APPEAL NO. 032481
FILED NOVEMBER 7, 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 August 5, 2003. With respect to the issues before him, the hearing officer determined that the respondent (claimant) had disability from August 5 to October 15, 2002, as a result of her July 29, 2002, compensable injury, and that her average weekly wage (AWW) is $541.98. In its appeal, the appellant (carrier) argues that the hearing officer erred in making each of those determinations and in denying its Motion for a Continuance. The appeal file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant had disability, as a result of her compensable injury, from August 5 to October 15, 2002. That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer's disability determination is supported by medical evidence from Dr. Veggeberg (Dr. V), the claimant's treating doctor, and the claimant's testimony. Nothing in our review of the record reveals that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer likewise did not err in determining that the claimant's AWW is $541.98. The evidence reflects that the claimant had multiple employment at the time of her compensable injury; thus, her AWW is calculated in accordance with Section 408.042(c) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(h) (Rule 128.1(h)). The claimant presented evidence that she was paid $4,445.75 by the nonclaim employer in the 13-week period preceding her compensable injury. Thus, the hearing officer determined that the claimant's AWW for the nonclaim employer is $341.98 ($4,445.75/13). Section 408.042 and Rule 128.1(h) specifically provide for determining the AWW in such a manner for an employee who worked for the nonclaim employer in the 13-week period immediately preceding the injury. Accordingly, we find no merit in the carrier's assertion that the hearing officer erred in determining the AWW for the claimant's employment with the nonclaim employer in accordance with those provisions. The claimant did not work for the claim employer for 13-weeks prior to the date of injury and the hearing officer determined that the claimant's AWW with the claim employer is $200.00 based upon the claimant's testimony. The carrier argues that the hearing

officer could not base his determination on the claimant's testimony as to her earnings, arguing instead that she was required to produce written documentation. We cannot agree that written documentation of the claimant's earnings was required, particularly because the claim employer did not provide a wage statement. The hearing officer's determination that the claimant's AWW for the claim employer is $200.00 is not so against the great weight of the evidence as to compel its reversal. Because we have affirmed the hearing officer's calculation of each component of the multiple employer AWW, we likewise affirm the determination that the claimant's AWW is $541.98, the sum of her AWWs from the claim employer and the nonclaim employer.

Finally, we cannot agree that the hearing officer erred in denying the carrier's Motion for a Continuance to obtain additional information pertaining to the claimant's AWW. We review the hearing officer's denial of that motion under an abuse-of-discretion standard. Initially, we note, as did the hearing officer, that the carrier did not file its motion until the morning of the hearing and that it made no effort to subpoena the requested information prior to the hearing. The hearing officer properly considered those factors in denying the continuance. In addition, we find no merit in the carrier's assertion that the additional information it sought about when the claimant earned her commissions, as opposed to when they were paid, was critical to the resolution of the AWW issue. The claimant was paid entirely on a commission basis in her nonclaim employment. However, under the plain language of Section 408.042 and Rule 128.1, the critical information for determining the claimant's AWW is what she was paid by the nonclaim employer in the 13-week period immediately preceding the injury. That information was available to the hearing officer and, as such, we perceive no error in the hearing officer's denial of the Motion for a Continuance to obtain information that was not critical to the resolution of the issue before him.

The hearing officer's decision and order are affirmed.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

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Elaine M. Chaney
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Margaret L. Turner
Appeals Judge