APPEAL NO. 991273

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 17, 1999, a hearing was held. He determined that appellant (claimant) did not have disability from January 5, 1999, to May 17, 1999, resulting from his compensable back injury of _____. The average weekly wage (AWW) was also determined to be $438.74 based on the wage of a similar employee. Claimant asserts that he was working on a trial basis at the time he was terminated on January 5, 1999, and that on January 19, 1999, he was taken off work by his doctor. In addition, claimant states that his AWW should be based on a "fair, just and reasonable standard" and that the similar employee upon whose 13 weeks of employment claimant's AWW was based, was paid at a rate less than claimant. Respondent (carrier) replied that the appeal addresses factual issues and states that the decision should be affirmed.

DECISION

We affirm in part and reverse and remand in part.

Claimant worked for (employer) when he injured his back on _____. He began working for employer on October 17, 1998. Claimant injured his low back, and his neck, when he was switching trailers; he had to adjust the leg or gear that holds the trailer and in securing it, his back popped and he felt "sharp pain." There was no notice issue. Claimant sought medical care later that day, after completing his run, from Dr. R; he said that when he indicated to employer that he wanted to get medical care, he was told that he could go to his family doctor or "our doctor" Dr. R. The medical records show that claimant returned to Dr. R repeatedly for the next 50 days.

Claimant did not work for several days. On December 2, 1998, Dr. R returned claimant to work with restrictions, including a lifting restriction. Dr. R was suspicious of a herniated disc but diagnosed a lumbar and cervical strain. (Dr. R did obtain an MRI, the results of which were noted on January 8, 1999, as showing a herniation at L4-5.) On December 9, 1998, Dr. R noted a "trial of regular activity" and returned claimant to regular duty on December 9, 1998. (Claimant testified that he asked for this change of status.) There is no dispute that claimant remained in this status, and worked, until he was fired on January 5, 1999; he remained in the regular work status until after he quit seeing Dr. R on January 15, 1999. Claimant did testify that he still had pain while working.

Mr. P was identified as claimant's supervisor. He said that on January 5, 1999, he and others were working in the "shop." Mr. P said he looked at GH truck and told him to "clean it out," to which GH said, "okay." Mr. P said he then looked at claimant's truck and said it was dirty and told claimant to clean it out, to which, Mr. P said, claimant replied, "f--- you, that truck is as clean as it's going to get." Mr. P said he then said, "you're fired." There was no testimony as to what claimant then said. In answer to an inquiry from the hearing officer, Mr. P said that claimant would still be working there if he had not been insubordinate. Claimant did not offer any evidence to indicate that the termination did not

occur as Mr. P said it did.

Dr. R continued claimant on regular duty after claimant's visits of January 4, January 8, and January 15, 1999. Dr. R in an undated letter said that claimant had no change in status on January 6, 1999. On January 22, 1999, Dr. R wrote that he first considered claimant to only be able to do modified duty but that claimant sought full duty; Dr. R concluded by saying that claimant's condition has not basically changed since his initial belief that claimant should only do modified work. Claimant changed his treating doctor to Dr. B, D.C. and began seeing him on January 19, 1999. Dr. B noted that claimant was not working. Claimant stated that he has not been able to work since January 5, 1999. Carrier had claimant examined on April 15, 1999, by Dr. S, who stated that claimant should be restricted to light/medium work including no frequent lifting over 15 pounds.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could choose to give Dr. R's medical releases to regular work more weight than he gave claimant's statement that he could not work, Dr. S's opinion in April 1999 that claimant could only do restricted work, or Dr. R's later letters in which he indicated that claimant should have only been doing modified work. In considering that Dr. R had begun his release to regular work as a "trial" and still wrote of it as a "trial" basis on January 4, 1999, just before the termination, the hearing officer could also consider that claimant was able to work without restrictions for approximately a month, including overtime according to claimant's testimony, without Dr. R ever canceling the regular duty release while claimant was working. The determination that claimant did not have disability from January 5, 1999, to May 17, 1999, is sufficiently supported by the evidence. In affirming the determination as to disability, we note that some consideration is being given to surgery; disability is a condition that a claimant may or may not have in a subsequent period of time.

Claimant states that a fair, just and reasonable wage should have been found instead of using a similar employee who made "2 to 3 dollars" an hour less. Section 408.042(b)(2)(B) provides that when an employee has not worked 13 weeks, the AWW is equal to the weekly wage employer paid a similar employee for similar services, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(f) provides that a similar employee is one with training, experience, skills and wages that are "comparable"; similar services are also said to be comparable, specifically mentioning comparable "number of hours normally worked."

The testimony of MK indicated that employer used the wage of GH, another truck driver, for 13 weeks as a similar employee to determine the AWW of claimant. (GH worked for employer about three years.) There is no appeal as to the number of hours worked not being comparable; MK testified, "I think you can pretty well see how--by how many hours overtime [claimant] had and by the hours overtime that [GH] had, that is comparable." (MK had noted that during rain or other delays the employees have the option to work in the shop for eight hours and be paid or "they have the choice of going home"; she added that claimant's supervisor said that many times claimant chose to go home.) MK also said that GH made $9.50 an hour part of the time involved and $10.00 an hour for the other part.

Claimant made $11.00 part of the time and received a raise 15 days before he was injured to $12.00 an hour.

Mr. K identified himself as the president of employer. He said that claimant was paid $12.00 because there is a "tight supply" of truck drivers now. He said he gave him a raise from $11.00 because claimant asked for more hours or more pay and Mr. K said he knew from claimant's application that he changes companies frequently. Mr. P testified that claimant had been hired to drive a particular truck but that either driver (claimant or GH) could drive the truck; they are both truck drivers.

The hearing officer's determination as to the AWW is only questioned on the basis of the difference in hourly wages. There was no indication of when in GH's 13 weeks of wages his wage changed from $9.50 to $10.00. The difference in GH's wage and claimant's appears to have amounted to $1.50 to possibly $2.50 during parts of the 13 weeks involved. This amount of wage differential cannot be said to be comparable. Differentials in hours worked between 40 and 61 were said not to be comparable in Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993. A difference in a weekly wage based on an average of $2.00 an hour would amount to $80.00 to $100.00 or more with overtime, which cannot be said to be comparable. Therefore, the case is remanded for the hearing officer to reconsider and develop the evidence as to claimant's correct 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. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge