APPEAL NO. 991164

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 May 4, 1999. With respect to the issues before him, the hearing officer determined that: (1) the compensable injury of the appellant/cross-respondent (claimant) did not extend to her neck, right arm, right hand, right wrist, and right side of the body; (2) claimant did not have disability from December 18, 1998, to the date of the CCH; (3) respondent/cross-appellant (carrier) did not waive the right to contest the compensability of the alleged injuries to the neck, right arm, right hand, right wrist, and right side of the body; and (4) claimant's average weekly wage (AWW) is $484.57. Claimant appeals the determinations regarding extent of injury, disability, and carrier waiver regarding the alleged neck injury. Carrier responds that the Appeals Panel should affirm those determinations. In a cross-appeal, carrier appealed the AWW determination, contending that the hearing officer should have used the fair, just and reasonable method to calculate the AWW. Claimant did not respond to carrier's appeal.

DECISION

We affirm.

Claimant first contends the hearing officer erred in determining that her compensable injury did not extend to her neck, right arm, right hand, right wrist, and right side of her body. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury and the extent of the injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). A claimant may meet the burden to establish an injury through his or her own testimony, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that she sustained a compensable injury on May 26, 1998, while working as a truck driver. She said she slipped and fell while holding onto the head rack of her truck, and that her shoulder came out of socket. Claimant said she felt pain in her neck, collarbone, armpit, and down to her elbow and wrist. She also said she experienced pinched nerves in her arm and fingers. Claimant said she had to "jam" her shoulder back

and indicated that it did not go back into place for four days. The record contains a March 1999 videotape that depicts claimant reaching out with her right arm, closing a car door with her right arm, and putting plastic sacks of groceries in the car with her right arm. The parties stipulated that claimant sustained a compensable right shoulder injury.

The hearing officer was the judge of the credibility of the witnesses and medical evidence. As the fact finder, he considered the issue of whether claimant's injury extended to these additional body parts. Claimant said she did mention these added injuries to her doctors; however, the medical reports created shortly after claimant's injury do not mention injuries to these body parts. In a June 19, 1998, medical report, Dr. W stated that claimant complained of neck pain. Later medical reports note cervical spasm and that claimant was eventually diagnosed with cervicobrachial syndrome. Dr. F said claimant's cervical MRI was essentially normal. The hearing officer was the sole judge of the medical evidence in this case. He determined the credibility of the medical evidence and determined what facts were established. We will not substitute our judgment for his because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Given our standard of review we will not overturn the hearing officer's decision. *Id*.

Claimant contends that her testimony that she reported these alleged additional injuries to her doctors is sufficient to support a finding in her favor on extent of injury. However, claimant's testimony merely raised a fact issue for the hearing officer to resolve. The hearing officer determined the issue regarding extent of injury in carrier's favor and we perceive no error.

Claimant contends the hearing officer erred in determining that she did not have disability from December 18, 1998, through the date of the CCH. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16).

Claimant said she first saw a doctor on May 30, 1998, and he took her off work. A certificate to return to work signed by Dr. S states that claimant may return to work on June 22, 1998. Claimant began treating with Dr. W in May 1998 and his records show that she was receiving manipulation and other treatments in 1999. In a January 13, 1999, letter, Dr. W stated that driving is aggravating claimant's injury and that she needs to stop driving until her therapy is complete and her injury has had time to heal. In an April 1999 prescription slip, Dr. C noted that claimant is still using a sling and in a January 21, 1999, letter, Dr. M noted that claimant still complained of pain and was not working. Dr. M stated that he injected claimant's shoulder with Lidocaine and cortisone. Neither Dr. M nor Dr. C specifically mentioned claimant's continuing off-work status. Dr. M noted that claimant had good strength and minimal pain, with some signs of impingement. He noted that her MRI was within normal limits and recommended general rehabilitation concentrating on muscle strengthening. The hearing officer noted that claimant did not adequately explain her activities on the March 1999 surveillance videotape.

The hearing officer stated that he was not persuaded by the medical evidence from Dr. W and the testimony from claimant regarding disability. After reviewing the evidence regarding disability in this case, we conclude that the hearing officer's disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain. Although there was evidence that claimant was still receiving treatment for her shoulder injury in 1999, the hearing officer decided what weight to give to this medical evidence and determined whether the evidence showed that claimant was unable to obtain or retain employment at her preinjury wage from December 1998, to the date of the CCH. We perceive no error.

Claimant contends the hearing officer erred in determining that carrier did not waive the right to contest the compensability of the claimed neck injury. Claimant asserts that carrier received sufficient written notice of the claimed neck injury in June 1998 and that it did not file its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) until February 23, 1999.

Section 409.021(c) provides in part that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) provides in part that if a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim, on or before the 60th day after the carrier received written notice of the injury or death. Rule 124.1(a) provides that written notice of injury as used in Section 409.021 consists of the insurance carrier's earliest receipt of: (1) the employer's first report of injury; (2) the notification provided by the Texas Workers' Compensation Commission (Commission) under subsection (c) (of Rule 124.1); or (3) if no first report of injury has previously been filed by the employer, any other notification regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability.

The hearing officer determined that carrier was first notified of claimed injuries to "body parts other than the right shoulder" on _____, and that carrier contested the compensability of these alleged injuries by filing a TWCC-21 on February 23, 1999. Claimant contends that carrier had earlier written notice of a claimed neck injury because, in a June 19, 1998, Initial Medical Report (TWCC-61), Dr. W noted that claimant had neck pain. However, in the TWCC-61, under "diagnosis," there was nothing listed regarding the neck and all the diagnoses pertained to the shoulder. Under "clinical assessment findings," Dr. W mentioned only the shoulder and not the neck. The TWCC-61 indicated that tests were done on the shoulder and no testing of the neck was mentioned. The neck was mentioned only under the "history" of the injury, where Dr. W wrote, "patient slipped and fell . . . . She felt sharp burning pains in her right shoulder and right side of neck." (Ms. B), the adjuster for this claim, testified that carrier received this TWCC-61 on June 19, 1998. After reviewing the TWCC-61, we conclude that the hearing officer did not err in determining that this TWCC-61 did not put carrier on notice of a neck injury. Ms. B testified that the first written notice carrier had of a claimed neck injury was on _____, when carrier received

claimant's medical records. Carrier filed a TWCC-21 the next day. We conclude that the hearing officer did not err in determining that carrier did not waive the right to contest the compensability of the claimed neck injury. We note that claimant did not contend on appeal that carrier received earlier notice of claimed additional injuries, other than the neck. Therefore, we will not address on appeal whether carrier waived the right to contest the compensability of the claimed injuries to the right arm, right hand, right wrist, and right side of claimant's body.

In its cross-appeal, carrier contends the hearing officer erred in determining that claimant's AWW is $484.57. Carrier asserts that there was no "same or similar" employee and that the hearing officer should have calculated claimant's AWW using the fair, just and reasonable method.

A full-time employee's AWW shall be determined by dividing the wages from the 13 weeks preceding the compensable injury by 13. Section 408.041(a); *see* Rule 128.3(d). If a full-time employee did not work for the employer for the 13 weeks preceding the compensable injury, the AWW is calculated using "the usual wage that the employer pays a similar employee for similar services." Section 408.041(b)(1); *see* Rule 128.3(f). If neither of the foregoing methods can "reasonably be applied because the employee's employment has been irregular" or because the employee lost time from work for certain enumerated reasons, the AWW is determined "by any method that the commission considers fair, just, and reasonable to all parties and consistent with the methods established under [the 1989 Act]." Section 408.041(c); *see* Rule 128.3(g). The determination of the amounts used to calculate an employee's AWW is factual matter for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 960259, decided March 25, 1996. A "similar employee" is "a person with training, experience, skills and wages that are comparable to the injured employee. . . ." "Similar services" are "tasks performed or services rendered that are comparable in nature to, and in the same class as, those performed by the injured employee, and that are comparable in the number of hours normally worked." The Commission, in Rule 128.1(c), has listed some categories of payments that will not be considered to be "remuneration." "[P]ayments made by an employer to reimburse the employee for the use of the employee's equipment . . . " are not considered remuneration. Rule 128.1(c)(1). The claimant has the burden to establish the amount of the AWW. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994.

Claimant testified that she has worked for her employer since 1996. She said she was a truck driver, but stated that she worked in the marketing department for employer from December 1997 to February 1998, making $250.00 per week. When questioned by carrier, claimant denied that she made only $64.00 while working in the marketing department for employer and stated that she disagreed with that amount. Claimant said she went back to being a truck driver in March. She testified that she and her husband drove together; that their pay was $.27 per mile; that layover pay was paid only to her husband; and that her share of the pay amounted to about $600.00 per week. Claimant testified that she and her husband could request reimbursement for expenses, such as inspection stickers, but that they did not ask for this reimbursement. She said they were

not paid for lodging because they slept in the truck. Claimant testified that employer would deduct amounts for oversized permit loads from their paychecks. She also said she and her husband were "owner/operators" and that they paid their own expenses. Claimant indicated that she was not sure whether employer "deducted" expenses from her paycheck. Claimant said she thought it did, but indicated that she was referring to deductions for social security and other withholding. Claimant testified that when employer paid wages for the last trip, during which she sustained her injury, it mistakenly paid all the wages to her husband and none to her. Claimant said she worked as a truck driver until May 26, 1998, when she sustained her compensable injury.

Claimant introduced a wage statement from employer on which employer indicated that a same or similar employee earned $6,299.39 during the 13-week period before claimant's injury. This amount divided by 13 equals $484.57. The wage statement indicated that that employee was a full-time employee.

Carrier introduced employer's payroll records, which listed no wages at all for claimant until the pay period beginning March 24, 1998. For the nine-week period between March 24, 1998, and May 25, 1998, the total of the "gross payroll" for claimant was approximately $,3200.00. This amount divided by nine equals $355.55. The payroll records indicate that an amount for "per diem" was deducted from the "gross payroll" amount to arrive at the "taxable pay." However, there was no testimony or evidence from employer to explain the payroll records. During argument, carrier asserted that the wage statement provided by employer could not be for a "same or similar employee" because it indicated that the alleged same or similar employee must have either worked more hours than claimant did or earned wages at a higher rate, perhaps because that employee did not split the pay with a spouse. However, there was no evidence to that effect. There was some evidence that employer's payroll records were not accurate and there was no testimony explaining the payroll records. Claimant's testimony regarding her wages, expenses, and deductions was not clear. Therefore, based on the evidence before him, including the claimant's testimony about her weekly earnings, the hearing officer could determine that the wage statement offered by employer was for a same or similar employee.

Carrier contends that the hearing officer improperly placed the burden on carrier to prove the amount of the AWW. The hearing officer stated in the decision and order that claimant made a *prima facie* showing that the AWW was $484.57. The hearing officer then said "the [c]arrier did not provide any evidence sufficient to overcome that showing." The hearing officer did not place the burden of proof on carrier. The hearing officer determined that claimant met her burden and that the other evidence in the record did not show that the AWW was not as shown by claimant. We perceive no error. We conclude that the hearing officer could find from the evidence that claimant's AWW is $484.57.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge