APPEAL NO. 950312

This appeal is considered under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 4, 1994, a contested case hearing was commenced in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing was continued to September 27, 1994, and the record closed on that date. With respect to the sole issue before her, the hearing officer determined that respondent's (claimant) average weekly wage (AWW) is $432.00. On appeal, appellant (carrier) maintains that the hearing officer's AWW determination is against the great weight of the evidence. Claimant's response urges affirmance, arguing the sufficiency of the evidence.

DECISION

We affirm.

It is undisputed that claimant sustained a compensable injury on (date of injury). On the day of the injury, claimant was employed as a maintenance worker at the (employer) and had been so employed since September 18, 1992. Prior to that date, claimant had performed maintenance work for the employer as an independent contractor. Claimant testified that in his position he worked eight hours per day at $6.00 per hour. He also stated that he worked an additional four hours per day in exchange for lodging in one of employer's motel rooms. Claimant testified that he was rented the room for a $24.00 rate (four hours at $6.00 per hour), rather than the $48.00 market rate for the room. Although claimant testified that he could not recall with specificity the amount of time he spent on each task on any given day of the three-week period that he was employed, he could recall the major tasks he performed each day during that time. Specifically, he stated that he usually began his work day at 7:00 a.m. and ended for the evening at 8:00 p.m. He said that the four hours he worked in exchange for his lodging were generally completed within the unit where he was staying. With respect to the other eight hours, he stated that he received his assignments from the motel manager, (Ms. C), the motel owner, who had hired him, and from the maintenance man and the desk clerks. Finally, he stated that there were occasions that he worked more than 12 hours on a given day and a few days he may have worked slightly fewer hours. Nevertheless, he maintained that he averaged 12 hours per day six days per week.

Ms. C testified that claimant never worked a 12 hour day. In fact, she stated that he worked substantially fewer than the eight hours he was supposed to work each day. Specifically, she stated that for the nearly two-week period from September 26, 1992, through the date of claimant's injury, (date of injury), he only worked a total of 31.5 hours or a little over 15 hours each week. Ms. C also stated that claimant was paid twice in the three-week period of his employment in the amounts of $99.00 and $189.00, respectively. Finally, Ms. C maintained that there was no connection between claimant's employment and the separate agreement he had to work four hours daily in exchange for lodging. She testified that in essence claimant had two jobs with the employer, one for which he received

an hourly wage and one for which he received lodging. There was substantial other conflict in the testimony of claimant and Ms. C at the hearing which lasted for nearly six hours over the course of two days; however, we have limited our discussion of the evidence to the major substantive differences therein.

It is well settled that "the burden of proof is upon the claimant claiming workers' compensation to offer sufficient competent evidence to establish his AWW." Texas Workers' Compensation Commission Appeal No. 94734, decided June 6, 1994. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). In that capacity, the hearing officer must resolve conflicts and inconsistencies in the evidence and testimony and enter findings of fact and conclusions of law accordingly. As the fact finder, the hearing officer is free to believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer's decision will only be reversed if it 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, 176 (Tex 1986).

Initially, we address carrier's assertion that because the hearing officer did not detail its evidence or Ms. C's testimony in her decision, she did not consider it in making that decision. While we would agree that the hearing officer's statement of the evidence was abbreviated, we cannot agree that its abbreviated nature is indicative of her abandonment of her responsibility to consider and evaluate all of the testimony and evidence in making her decision. Each party's attorney noted in final argument that this case turned on credibility and our review indicates that that assessment is accurate. The hearing officer obviously credited the claimant's testimony over that of Ms. C. In addition, she credited the claimant's summaries of the tasks he performed on the dates of his employment and his testimony that he averaged 12-hour work days six days a week in the period over Ms. C's testimony that he worked substantially fewer hours. It was within the hearing officer's province as the fact finder to so resolve the conflicts and inconsistencies in the testimony and evidence. Finding that the evidence sufficiently supports the hearing officer's AWW determination and that it is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust, we find no basis for disturbing that determination on appeal. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Lastly, we find no merit in carrier's argument that the value of the four hours of work the claimant performed in exchange for lodging was improperly included in calculating claimant's AWW. Contrary to carrier's assertion, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(b)(2) (Rule 128.1(b)(2)) specifically provides for the inclusion of the value of lodging furnished as remuneration for the employee's services in the calculation of AWW. Thus, we reject this allegation of error in that the value of the lodging was properly added in accordance with Rule 128.1(b)(2).

The decision and order of the hearing officer are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge