APPEAL NO. 950090
FILED FEBRUARY 28, 1995

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing (CCH) was held on December 29, 1994. She determined that the appellant's (claimant) average weekly wage (AWW) was $222.72 per week based upon a fair, just, and reasonable formula and that the claimant had disability since October 4, 1994, from an injury of _____. The disability issue has not been appealed; however, the claimant asserts error in a number of matters regarding his hearing and urges his AWW should be the same as his supervisor who performs similar work. The respondent (carrier) asks that the decision be affirmed since it is supported by sufficient evidence.

DECISION

Affirmed.

Although the claimant urged the addition of a number of issues (maximum medical improvement, impairment rating, life time benefits, etc), none of these were before the benefit review officer or reported as unresolved issues from the benefit review conference (BRC), the only issues decided by the hearing officer were those contained in the BRC report: AWW and disability. We agree with the hearing officer's determination that the other issues attempted to be raised were either not ripe for resolution at the CCH or had not been raised earlier in the dispute resolution process. The carrier objected to the attempt to add these issues. Although these issues were not germane to the instant hearing, our agreement with the hearing officer's determination does not indicate any opinion that such issues have been waived.

Regarding the issue of AWW, the record demonstrated that the claimant had not worked for the employer for 13 weeks preceding the injury in question. There was also evidence that the claimant was hired for a security patrol type job and was paid $5.00 per hour. His supervisor, who performed some of the same duties but also other supervisory functions, was paid $6.25 per hour although he had started at the rate of $5.00 per hour a couple of years earlier. The employee's wage statement was in evidence and the claimant had apparently worked 11 and 1/2 weeks prior to his injury. The hearing officer determined that the claimant's AWW would be determined by the fair, just, and reasonable formula and did so by totaling the claimant's wages for the 11 and 1/2 weeks and dividing by 11 and 1/2. She rejected the claimant's position that the claimant's AWW should be based upon the same or similar employee method using the supervisor's wages and found that the supervisor was not a same or similar employee as he had supervisory functions in addition to duties performed by the claimant.

Section 408.041 in setting out methods for calculating AWW generally provides that if an employee has not worked at least 13 consecutive weeks, then the AWW is

determined by using the usual wage of a similar employee for similar services or the wages paid in the vicinity for the same or similar services. If these methods are not available or appropriate, then the Texas Workers' Compensation Commission may determine the employee's AWW by any method considered fair, just, and reasonable to all parties. The issue of AWW is a factual issue for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93950, decided December 1, 1993; Texas Workers' Compensation Commission Appeal No. 93930, decided December 1, 1993. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). Where there is sufficient evidence in support of a hearing officer's determination, as there is here, we do not substitute our judgment for that of the hearing officer. Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994.

We do not find any merit to the various other matters mentioned in the claimant's request for review. However, his assertion that the hearing officer "got curshele" (sic) with the claimant during the hearing is not supported from our review of the entire record. Indeed, she appropriately conducted the hearing under somewhat trying circumstances and had to caution the claimant regarding his improper method in answering questions. We find no basis to conclude that a full and fair hearing was not held in this case.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge