APPEAL NO. 012345
FILED NOVEMBER 6, 2001

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 7, 2001, (hearing officer 1) presiding as hearing officer. With regard to the issues before her, the hearing officer 1 determined that the respondent/cross-appellant (claimant) did not have disability from November 7, 2000, through the date of the CCH, and that the claimant's average weekly wage (AWW) was $564.51.

In Texas Workers' Compensation Commission Appeal No. 011188, decided July 12, 2001, the Appeals Panel remanded the case for the very specific purpose of obtaining a copy of Claimant's Exhibit No. 4 (which contained statements which might be relevant regarding the disability issue). In the temporary absence of hearing officer 1, (hearing officer 2) was assigned, without objection, to review the case. Hearing officer 2 obtained the required exhibit and made it part of hearing officer 1's decision on September 11, 2001. The parties, in large part, resubmitted their requests for review and the appellant/cross-respondent (carrier) resubmitted its response to the claimant's appeal.

The carrier appealed the AWW issue, asserting that the AWW should be either $308.00 or $366.00, based on the claimant's hourly wage for a 40-hour work week. The claimant appeals the disability issue, contending that his doctor had him off work, that he "never actually worked" at a cleaning establishment, and that the hearing officer at a prior CCH "was supposed to be there." The carrier responded to the claimant's appeal. There is no response to the carrier's appeal.

DECISION

Affirmed.

The claimant was employed as a cashier/delivery person for a meat retailer (employer). The claimant was involved in a compensable motor vehicle accident on _____. The carrier accepted liability for a left arm and elbow injury, and another hearing officer in a prior CCH found that the compensable injury extended to the low back and that the claimant had disability from March 7, 2000, to October 23, 2000. That decision was affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 002702, decided January 4, 2001, and according to the carrier has been appealed to district court. At issue in this case is disability on and after November 7, 2000, and the claimant's AWW.

The claimant relies primarily on the reports of his treating doctor, Dr. H, a chiropractor, who, in several reports (after November 7, 2000), states that the claimant "was taken off work to prevent further injury as well as give the injured areas time to heal," and the claimant's own testimony of continued back pain. The carrier relies on a surveillance report and surveillance videotape of the claimant's activities between October

27 and November 9, 2000, showing the claimant picking up bags of clothes and making deliveries to certain cleaning establishments. The claimant contends that he never "worked" for the cleaning establishment and was just doing a favor for a friend who worked for the cleaners. The claimant subsequently returned to work for a pizza restaurant on March 26, 2001. There was a dispute regarding how much the claimant was earning at the pizza restaurant. Hearing officer 1 commented:

> In evidence was video tape taken November 7, 2000. In the video Claimant was seen picking up laundry for a cleaners. From watching the video, there was sufficient evidence that Claimant was able to work. Claimant's testimony regarding the amount of time spent and that he was not actually working were not credible. Clearly Claimant had a key to the van used for both cleaners and was taking and carrying out items from both stores. Claimant did state during his testimony that he had spent enough time in the cleaners to learn the route and business. Though he stated that he learned because he thought he may do this one day, again his testimony was not credible. Neither was the testimony regarding his earnings at [the pizza restaurant]. Claimant was vague and argumentative regarding how much he earned in tips. It was also of note that Claimant's lack of hours were not due to the work injury but the hours available by the store. In spite of some medical indicating an inability to work, the Claimant did not establish that he was unable to obtain and retain employment from November 7, 2000 to the present.

The point is not whether the claimant was actually employed by the cleaners, rather it is whether the claimant's compensable injury prevented the claimant from obtaining and retaining employment at his preinjury wage. *See* Section 401.011(16). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and her determination on this issue is not 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).

Regarding the AWW, the employer gave the claimant an Employer's Wage Statement (TWCC-3) showing the claimant's wages for four weeks, from November 7 through December 4, 1999 (the claimant had not been employed for 13 consecutive weeks prior to his injury and had returned to the employer on November 8, 1999). The carrier seeks to establish an AWW by multiplying the claimant's $7.70 per hour wage times 40 or 41.5 hours a week. The claimant testified, and the TWCC-3 in evidence supported, that the claimant had been working substantial overtime at the time of his injury. The employer had failed to provide a TWCC-3 for a similar employee performing similar services. Section 408.041 provides how the AWW is to be calculated. In that the claimant had not been employed for the 13 consecutive weeks prior to his injury and there was no evidence of a similar employee, the hearing officer used the method provided for in Section 408.041(c) of a fair, just, and reasonable method by adding the actual wages received by

the claimant in the four weeks he worked and dividing by four to arrive at an AWW of $564.51. Hearing officer 1 did not err in using this method to calculate the AWW.

Finally, we briefly address the claimant's complaint that hearing officer 1 who heard this case was biased and/or was improperly assigned because another hearing officer had heard his prior case. As should be clear, there is no guarantee that a hearing officer who has heard a case will continue to handle all cases involving that claimant. Cases are assigned based on scheduling needs, availability of hearing officers, illness, and other considerations. There is absolutely no evidence that hearing officer 1 who heard this case was anything other than completely fair and objective in her decision, the claimant's contentions to the contrary notwithstanding.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRINITY UNIVERSAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

DONALD GENE SOUTHWELL
10000 N. CENTRAL EXPRESSWAY
DALLAS, TEXAS 75265.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge