APPEAL NO. 001334

A contested case hearing (CCH) was originally held on February 10, 2000, under the provisions of the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 000602, decided May 10, 2000, the Appeals Panel reversed the decision of the hearing officer that the respondent's (claimant) average weekly wage (AWW) is $493.85 and remanded for her to make findings of fact and conclusions of law, to render a decision, and enter an order based on the evidence in the record. The hearing officer held another CCH on May 31, 2000, and rendered another decision on June 6, 2000, in which she again determined that the claimant's AWW is $493.85. The appellant (carrier) appealed, contended that the hearing officer erred in concluding that the application of Section 409.005 is dependent upon a party raising an objection at the time an Employer's First Report of Injury or Illness (TWCC-1) is offered as an exhibit, stated that the issue of who the employer is was not before the hearing officer, argued that the hearing officer erred in determining that two different employers were one and the same, urged that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. The claimant responded, stated that the hearing officer did not use the TWCC-1 in rendering her decision, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

In Appeal No. 000602, *supra*, we set forth the provisions of Section 409.005(f). The language that the TWCC-1 may not be considered to be an admission or evidence against an employer or a carrier when the facts set out in the report are contradicted by the employer or the carrier is a clear prohibition. We do not agree with the statement of the hearing officer that a carrier is required to lodge an objection urging limitation on the use of the TWCC-1 at the time that it is offered into evidence. However, in her Decision and Order on Remand, the hearing officer did state that even without any consideration being given to the TWCC-1, the findings of fact and conclusions of law remain the same. Since she did not consider the TWCC-1 in rendering her Decision and Order on Remand, her incorrect statement did not result in reversible error.

It is not clear why the hearing officer held another CCH. The reversal and remand was for improper consideration of evidence, not for further development of the evidence. No additional testimony was received. The carrier offered and had admitted into evidence one exhibit. Since only the carrier offered additional evidence, it was not harmed by the hearing officer permitting additional evidence to be admitted.

The Decision and Order on Remand and Appeal No. 000602, *supra*, contain summaries of the evidence. The claimant contended that his AWW should be determined based on all of the work that he did under the supervision of persons who worked out of one address. The carrier contended that the claimant worked for two employers whose addresses are the same and that only the wages paid to the claimant during the 13 weeks immediately preceding the injury by the employer for whom the claimant was working at the time he was injured should be considered in determining the claimant's AWW. Under the circumstances of the case before her, the hearing officer was required to make findings of fact concerning who was the claimant's employer to determine the claimant's AWW.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). That different factual determinations could have been made based on the same evidence is not a sufficient basis to overturn the factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge