APPEAL NO. 002655

Following a contested case hearing (CCH) held on October 13, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant's (claimant) compensable injury of _____, does not extend to and include a neck and low back injury and that, using a fair, just, and reasonable method of calculation, the claimant's average weekly wage (AWW) is $195.50. The claimant has appealed, asserting that he was denied "due process" because the Spanish-language translator only translated his testimony and not the entire CCH proceedings; that the hearing officer misstated the evidence in stating that the claimant was sent to Dr. J by his attorney; that the evidence established that the claimant's _____ injury extended to and included his neck and low back; and that the hearing officer's method of calculating the AWW was not fair, just, and reasonable. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged extent-of-injury and AWW determinations and that not only did the claimant not raise any issue at the hearing concerning the extent of the interpreting but that it is well-settled that the Appeals Panel does not resolve questions of constitutionality.

DECISION

Affirmed.

The claimant testified that on _____, while cutting points on wood stakes to drive into the ground to brace 2" X 4" boards for framing a concrete sidewalk, he slipped and fell backwards and the circular saw he was using cut the top of his right leg above the knee; that he reported the injury to his boss, Mr. B, who was at the work site; that Mr. B took him to a hospital where the laceration was repaired; and that he later changed doctors to Dr. J, who has been treating his neck and back which were also hurting after the accident. Mr. B, the owner of the irrigation landscaping business, testified that although he did not see the accident, he was present at the job site; that the stakes had already been driven into the ground to brace the 2" X 4" frame; that he instructed the claimant to simply kneel down and cut off the tops of the stakes so they would be level with the frame; that the area was dry; and that he could not understand how the claimant would have fallen backwards since he would be kneeling down to make the cuts.

The claimant had the burden to prove that his compensable injury extended to a neck and low back injury and while that burden may be met by his testimony alone, such testimony is not binding on the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the hearing officer's finding that the claimant did not sustain an injury to his neck and low back on _____, 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Although the hearing officer did use a fair, just, and reasonable method to calculate the claimant's AWW (Section 408.041(c)), as the claimant had urged that he do, the claimant complains on appeal that the hearing officer did not use one of the two methods the claimant proposed at the hearing. The hearing officer excluded the two weeks that the claimant did not work during the 13-week period preceding the date of injury, divided the total number of hours he did work by the 11 weeks, and multiplied that number by the hourly wage of $10.00 which yielded the $195.50 found by the hearing officer to be the AWW. We cannot say that this method constitutes either legal or factual error.

We find no merit in the two remaining assertions of error. Concerning the complaint that the claimant was denied "due process" of law because the entirety of the hearing was not translated from English to Spanish for the claimant's sake, we note that the claimant was represented by an attorney at the hearing and that this matter was not complained of below and is raised for the first time on appeal. Finally, we agree with the claimant that the record does not contain evidence to support the hearing officer's comment that the claimant's "newly hired attorney had sent him" to the doctor (Dr. J) who treated his neck and low back complaints. However, we do not find this lapse to constitute reversible error. The claimant has not demonstrated how this statement probably resulted in an erroneous decision by the hearing officer. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge