APPEAL NO. 001340

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 April 17, 2000 and May 9, 2000. The hearing officer determined that the appellant (claimant) had disability from the February 11, 1999, compensable injury from February 12, 1999, to July 19, 1999, and from July 23, 1999, continuing through the date of the CCH; that the employer did not tender a bona fide offer of employment to the claimant; and that the claimant's average weekly wage (AWW) was $147.00.

The claimant appealed only the issue of AWW, contending that the hearing officer erred when he did not use a fair, just, and reasonable method to determine the claimant's AWW. The claimant requested the Appeals Panel to reverse the hearing officer's decision and render a decision that the claimant's AWW was $280.00. The respondent (carrier) replied that the hearing officer properly used a same or similar employee's wages to compute the claimant's AWW, and that the evidence was sufficient to support the hearing officer's decision; and urged the Appeals Panel to affirm the decision and order. The determinations that the claimant had disability from February 12, 1999, to July 19, 1999, and from July 23, 1999, continuing through the date of the CCH and that the employer did not tender a bona fide offer of employment were not appealed and have become final by operation of law. Section 410.169.

DECISION

Reversed and remanded.

The claimant testified he began working for the employer as an aircraft serviceman on January 7, 1999; that he was hired as a full-time employee to work 40 hours per week at $7.00 per hour; and that on _____, he sustained an injury to his head, mouth, and lower back. The claimant acknowledged that he did not work 13 consecutive weeks for the employer prior to his date of injury, but contended that a fair, just, and reasonable method should be used to calculate his AWW rather than using the wages of a same or similar employee because he lost time from work due to the unavailability of another employee to train him during the weeks preceding his date of injury and, therefore, his hours of work were restricted by factors outside his control.

The carrier offered an Employer's Wage Statement (TWCC-3) for Mr. V as a similar employee who worked concurrently with the claimant; however, the document contained three calculation pages (last page)--two dated February 17, 2000, and the other dated April 23, 1999. The form contained total gross wages of $1,911.49 and $4.00 per week for clothing/uniforms for a total of $52.00 in fringe benefits. The total wages on the TWCC-3 for the similar employee were $1,963.49.

The original TWCC-3 page dated February 17, 2000, did not have the calculation of benefits portion of the document filled in on the last page except for the block indicating $151.04 as the AWW. It is clear this figure was derived by dividing a total wage of $1,963.49 by 13.

The other calculation page dated April 23, 1999, contains gross wages of $820.47 and total hours worked as 117.21. The AWW represented on this page is $136.75 and was derived by dividing $820.47 by 6. Neither party asserted these figures should be used to calculate the claimant's AWW.

The amended February 17, 2000, TWCC-3 (as of March 1, 1999) with the calculation page filled in was represented by the carrier as the correct one to use in calculating the similar employee's total wages. The same total gross wages of $1,911.49 are included but the employer deleted the fringe benefit total of $52.00 for the uniforms even though the fringe benefit page still contained the $4.00 weekly payment for uniforms. When the $1,911.49 is divided by 13, the AWW is $147.04. There was no explanation offered by the carrier as to why this $52.00 was initially included in the February 17, 2000, TWCC-3 and subsequently deleted by the employer when it amended the document on March 1, 2000. The claimant argued that the amended document was prepared simply to reduce the claimant's wages.

The claimant argued that Mr. V was selected by the employer to represent an employee who worked less than 40 hours per week. At the hearing, Mr. M, who completed the TWCC-3, represented that Mr. V performed the same type of duties that were performed by the claimant. Neither Mr. V's job title nor his duties were discussed or described by either party. Mr. M testified that he did not know why Mr. V did not work 40 hours each week and assumed that it could be because of a variety of reasons.

Mr. M testified that the claimant was not necessarily hired as a full-time or part-time employee, but whether the claimant worked 40 hours per week or less than 40 hours per week depended solely on the airline schedules. Mr. M explained that the claimant, as well as other employees, were hired with the understanding that their schedules were dependant on the availability of work when the flight manager reviewed the number of incoming flights that day or week. The work schedules were created and assigned per the airline schedule. Mr. M testified that he could not guarantee the claimant 40 hours per week or even 20 hours per week but if work was available and the claimant requested more hours, he would have been accommodated. Mr. M testified that he had no knowledge of the claimant asking for more hours than to which he was assigned.

The hearing officer found the claimant was a part-time employee. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(a) (Rule 128.3(a)) defines a full-time employee as one who regularly works at least 30 hours per week and that schedule is comparable to other employees of that company and/or other employees in the same business or vicinity who are considered full-time. For purposes of AWW, Section 408.042(c) defines a "part-time employee" as an employee who, at the time of the injury, was working less than the full-time hours or full-time workweek of similar employees in the same employment, whether for the same or a different employer. Mr. M testified that all of the employees were subjected to the same "as needed" scheduling and that at the time of the claimant's injury the company had about 40 plus employees; whereas, at the time of the CCH, the company had over 100 employees with only about 30 plus employees able to achieve 40 hours every week. The hearing officer found that Mr. V's average hours per

week were approximately 21.00 hours per week and this was "comparable" to the hours worked by the claimant under the provisions of Rule 128.3.

Whether the claimant was a part-time or full-time employee was a question of fact for the hearing officer to resolve. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts 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 trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and 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 could 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).

Once a determination was made that the claimant was a part-time employee, the hearing officer was required to calculate the claimant's AWW under the provisions of Section 408.042 and Rule 128.4. Section 408.042(a) provides that the AWW of a part-time employee who limits the employee's work to less than full-time hours or a full-time workweek as a regular course of that employee's conduct is computed as provided in Section 408.041. Section 408.042(b) provides that for part-time employees who are not covered by subsection (a), the AWW for determining temporary income benefits is computed as provided by Section 408.041; and for determining impairment income benefits (IIBs), supplemental income benefits (SIBs), lifetime income benefits (LIBs), and death benefits, if the employee has worked for the employer for less than 13 weeks immediately preceding the date of the injury, the AWW is equal to: (i) the weekly wage that the employer pays a similar employee for similar services in full-time employment; or (ii) if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for compensation in full-time employment. Rule 128.4(e) further explains how the AWW for purposes of IIBs, SIBs, LIBs, and death benefits for an employee covered by Section 408.042(b)(2) is to be calculated.

Section 408.041(a) provides, in pertinent part, that except as otherwise provided by this subtitle, 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 wages paid in the 13 consecutive weeks immediately preceding the injury by 13. Section 408.041(b) provides, in pertinent part, that the AWW of an employee who has worked for the employer for less than the 13 weeks immediately preceding the injury equals the usual wage that the employer pays a similar employee for similar services. Section 408.041(c) provides, in pertinent part, that if (a) or (b) cannot reasonably be applied because the employee's employment has been irregular or because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, 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.

The hearing officer determined that the customary method for calculating AWW could not be used because the claimant did not work for the employer for 13 consecutive weeks prior to his date of injury and turned to the method in Section 408.041(b)(1) to determine whether the claimant's AWW could be calculated under the "same or similar employee" method. Section 408.046 provides that for purposes of AWW, the determination as to whether employees, services, or employment are the same or similar must include consideration of :

1. the training and experience of the employees;

2. the nature of the work; and

3. the number of hours normally worked.

We have previously held that the question of whether an employee was a same or similar employee for purposes of the 1989 Act was a question for the trier of fact to resolve. Texas Worker's Compensation Commission Appeal No. 92238, decided July 22, 1992. Our review of the record demonstrates that the hearing officer cut off questioning regarding the claimant's training and concurrent employment, ruling they were irrelevant to the issue of AWW. Further, no evidence was taken to establish what, if any, training the employer or other entity had given Mr. V to perform his duties. The only question as to the nature of the work performed by Mr. V was addressed by Mr. M when he answered in the affirmative as to whether Mr. V performed the same type of duties as the claimant. Mr. V's duties were never described. The third requirement as to number of hours worked was found to be similar between the claimant and Mr. V; however, Mr. M could not answer why Mr. V worked the hours listed on the TWCC-3.

It is only where a hearing officer determines that the "same or similar employee" method cannot be reasonably applied, for reasons such as losing time due to weather, that a resort to a "fair, just and reasonable" method is appropriate. Evidently, the hearing officer believed (and there is some evidence to support) that the similar employee's wage statement could be reasonably applied in this case to compute the claimant's AWW. While we are not prepared to say that the hearing officer could not have used, if he so chose to do so, the "fair, just and reasonable" method set forth in Section 408.041(c), we do not believe that he was compelled to do so. Our review of the record does not demonstrate that the hearing officer's determination that Mr. V was a same or similar employee within the meaning of the 1989 Act was so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for reversing that determination on appeal and we affirm the hearing officer's decision to use a same or similar employee method to calculate the claimant's AWW. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). However, this holding does not resolve the question of whether the hearing officer correctly determined that the claimant's AWW in this case was $147.00.

For purposes of IIBs, SIBs, LIBs, and death benefits, Rule 128.4(b) notes that part-time employees are considered in two different categories in calculating AWW: those that worked part-time as a regular course of conduct and those who did not. The rule further states:

> A "regular course of conduct" for part-time work shall be determined by reviewing the work history of the employee for the 12-month period preceding the injury. If the employee only worked part-time during that period, the employee is presumed to have worked part-time as a regular course of conduct unless such presumption is rebutted by credible evidence.

We note that Rule 128.4(b) specifically directs that all employment, not just the employment held with the employer where the injury occurs, is reviewed to determine the employee's regular course of conduct. The hearing officer did not make findings regarding the claimant's regular course of conduct. Some evidence was taken that the claimant worked at a coffee house, provided pet-sitting services, and cleaned houses while working for the employer although no documentary proof was offered to corroborate the claimant's testimony.

Rule 128.1(b) provides that an employee's wage, for the purpose of calculating AWW, shall include every form of remuneration paid for the period of computation of AWW to the employee for personal services. An employee's wage includes, but is not limited to the market value of meals, lodging, clothing, laundry and fuel. The TWCC-3 submitted by both the claimant and the carrier clearly includes a $4.00 weekly uniform payment on all three versions of the document, yet there was no testimony addressing why the employer deleted this remuneration from the March 1, 2000, version of the February 17, 2000, document. The carrier merely asserted the latest version was correct ($147.04 versus $151.04) and the claimant did not address it at all. We reverse the hearing officer's finding that the claimant's AWW is $147.00 and remand the case for further consideration in a manner consistent with Section 408.042 and Rule 128.4.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See*

Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Kathleen C. Decker
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge