

APPEAL NO.980054

This appeal arises 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 9, 1997. The hearing officer determined that the sole issue for resolution was the question of the appellant's (claimant) average weekly wage (AWW). After the close of the CCH, the hearing officer stated in his decision and order of December 17, 1997, that each party had communicated to him that the "evidence presented regarding the [AWW] issue was predicated on an erroneous statement." He, therefore, "vacate[d] the [AWW] issue and assign[ed] the [AWW] issue to the [CCH] scheduled for Friday March 6, 1998." This action was predicated on what he construed to be motions from both parties to reopen the hearing. On the same date of the decision and order, the hearing officer issued a separate "Order on Requests to Reopen Hearing" granting these motions and directing that the AWW issue be "tried de novo" at the March 6, 1998, CCH. For purposes of this appeal, we incorporate the separate order on the requests to reopen the record into the decision and order of the hearing officer.

The claimant objects to this action by the hearing officer, possibly under the misapprehension that he was referring the matter to a benefit review conference (BRC), and requests that the Appeals Panel resolve the issue of AWW in her favor and order the carrier to pay the claimant an additional \$4030.00. The carrier replies that because the hearing officer "vacated" the AWW issue, his decision and order is moot pending resolution of the AWW issue at the March 6, 1998, CCH.

DECISION

Affirmed, as reformed.

Because the hearing officer announced that he would only address an AWW issue, we will not address other irregularities in these proceedings and how they might affect the resolution of numerous other issues between the parties except as set out below. In its motion of December 15, 1997, to "Reopen the [CCH] Evidence" the carrier cited as its reason that the employer's wage statement submitted at the CCH (Carrier's Exhibit 7) was incorrect and that it proposed to substitute a correct wage statement in place of it. On December 15, 1997, the claimant faxed to the hearing officer a motion that she titled "Claimant's Motion to Reopen [CCH] Evidence." A review of the text of this "motion" discloses that it was not a request to reopen the record but to "immediately order the Carrier to pay to the Claimant what it knows that it owes. That amount is exactly \$4030." From this we conclude that the hearing officer mischaracterized the claimant's submission and that the claimant did not, as implied by the hearing officer, join in a motion to reopen the record. In addition, we observe that a motion submitted before a decision and order is issued to reopen the record for the production of additional evidence does not require or justify the vacation of the prior proceedings and a "de novo" hearing.

Given the history of this dispute, we decline to reverse the decision and order of the hearing officer and remand the issue of AWW to him to consider as a continuation of the prior CCH. *Compare* Texas Workers' Compensation Commission Appeal No. 94109 , decided March 8, 1994. His order to address the issue de novo serves essentially the same purpose. For this reason we decline to reverse that decision and order.

In her appeal, the claimant raises numerous issues of compliance by the carrier with the rules of the Texas Workers' Compensation Commission (Commission). These are properly addressed to the division of compliance and practices. We also reject as unfounded her allegation that the hearing officer was biased in this case in favor of the carrier.

We note that the parties stipulated that the claimant was entitled to 105 weeks of temporary income benefits (TIBS). The hearing officer then made a finding of fact and conclusion of law that the "Carrier has paid Claimant 105 weeks of [TIBS]." We reform the decision and order of the hearing officer to delete this sentence in Finding of Fact 8 and Conclusion of Law 5. This determination is premature pending a determination of AWW. Once AWW is determined, the parties should be able to agree on the amount of TIBS that were actually paid and if TIBS have been over or underpaid, which we believe, is the essence of this dispute.

For the foregoing reasons, we affirm the decision and order of the hearing officer, as reformed.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge