APPEAL NO. 002080

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 16, 2000. The hearing officer determined that: (1) respondent (claimant) sustained a compensable injury on _____; (2) claimant had disability from April 4, 2000, through August 16, 2000; and (3) claimant's average weekly wage (AWW) is $440.00. Appellant (carrier) appealed these determinations on sufficiency grounds. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

The hearing officer summarized and discussed the facts in her decision and order. Briefly, claimant said he had been off work and was paid short-term disability payments due to unrelated gastrointestinal problems for several months before _____. He said he had kept in touch with (employer), that he thought he still had a job, that he arrived at employer's premises on _____, and that he was told what work he would be doing. He said that Mr. H showed him the welder he would be using, that then claimant began to clean the area, and that he injured himself lifting some heavy metal sheets. Mr. H said he wanted claimant to come back as an employee because claimant knew the work and would not have to be trained. Claimant said he has not been able to return to work since then due to his back injury and inability to lift. Claimant testified that, as a welder, he had usually worked 50 hours per week and that he earned $8.00 per hour. Mr. E, employer's general manager, said that employer paid "time and a half" for hours worked over 40 hours per week.

Carrier contends that the hearing officer erred in determining that claimant was an employee of employer on _____. Carrier asserts that: (1) claimant had been an employee prior to being off work for gastrointestinal problems; (2) claimant had been off work prior to _____, due to these other health problems; (3) claimant was on employer's premises on _____, only to be shown around the plant while Mr. H checked on claimant's "status"; and (4) claimant had not received a time card and no paperwork had been completed "recognizing" claimant as an employee. Claimant testified that he had understood that he still had a job and that when he saw employer's office workers while he was off work, they would ask him when he would be coming back to work. There was evidence from Mr. E that although claimant was being shown around the plant on _____, he had already decided not to rehire claimant. We conclude that the hearing officer could find from the evidence that claimant was employed by employer at the time of the _____, injury. *See* Texas Workers' Compensation Commission Appeal No. 971310, decided August 25, 1997.

Carrier contends the hearing officer erred in determining that claimant sustained a compensable injury and that he had disability from April 4, 2000, through August 16, 2000. Carrier asserts that: (1) claimant was in no condition to return to work when he showed up

on _____; (2) it is not believable that claimant sustained an injury his first day back at work, while doing his "first physical action"; (3) the medical records state that claimant sustained an injury "bending" and not while picking up sheet metal, as claimant had claimed at the hearing; and (4) it was not reasonable for the hearing officer to find that claimant sustained an injury in the manner described.

The applicable law regarding injury and disability issues and our standard of review are set forth in Texas Workers' Compensation Commission Appeal No. 001392, decided July 24, 2000. The matters carrier raises in its brief involved credibility and fact issues, which the hearing officer resolved. A review of the decision and order shows that the hearing officer found claimant credible, despite the evidence and inconsistencies emphasized by carrier. We conclude that the hearing officer's determination that claimant sustained a compensable injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Carrier also asserted that because claimant did not sustain a compensable injury, he did not have disability. Because we have affirmed the determination that claimant sustained a compensable injury, we also affirm the disability determination.

Carrier contends that the hearing officer erred in determining that claimant's AWW is $440.00. Carrier asserts that the AWW "would be no greater than $380.00." Mr. E stated that a welder would usually work from 40 to 45 hours per week. The hearing officer determined that claimant worked 40 hours per week at $8.00 per hour, for $320.00 per week, and that he also worked 10 hours per week overtime at $12.00 per hour, for $120.00 per week. This totaled $440.00 per week, which the hearing officer found was claimant's AWW. No wage statement of a similar employee or employee in the vicinity was included in the record. The hearing officer stated that she used a "fair, just and reasonable" method of determining the AWW. We have reviewed the hearing officer's AWW determination and we conclude that it is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge