APPEAL NO. 92344

On June 30, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the average weekly wage for purposes of calculating the income benefits of the claimant, (claimant), the appellant herein, should be $472.68. At the time of his injury on (date of injury), the appellant was employed as a computer operator for (employer).

The appellant asks that the decision be reviewed and reversed, arguing that an amount of money he was paid on (date) for accrued vacation and sick leave should be added, in total, to the amount he was paid as wages for the 13 weeks preceding the injury. Respondent supports the hearing officer's decision, but notes, in the alternative, that no more than one quarter's worth of accrued vacation and sick leave should be added to the total wages paid to the appellant in the 13 weeks prior to the injury, if the Appeals Panel agreed that same should be included as wages. This would yield an average weekly wage roughly $10.00 more than that awarded by the hearing officer.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. Art. 8308-6.34(e) (Vernon's Supp. 1992) (1989 Act). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

At the time of his injury, the appellant had been employed for more than 13 weeks by the employer as a computer operator. Generally, the appellant worked three days a week, 12 hours per day, but would be paid for 40 hours per week. He stated that hours over and above 40 hours per week were paid at a time-and-a-half overtime rate.

At the hearing, the appellant and respondent basically agreed as to the amount of gross salary and employer-paid insurance benefits that had been paid during the 13 weeks prior to the injury. However, the parties disputed a total amount paid to the appellant for accrued, but unused, leave time, in the amounts of $403.84 for vacation time (40 hours), and $131.25 for sick leave. This was paid on (date), three days after the injury, when the appellant was terminated for reasons not made apparent in the record. There was no dispute over the fact that an on-the-job injury had occurred.

Neither the appellant, nor the benefits coordinator for the employer, (Ms. M), were able to answer whether the leave time accrued periodically as appellant worked. Appellant stated his belief that the total amount was awarded on each anniversary date with the company. Because he began working for the employer in May 1989, he stated that every May, he was awarded 2 weeks vacation leave and 5 sick days for the coming year, which he was free to take anytime subject to work-related demands for his attendance. Ms. M stated simply that she did not know whether the time accrued periodically, or not.

Under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-4.10 (a) (Vernon's Supp. 1992) (1989 Act), the average weekly wage for an employee who has worked for an employer at least 13 weeks prior to the injury is calculated by adding together "the sum of the wages paid in the 13 consecutive weeks immediately preceding the injury, divided by 13". The 1989 Act defines wages to include "every form of remuneration payable for a given period to an employee for personal services" and further lists items that are so included. Article 8308-1.03 (47). If an employee takes paid sick, holiday, or vacation leave during the 13 weeks preceding the injury, applicable commission rules make clear that those amounts are included as part of the "wage"; in other words, those amounts cannot be deducted on the theory that personal services were not rendered during the days the employee was on paid leave. *See* Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE §128.1 (b)(1) (Rule 128.1); Employers Reinsurance Corp. v. Beaty, 576 S.W.2d 481 (Tex. Civ. App.-Houston [14the Dist.] 1979, writ ref'd n.r.e.).

In this case, the appellant was actually paid for the unused leave after the date of injury, so such amounts would not literally be within the ambit of wages paid for the preceding 13 week period. Moreover, in the absence of evidence as to the employer's method for accrual of leave time, such payments appear to be more in the nature of settlement for leave the appellant could have taken in the future, had he not been terminated. In any case, there is sufficient evidence to support the determination of the hearing officer that these amounts were not based on, and paid as remuneration for, services rendered by the appellant for the 13 weeks immediately preceding his injury.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge