APPEAL NO. 001839

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 July 5, 2000. The issue at the CCH was the amount of the appellant's (claimant) average weekly wage (AWW). The claimant had not worked for 13 weeks prior to his date of injury. The hearing officer used a wage statement for a similar employee and found that the claimant's AWW was $298.46.

The claimant has appealed, arguing that the employee tendered by the employer was not similar to his own circumstance. The claimant argues that he would have worked 12 hours a day, 7 days a week, until laid off and that his AWW should have been based upon what he actually earned before his injury, using the "fair, just, and reasonable" method of computation. The respondent (carrier) responds that it is the injured worker's burden to prove his or her AWW. The carrier notes that the claimant offered no rebuttal evidence as to what a similar employee would make, but merely requested an AWW that would greatly exceed his historical wage level. The carrier argues that the decision is supported in the evidence.

DECISION

We affirm.

The claimant was employed at the time of his injury by (employer) as a laborer. He was injured on _____. At that time, he had been involved in a week of paid training, followed by a full week of labor, and then a partial week of work prior to his injury. He worked a total of 110 hours over 3 weeks, earning $1,056.00. The type of job involved short-term contracts of service on kilns and refractory equipment for the employer's customers. The claimant said he was originally hired to work 10 hours a day but that the job became 12 hours a day, 7 days a week.

Mr. R, the owner of the employer, characterized the claimant as a "part-time" employee but from his testimony this appeared to relate to the duration, rather than the hours, of employment. Mr. R testified that the laboring jobs tended to be job-specific and could last from one day to a few months. Mr. R said that the hours could range from a few hours a week to many hours a day, although he said that the employer generally tried to avoid working as many as 12 hours a day or 7 days a week, although he conceded that a customer sometimes wanted this. Mr. R said that it was difficult to find a similar employee since most laborers did not work for as long as 13 weeks. However, Mr. R said he asked his payroll department, using job classifications in the computer, to search for and pull out the wage records of a laborer who had worked 13 weeks that would precede the claimant's injury.

The records of this employee, who Mr. R said was personally unknown to him, show that he worked as many as 71 hours a week, and as few as 8. (The average was a little over 33 hours a week.) Mr. R said that this laborer was paid the same hourly wage, $8.00 per hour, as the claimant.

The claimant acknowledged that his work history preceding the job for the employer was a series of short-duration jobs, at least one of which he characterized as "seasonal." He agreed that his history of earnings in 1998, as derived from his federal income tax return, averaged around $200.00 a week, although that could mean that he earned zero dollars one week, and $400.00 the next. The claimant alluded to the fact that this may not have taken into account jobs that he was paid in cash. He had not yet filed a 1999 income tax return at the time of the CCH.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(e) (Rule 128.3(e)) provides that if an injured worker has been employed for less than 13 weeks at the time of injury, then "the wages paid to that employee are not considered." If actual wages are not considered, the hearing officer is not free to consider wages subjectively characterized as promised or expected, but not paid. Had a similar employee not been located that worked for the employer, the default is not automatically to "fair, just, and reasonable" but to the wages of a similar employee in the vicinity. Under the facts of this case, we cannot agree that the hearing officer either abused her discretion or went against the great weight and preponderance of the evidence in finding that the employee tendered by the employer was a similar employee to the claimant. The hearing officer evidently concluded, and is supported by the record, that the computer method used to identify the employee whose wages were used was a valid one for locating a same or similar employee, as defined in Rule 128.3(f). "Similar" under this rule does not mean identical.

Although the claimant suggests that it would be fair and reasonable to simply divide his wages in half, the claimant was in fact employed for three weeks and the AWW would, therefore, be more appropriately calculated by dividing the total wages paid by three. But we would further observe that claimant's testimony and his allusion to seasonal employment at least raised the prospect that calculation under the seasonal employee provisions was a possibility, albeit unexplored, which would have meant computation of the temporary income benefits AWW in accordance with the same or similar employee method and for other benefits by taking the previous year's wages and dividing by 50, which, according to the employee's testimony, may well have yielded an even lower AWW.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the

great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge