, indicated by the hearing officer's statement on the record, could negatively affect that party (including the risk that claimant's evidence might not be admitted, or that the hearing might be continued pending carrier's pursuit of remedies under APA and in district court), the hearing officer was not compelled to rule that claimant could not submit evidence that otherwise complied with Commission rules. The record contains no indication that the carrier asked for a continuance in order to seek an administrative penalty against claimant or to enforce a subpoena in the district court. (*See* Rule 142.12(g)). The hearing officer did not abuse her discretion in admitting claimant's exhibits and allowing his testimony.

Claimant's evidence included an Employer's Wage Statement that listed payments to claimant for 13 weeks. (We note that the wage statement runs through January 31, 1992, not January 21, 1992, the date of injury, that carrier did not object to the last week included within the wage statement, and that subtracting the last week from that wage statement would not affect the rate of compensation claimant was ordered to be paid-- AWW would be $692.49, as opposed to $749.16 as stated by the hearing officer, when payments were reduced from $23,053.21 to $22,316.69.) *See* Section 408.103 which states that temporary income benefits will be paid at the rate of 70% of the AWW, with maximum and minimum amounts.

Section 408.041 provides direction for determining the AWW. Subsection (a) provides for figuring the AWW based on the 13 weeks of wages immediately preceding the injury. The carrier did not argue that subsection (b) should be applied (it provides an alternative if the employee has not worked 13 weeks, among other points it makes). The carrier cited Rule 128.1 which provides for using wages, including certain adjustments to be added and others to be subtracted, to figure AWW. It said that insufficient information had been provided to it to determine the extent of wages included within payments made to claimant. Claimant's Exhibit No. 3 was a listing of expenses which the hearing officer used as a basis to subtract a total of $13,314.21 from the $23,053.31 paid in the 13 weeks (the latter figure should be $22,316.69). Claimant does not appeal the subtraction of any expense listed. The hearing officer's application of the 1989 Act and the Rules to reach an AWW based on

the employer's wage statement, from which she subtracted certain amounts, was sufficiently supported by the evidence.

Carrier also asserts that it objected to claimant's evidence because claimant failed to respond to interrogatories. Claimant's Exhibit No. 1, a letter from carrier's law firm to (at that time) claimant's lawyer, referred to tax information and then stated that claimant "refused to respond to interrogatories relating to this information." From that statement the hearing officer could have inferred that claimant did not fail to answer the interrogatories submitted by carrier, but that he failed to answer particular questions relating to tax information within those interrogatories. We note from Claimant's Exhibit No. 5, Answers and Objections to Interrogatories, that carrier refused to answer two questions citing the Texas Rules of Civil Procedure and refused to answer a question that asked how it would use claimant's income tax information, if provided, by stating that the question called for speculation. The 1989 Act is not governed by the Texas Rules of Civil Procedure. *See* Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992, and Appeal No. 92079, decided April 14, 1992, which state that the Texas Rules of Civil Procedure do not control disputes under the 1989 Act.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She may resolve conflicts in the evidence provided by different parties or even conflicts within the evidence provided by one party. *See* Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). In addition, she may also make reasonable inferences from the evidence. *See* Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). She did not abuse her discretion in admitting claimant's exhibits that met exchange requirements, even though claimant had not complied with an order to produce certain tax documents. *See* Sections 410.160 and 410.161. The evidence introduced by claimant sufficiently supported the findings of fact. Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge