APPEAL NO. 013121
FILED JANUARY 28, 2002

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 November 27, 2001. The hearing officer determined that (1) the respondent/cross-appellant's (claimant) compensable injury includes herniated discs at L4-5 and L5-S1; (2) the claimant had disability from December 15, 2000, to January 31, 2001, and from June 11, 2001, to the date of the hearing; (3) the appellant/cross-respondent (self-insured) did not waive the right to dispute the compensability of the injuries at L4-5 and L5-S1; and (4) the average weekly wage (AWW) is $970.50. The self-insured appeals the injury and disability determinations on sufficiency grounds. The claimant cross-appeals the disability, waiver, and AWW determinations on factual and legal grounds.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

INJURY

The hearing officer did not err in determining that the compensable injury includes herniated discs at L4-5 and L5-S1. Whether such injuries arose out of and in the course and scope of the claimant's employment on_____, was a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. 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, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the claimant's testimony with regard to the mechanism of injury, we cannot conclude that the hearing officer's determination is 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 (Tex. 1986).

DISABILITY

The hearing officer erred in determining that the claimant had disability from December 15, 2000, to January 31, 2001, but did not err in determining that the claimant had disability from June 11, 2001, to the date of the CCH. The claimant asserts on appeal that he did not have disability from December 15, 2000, to January 31, 2001, but had disability only for the period of June 11, 2001, to the date of the CCH. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). There was no controversy at the hearing with regard to the period of December 15, 2000, to January 31, 2001, and no evidence was presented to show that the claimant was unable to obtain or retain wages equivalent to his preinjury wage while working light duty during such period. Accordingly,

we reverse the hearing officer's decision that the claimant had disability from December 15, 2000, to January 31, 2001.

The self-insured's challenge to the hearing officer's disability determination was premised upon the success of its argument that the claimant did not sustain a compensable injury. Given our affirmance of the injury determination, we likewise affirm the hearing officer's determination that the claimant had disability from June 11, 2001, through the date of the CCH.

WAIVER

The claimant's challenge to the hearing officer's waiver determination appears to be in response to the self-insured's appeal of the injury determination. Given our affirmance of the injury determination, we do not address the claimant's appeal on this issue.

AVERAGE WEEKLY WAGE

The hearing officer erred in determining that the claimant's AWW is $970.50. In the "Statement of Evidence" portion of the decision and order, the hearing officer states:

> The average weekly wage (AWW) issue boils down to the question of whether the claimant's vacation pay should be counted in the wage computation. The evidence showed that the claimant took a week's vacation starting the day after the date of his injury. The evidence also indicated that the employer pays each eligible employee, which would include the claimant, 40 hours "vacation pay" each year on the anniversary of his hire date; the employee can take his vacation at any appropriate time thereafter. If the employee does not take his vacation time, the "vacation pay" essentially amounts to a bonus. The salient point here is that the claimant took his vacation after the date of injury; even if he "earned" his vacation pay at that point, as he argued, it still would not fall into the 13-week period preceding the date of injury that is the basis for computing AWW. The claimant neither "earned" nor received his vacation pay during the 13-week period here, and it should not be included in the AWW calculation.

The hearing officer misstated the evidence. The claimant asserted at the CCH and on appeal that he took vacation time during the ninth week of the 13-week period preceding the date of injury. Although the claimant did not offer testimony with regard to this matter, the claimant's assertion is borne out by the documentary evidence. Employer records for the pay period of October 29, 2000, through November 4, 2000, show that the claimant worked approximately 3.25 hours and took vacation for the remainder of the pay period. Indeed, the Employer's Wage Statement (TWCC-3) shows that the claimant worked only 3.25 hours during the ninth week of the 13-week period.

In Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993, we stated that a hearing officer is not required by the 1989 Act to recite the facts of a case in a "Statement of Evidence." Notwithstanding, a statement of evidence, if made, must reasonably reflect the evidentiary record. Texas Workers' Compensation Commission Appeal No. 013029, decided January 9, 2002. While we recognize that AWW is a question of fact to be determined by the hearing officer, we find it necessary to remand the case for redetermination of the AWW consistent with the facts in evidence.

The hearing officer's decision and order is affirmed with regard to injury, affirmed in part and reversed and rendered in part with regard to disability, and reversed and remanded with regard to AWW.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1021 MAIN STREET, SUITE 1150
HOUSTON, TEXAS 77002.

Edward Vilano
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge