

APPEAL NO. 040467
FILED APRIL 22, 2004

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 February 4, 2004. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) compensable injury of _____, includes a lumbar sprain/strain and that the claimant's average weekly wage (AWW) is \$527.27. In its appeal, the appellant (carrier) asserts error in each of those determinations. 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's compensable injury of _____, includes a lumbar sprain/strain. 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). There was conflicting evidence on the disputed issue and the hearing officer was acting within his province as the fact finder in determining that the claimant sustained her burden of proving that she sustained a lumbar sprain/strain in the incident at work on _____. 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). We find no merit in the carrier's assertion that the claimant was "estopped" from alleging that her injury extends to additional body parts in this instance because at a prior hearing, a different hearing officer determined that the claimant sustained a compensable injury to her right leg and hip on _____. At that hearing the only issue before the hearing officer was whether the claimant sustained a compensable injury. The hearing officer resolved that issue in favor of the claimant and identified the nature of the injury as a right leg and hip injury. However, the hearing officer did not, and could not, determine the extent of the compensable injury because that issue was not before him.

Next, we consider the assertion that the hearing officer erred in determining that the claimant's AWW is \$527.27. 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).

In this instance, there was conflicting evidence on the issue of whether the claimant was a salaried employee or was paid hourly and whether the Employer's Wage Statement (TWCC-3) accurately reflected the wages paid to the claimant in the 13 weeks prior to the compensable injury. The hearing officer resolved that conflict by determining that the claimant was a salaried employee and that the TWCC-3 did not accurately reflect the claimant's earnings. He determined that the claimant earned \$533.60 for 8 of the 13 weeks prior to her injury and that she earned \$510.40 for 3 other weeks in accordance with the claimant's testimony and the evidence from the statement from the director of the department where the claimant worked. Finally, the hearing officer determined that the claimant missed work for 2 weeks in the 13-week period for reasons beyond her control because she took unpaid leave to care for a relative out-of-state who underwent surgery for cancer. The carrier argues that the claimant did not lose time from work for reasons beyond her control within the meaning of Section 408.041(c) because she elected to take the time off without pay instead of using any accrued vacation or sick time that was available to her. The carrier does not cite any authority for the proposition that the claimant was required to exhaust any accrued leave before the 2 weeks where she did not earn any wages because she was caring for a sick relative could be excluded from the AWW calculation and we are unaware of any such requirement. Accordingly, we cannot agree that the hearing officer erred in turning to the fair, just, and reasonable method found in Rule 128.3(g), or in determining that the claimant's AWW is \$527.27. The Appeals Panel has previously noted, that when the hearing officer determines that the usual AWW calculation methods cannot be applied in a given case, the hearing officer has discretion to apply any fair, just and reasonable method in arriving at AWW and we review the method used under an abuse of discretion standard. See Texas Workers' Compensation Commission Appeal No. 941292, decided November 9, 1994, and cases cited therein. Our review indicates that the hearing officer's method of calculating AWW was fair, just and reasonable and was consistent with the methods established in Section 408.041 to calculate AWW. Therefore, he did not abuse his discretion in so calculating AWW and we affirm the determination that the claimant's AWW is \$527.27.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** 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.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge