

APPEAL NO. 030538  
FILED APRIL 9, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 022628-s, decided November 15, 2002. We had held that under the facts of this case, the hearing officer had erred in using Section 408.041(a) to compute the appellant's (claimant herein) average weekly wage (AWW) and had remanded for the hearing officer to compute the claimant's AWW using Section 408.041(b) or Section 408.041(c), if a wage statement was not produced for a same or similar employee. The hearing officer held a hearing on remand on January 9, 2003. The hearing officer determined that the claimant's AWW was \$581.17. The claimant appeals, contending that the hearing officer erred in computing the claimant's AWW and asks that we render that the claimant's AWW is \$650.00. The respondent (carrier herein) files a response to the claimant's request for review in which it appears to want us to reconsider and overrule our decision in Appeal No. 022628-s and render a decision computing the claimant's AWW using Section 408.041(a). We note that the carrier's pleading is untimely to act as a request for review, so at most we may treat it as response to the claimant's request for review.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The rather unique facts of this case are set out in our decision in Appeal No. 022628-s, *supra*, and we incorporate our discussion of the facts of the case from that decision by reference. Essentially, we held in that decision that the hearing officer erred in using Section 408.041(a) in computing the claimant's AWW when the claimant's AWW was not fixed during the 13 weeks preceding her injury. We directed the hearing officer on remand to use Section 408.041(b) to compute the claimant's AWW or to use Section 408.041(c) if a wage statement of a same or similar employee was not produced. At the hearing on remand, the claimant did not produce a wage statement of a same or similar employer, but testified to the wages of other employees working for the employee who held the same type of position (store manager) as the claimant at the time she was injured. The hearing officer stated in her decision that she did not find this testimony credible. The hearing officer then computed the claimant's AWW using Section 408.041(c), which provides for computing the AWW using a "just, fair and reasonable method." In applying Section 408.041(c), the hearing officer accepted the claimant's testimony of what she had been paid during the 13 weeks prior to her injury, an amount that differed greatly from the amount set out in the employer's wage statement. The hearing officer took the amount the claimant testified she was paid during the 13 weeks prior to her injury and divided this amount by 13 to compute an AWW of \$581.17.

The claimant argues that this method constituted error for two reasons. First, the claimant argues that the hearing officer should have accepted the claimant's testimony as to what other store managers for the company were paid and used this information to compute an AWW using the "same or similar employee" method provided by Section 408.041(b). Second, the claimant argues that the method used by the hearing officer was not a proper application of Section 408.041(c), and that to reach a "fair, just, and reasonable" wage, the hearing officer should have simply used the weekly wage the claimant was paid at the time of her injury.

As far as use of Section 408.041(b), we note that the claimant did not provide a wage statement from a same or similar employee. While the hearing officer could have accepted the claimant's testimony as to the wages of other managers, the hearing officer was not required to believe this testimony. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of 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, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. 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 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). Applying this standard, we cannot say that the hearing officer erred in rejecting the claimant's testimony concerning the wages of other store managers as a matter of law.

Nor can we say that the hearing officer failed to properly apply Section 408.041(c) as matter of law. We review whether a hearing officer correctly applied Section 408.041(c) using an abuse-of-discretion standard. Determining a "fair, just, and reasonable" wage obviously involves wide latitude and there is no set method to make such a determination. We have approved a hearing officer using the claimant's actual wages earned as one method of making this calculation. See Texas Workers' Compensation Commission Appeal No. 021501, decided July 25, 2002. We cannot say that the hearing officer abused her discretion as matter of law in the way she applied Section 409.041(c).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Terri Kay Oliver  
Appeals Judge