APPEAL NO. 030306
FILED MARCH 19, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 16, 2003. The hearing officer determined that the compensable injury sustained by the appellant (claimant) on _____, does not include mild annular bulging at L3-4 and L4-5; that the claimant had disability resulting from the compensable lumbar sprain from September 19 through December 3, 2002; that the respondent (carrier) did not tender a bona fide offer of employment (BFOE) to the claimant; and that the claimant's average weekly wage (AWW) is $2.05. The claimant appeals this decision. The carrier urges affirmance.

DECISION

Affirmed.

We note that the claimant has appealed the hearing officer's finding that the carrier failed to establish that it tendered a BFOE to the claimant. However, as that finding is favorable to the claimant, we decline to address the claimant's opposition to it on appeal.

Whether the compensable injury includes the alleged lumbar conditions and whether the claimant had disability were factual questions for the hearing officer to resolve. Conflicting evidence was presented at the hearing on these disputed issues. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. With regard to the claimant's assertion on appeal that his testimony, coupled with the medical records in evidence, established a causal link between the injury and the lumbar bulges, we note that the hearing officer obviously was not persuaded by the evidence that the causal link had been established. Nothing in our review of the record indicates that the hearing officer's extent-of-injury and disability determinations 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).

The claimant argues on appeal that his AWW should be $220.00. Presumably, this amount reflects the wages he would have earned in one week had he worked 40 hours per week. The evidence reflects that, although it was anticipated that the claimant would work 40 hours per week, as evidenced by the Employer's First Report of Injury (TWCC-1), the claimant had worked sporadically throughout his tenure with the employer, a temporary agency, and had not worked 40 hours per week in any of the 13 weeks preceding the injury. Section 408.041(a) provides that a full-time employee's AWW shall be determined by dividing the wages from the 13 weeks preceding the compensable injury by 13. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §

128.3(d) (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); Rule 128.3(f). If neither of the foregoing methods can "reasonably be applied," the AWW is determined "by any method that the [Texas Workers' Compensation Commission] considers fair, just, and reasonable to all parties and consistent with the methods established under [the 1989 Act]." Section 408.041(c); Rule 128.3(g). The hearing officer, applying Section 408.041(c), determined that the claimant's AWW is $2.05, which reflects the wages actually earned by the claimant in the 13 weeks preceding the injury, divided by 13. Under these facts, we perceive no error in the hearing officer's AWW determination

The hearing officer's decision and order is affirmed.

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

GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

I concur in the result and write separately to point out that the "just" and "fair" method is not applicable to this case. Although the claimant was employed by a temporary agency for the 13 weeks prior to the injury, he did not work every week of those 13 because he did not call the employer or otherwise make himself available for an assignment. The Appeals Panel has previously determined that the "just and fair" method is not applicable where the irregularity of the claimant's employment in the 13-week period was a result of his not having made himself available for assignments. *See*

Texas Workers' Compensation Commission Appeal No. 001778, decided September 14, 2000.

_____
Roy L. Warren
Appeals Judge