APPEAL NO. 042996
FILED JANUARY 18, 2005

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 October 27, 2004. The hearing officer determined that the appellant/cross-respondent's (claimant) compensable (left ankle) injury of _____, includes left plantar fasciitis, that the claimant had disability from February 8 through February 21, 2004, from March 21 through April 3, 2004, and from September 18, 2004, to the date of the CCH, and that the claimant's average weekly wage (AWW) is $127.99.

The claimant appeals the AWW issue, contending that the wage of a "same or similar employee . . . did not meet the requirements under [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(f)(1)(2)] ([R]ule 128.3(f)(1)(2))." The claimant contends that the employee selected by the respondent/cross-appellant (carrier) as a same or similar employee was not in fact a same or similar employee and requests that a "fair, just and reasonable" calculation be used. The claimant also alleges that she had additional periods of disability. The carrier appeals, contending that the hearing officer erred in refusing to admit two exhibits into evidence, that the hearing officer erred on finding plantar fasciitis was part of the compensable injury and that the claimant had disability. The carrier responded to the claimant's appeal, urging affirmance on the AWW issue and the claimant responded to the carrier's appeal, urging affirmance of the issues appealed by the carrier.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant worked for the employer as a part time on call certified nurse's aide and that she had been employed by the employer less than 13 weeks on _____, when she fell and sustained a left ankle injury. It is also undisputed that at the time of her compensable injury the claimant had concurrent employment as a cashier and that the AWW of the concurrent employment was $78.61.

EXCLUSION OF EXHIBITS

The benefit review conference (BRC) for this case was held on August 11, 2004. The carrier offered into evidence Carrier Exhibit K, an investigation report regarding surveillance of the claimant on October 13, 14, 15, and 18, 2004, and Exhibit L, a video tape of the claimant for the dates mentioned. The carrier exchanged the exhibits with the claimant on October 22, 2004. The claimant objected to the admission of the exhibits as not being timely exchanged pursuant to Rule 142.13(c)(1). The carrier responded that it had exchanged the exhibits as soon as it became available pursuant to Rule 142.13(c)(2) and that the surveillance exhibits were relevant to the time period at issue because the claimant was alleging disability to the date of the CCH. The

hearing officer ruled "I'm not going to admit CR-K and L, not being timely exchanged and not having good cause to introduce them."

Rule 142.13(c)(1) provides that the parties exchange documentary evidence "no later than 15 days after the [BRC]." Rule 142.13(c)(2) provides that "Thereafter, parties shall exchange additional documentary evidence as it becomes available." A party who belatedly investigates the facts and then does not disclose known information in order to make further investigation and development does run the risk of having evidence excluded for failure of exchange. Texas Workers' Compensation Commission Appeal No. 991744, decided October 1, 1999.

To obtain a reversal on the basis of admission or exclusion of evidence, it must be shown that the ruling admitting or excluding the evidence was error and that error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been stated that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Texas Workers' Compensation Commission Appeal No. 992153, decided November 12, 1999; Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In this case the carrier offers no evidence why in the exercise of due diligence the surveillance could not have been performed earlier. Our review of the excluded evidence does not indicate that it would have reasonably caused the rendition of a different judgment. We conclude that the hearing officer did not commit reversible error in the exclusion of the exhibits.

EXTENT OF INJURY

The claimant fell spraining her left ankle on _____, and began seeing her treating doctor on October 15, 2003, who first noted "pain in the heel" and assessed plantar fasciitis possibly exacerbated by the ankle sprain in a note dated December 17, 2003. The claimant relies on the reports of the treating doctor and a required medical examination doctor to show the plantar fasciitis was related to the compensable injury. The carrier contends that the left ankle sprain had resolved and was unconnected to the plantar fasciitis. The carrier relies on the reports of (Dr. G) and a peer review doctor.

The disputed issue involved a factual question for the hearing officer to resolve. Section 410.165(a) provides that the 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 to 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). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Nothing in our review of the record indicates that the hearing officer's decision on the extent issue is so against the great weight and preponderance of the

evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

DISABILITY

The carrier appeals the disability determination largely on the basis of the extent-of-injury issue. Having affirmed the extent-of-injury issue, we also reject the carrier's contention that the claimant did not have disability after December 17, 2003.

The claimant appeals, contending that she had additional/different dates of disability found by the hearing officer but references no documentary or testimonial evidence to support her allegations. The claimant had the burden to prove that she had disability as defined by Section 401.011(16). The hearing officer's disability determinations are supported by sufficient evidence.

AWW

It is undisputed that the claimant was hired by the employer on August 11, 2003. The claimant then worked 1 week of orientation which the employer time card records indicate was from September 1 through September 6, 2003.[1] In that the claimant had not worked for the employer for 13 weeks prior to the date of injury, the carrier submitted a wage statement of a purported similar employee (Carrier Exhibit H). During the 13 weeks prior to the date of injury the "similar" employee had an AWW of $49.38. The hearing officer found that the employer employed a similarly situated employee who worked for the employer for the 13 weeks immediately preceding the date of claimant's injury and combined the $49.38 AWW of that similar employee with the AWW of $78.61 to arrive at the claimant's AWW of $127.99. The claimant contends that she worked more than the 5.75 hours a week that the alleged similar employee worked. The carrier responded that the claimant's hours varied, that "she did not work each day" and that claimant's "total weekly hours did not equal 35.8 hours per week."

Rule 128.4 provides for the calculation of AWW for part time employees. Rule 128.4(c) provides that for an employee who worked part time as a regular course of conduct Rule 128.3(d)(e) or (g) shall be used to calculate the AWW. Rule 128.3(f) provides that a "similar employee" is a person with training, experience, skills and wages that are comparable to the injured employee, and that "similar services" are tasks performed or services rendered that are comparable in nature to, and in the same class as, those performed by the injured employee, and that are comparable in the number of hours normally worked. While the hours need not be identical, they must be comparable. Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993. The employer's workers' compensation manager testified that the similar employee selected had the same title as the claimant, was the same part time on call employee, in the same department and had the same duties. At issue is the number of hours worked.

[1] Both before and for some period after the claimant's date of injury the claimant worked at concurrent employment as a cashier at a supermarket. It is undisputed that the claimant AWW from the concurrent employment was $78.61.

The claimant testified that she would sign up for as many hours as she wanted and then the employer would call her and tell her what hours and shifts were available. A review of the 5 full weeks (September 7 through October 11, 2003) prior to the claimant's injury showed that the "similar" employee worked on the average of 7.78 hours a week (Carrier's Exhibit H) while the claimant worked an average of 30.81 hours a week (Carrier Exhibit M).

In Texas Worker's Compensation Commission Appeal No. 92073 decided, April 6, 1992, and Appeal No. 93386, *supra*, we held that Rule 128.3(f)(2) specifically states that similar services are those which are among other things, comparable to the number of hours normally worked by the injured employee. Thus, while the hours need not be identical, they must be comparable. During the 5 week period (we excluded the orientation week where the claimant worked 40 hours and the day before the claimant's injury where the number of hours the similar employee may have worked was unknown) prior to the claimant's injury the claimant worked almost four times as much as the tendered similar employee. The claimant, during that time never worked fewer than 24.2 hours and worked as much as 45.6 hours during 1 week. The tendered similar employee never worked more than 8.74 hours a week and in 1 week only worked 4.48 hours. We hold that the tendered employee was not a similar employee because the number of hours worked were not comparable. We reverse the hearing officer's determination that the employer employed a similarly situated employee and that the claimant's AWW is $127.99. In the absence of a similar employee we have totaled the claimant's preinjury earnings (Claimant's Exhibit No. 9) and divided by the number of weeks the claimant worked to arrive at an AWW of $294.46 (*see* Claimant's Exhibit No. 10) paid by the employer using a fair, just and reasonable method calculation. *See* Rule 128.3(g). We then added the AWW of $78.61 paid by the concurrent nonclaim employer to arrive at an AWW of $373.07. *See* Section 408.042(c) and Rule 128.1(h). Accordingly, we render a new decision that the claimant's AWW is $373.07.

We affirm the hearing officer's decision on the extent-of-injury and disability issues and render a new decision that the claimant's AWW is $373.07.

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 75251-2237.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge