APPEAL NO. 001329

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 23, 2000. The hearing officer resolved the sole disputed issue, the appellant's (claimant) average weekly wage (AWW), by concluding that the claimant's AWW is $482.33. The claimant' request for review challenges this conclusion and two factual findings, contending that there were two similar employees whose wages could be compared with his and that the Employer's Wage Statement (TWCC-3) is underestimated. The claimant seeks his "fair 70% of wages of $506.45 - temp income benefits." The file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

The claimant attached to his request for review certain documents which were not offered into evidence at the CCH. The Appeals Panel is generally constrained to consider only the record of the hearing developed below with certain exceptions not applicable here. Section 410.203(a).

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant does not dispute findings that he earned $1,447.00 during the three weeks preceding his injury of _____, and that his employment was irregular and he worked only two of the three weeks preceding the date of injury of _____.

The claimant testified that he is a recording engineer who works the sound systems for various musical groups that go on tour; that the annual tour season begins in February and runs until December with fewer shows earlier in the season; that he was in another state and was hired by (employer) over the telephone around the first week in February 2000 (all dates are in 2000 unless otherwise stated); and that, pursuant to an oral agreement, he was guaranteed to work 200 concerts of country singer Mr. W at the rate of $200.00 gross per show worked. He further stated that he worked from February 9 to February 15 and earned a net of $684.00; that he had no earnings during the second week; and that he earned a net of $763.00 the third week before sustaining his injury. The claimant also said that when he was on the road he was also given cash per diem payments to cover various expenses, such as food and showers at truck stops. He said that the employer did not provide him with a Form 1099 reflecting these cash payments and indicated that he did not have to account to the employer for how he spent these payments. He described these cash per diem payments as "basically icing on the top." The claimant did not testify to the actual number of days for which he was paid the per diem.

The evidence indicated that the claimant strained his back on _____, lifting a cyber light case and that he did not work for some period of time before resuming work for another employer. The claimant indicated that the employer did not provide him with health insurance or other benefits.

Section 408.041(a) provides, in part, that the AWW of an employee who has worked for the employer for at least 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 injury by 13. Section 408.041(b) provides, in part, that the AWW of an employee who has worked for the employer for less than 13 weeks immediately preceding the injury equals the usual wage the employer pays a similar employee for similar services or, if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services. Section 408.041(c) provides, in part, that if Section 408.041(a) and (b) cannot be reasonably applied because the employee's employment has been irregular, the Texas Workers' Compensation Commission (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." *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3 (Rule 128.3)).

Obviously, the claimant had not worked for the employer for the 13-week period preceding the injury. Although the number of hours that the claimant worked in the weeks when he was on tour was not developed, the claimant did not contend he was either a part-time or a seasonal employee. The claimant took the position at the hearing that there was no similar employee and he adduced no evidence of such. He also contended that the fair, just, and reasonable method of determining his AWW would be to divide the two sums he was paid in February by two because he only worked shows during those two weeks. The carrier maintained that the two sums should be divided by three since the claimant was employed during those three weeks, albeit that no shows were scheduled during the second week. As previously noted, the claimant's appeal now contends that indeed there were two similar employees and he provides their names.

Challenged by the claimant are findings that there is no same or similar employee to compare the claimant's wage and service with and that a fair, just, and reasonable AWW is $482.33. Although the claimant identifies two employees in his appeal whom he contends are similar employees, he did not present this information as evidence at the hearing.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We are satisfied that the finding that there

is no same or similar employee to compare the claimant's wages and service with is sufficiently supported by the evidence.

As for the finding that a fair, just, and reasonable AWW is $482.33, we do not find this determination to be against the great weight of the evidence based on the hearing officer's method of determining that figure; that is, by adding the two net amounts the claimant was paid for the two weeks he worked shows on tour and then dividing that sum by the three weeks of his employment, rather than by the two weeks he was on tour which the claimant asserts to be the more fair method. Although the evidence established that the claimant was not on tour during the second week of February, the claimant did not contend that he was then unemployed.

The hearing officer made no factual findings concerning the $25.00 per diem payments the claimant said he received. However, in her statement of the evidence, the hearing officer states that the claimant testified that the per diem was paid in cash and that he did not have supporting documentation to corroborate his claim for the per diem. The hearing officer further stated that it is the substance of the payments and not the label "per diem" that governs whether such payments should be included in the AWW and whether the cash payments to which the claimant testified were to defray travel expenses, such as food, rather than to provide the claimant with a financial or economic gain. The TWCC-3 shows only the $684.00 and $763.00 amounts. A document introduced by the carrier and identified as a "_____" record bears the claimant's name, as well as the amounts of $684.00 and $763.00, and reflects a handwritten entry stating "pre-dium [sic] $210.00 a week." The claimant's testimony was not clear concerning whether per diem was paid for days he was not on tour for the entire day.

The definition of "wages" in Section 401.011(43) includes all forms of remuneration payable for a given period to any employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration. Rule 128.1(b) provides, in part, that an employee's wage includes the market value of any other advantage provided by an employer as remuneration for the employee's services that the employer does not continue to provide, including but not limited to meals, lodging, clothing, laundry, and fuel and Rule 128.1(c)(1) provides, in part, that an employee's wage for purposes of calculating the AWW shall not include payments made by an employer to reimburse the employee for the use of the employee's equipment or for paying helpers. The Appeals Panel has had occasion to discuss the issue of whether payments made to an employee are in the nature of remuneration for personal services rendered to the employer or reimbursement for expenses incurred. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 950514, decided May 17, 1995; and Texas Workers' Compensation Commission Appeal No. 991713, decided September 23, 1999.

Again, we are satisfied that the finding that the claimant's AWW is $482.33 is not against the great weight of the evidence. The hearing officer's statement of the evidence details the problems with the claimant's evidence concerning the amount he felt should be the AWW. The hearing officer, considering the evidence, determined that the claimant failed to meet his burden of proof not only in establishing the actual amount of per diem payments but also in establishing that such payments represented remuneration of the personal services he rendered and not reimbursement for certain of his expenses.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert E. Lang
Appeals Panel
Section Manager