

APPEAL NO. 970276

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 October 2, 1996. We addressed an appeal of her October 8, 1996, decision and reversed and remanded the case in Texas Workers' Compensation Commission Appeal No. 962207, decided December 16, 1996. The hearing officer issued her January 8, 1997, decision in accordance with the remand and, with regard to the issue at the CCH, determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the twelfth compensable quarter. The claimant appeals, seeking reversal, and the respondent (carrier) responds, seeking affirmance.

DECISION

We affirm.

The facts of this case are set forth in detail in our original decision and will not be repeated herein. However, it is important to note that the claimant was employed during the twelfth quarter SIBS filing period, but at less than 80% of his average weekly wage. His position at the time of the injury was construction superintendent and his position during the filing period was carpenter leadman.

In her original decision, the hearing officer found, with regard to the twelfth quarter SIBS filing period, that the claimant did make a good faith job search but that his underemployment during the filing period was not a direct result of his impairment. The claimant appealed her determination that his underemployment during the filing period was not the direct result of his impairment. The hearing officer's finding in the original decision that the claimant's underemployment was not a direct result of his impairment appeared to rely heavily on "market factors" and we held the evidence did not support that finding. We reversed because the hearing officer's findings on the SIBS "good faith" and "direct result" criteria appeared incongruous. Section 408.142(a)(3) and (4). However, we recognized other evidence in the record that may have affected the direct result criterion and we remanded for further consideration.

In her decision on remand, the hearing officer again found that the claimant's underemployment during the filing period was not a direct result of his impairment and, therefore, he is not entitled to twelfth quarter SIBS. Her finding with regard to the direct result criterion does not rely on economic factors, but rather on the claimant's failure to follow up on several superintendent positions and on turning down one such position. In the decision the hearing officer states:

Claimant also stated that he recently turned down a superintendent's job, since he did not feel physically capable of performing the job in what he considered the optimal manner. [Emphasis in original.]

Claimant's own testimony supports the conclusion that the job of a superintendent, his preinjury employment, could be performed in a manner consistent with his physical restrictions while still satisfying a potential employer's expectation that a superintendent perform his duties in a commercially reasonable manner, since it would be generally acceptable for a construction superintendent to perform such job in a generally sedentary manner, and performing such a job in this manner apparently would be consistent with the restrictions outlined in [Dr. K's] report of September 30, 1992. [Footnote omitted.]

Claimant's admitted physical ability to work as a carpenter leaderman [sic] would include the physical ability to work as a superintendent, since the job of a superintendent usually would require less physical exertion than the job of a carpenter leaderman [sic]. For this reason, it cannot be determined that Claimant's underemployment during the filing period in question was a direct result of his impairment.

Whether an employee has met the "direct result" criterion is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. The hearing officer correctly notes that the claimant has the burden of proof to establish that he has met the direct result criterion. Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993. The determination as to whether the direct result criterion has been met may be based on circumstantial evidence. Texas Workers' Compensation Commission Appeal No. 960684, decided May 20, 1996. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995; Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We conclude that the hearing officer's decision on remand is supported by the evidence. Her reliance on the claimant's impairment relative to his underemployment avoids incongruous good faith and direct result findings. Dr. K states that the claimant "could do some restricted superintendent work." The claimant testified at the CCH that a superintendent's job is less strenuous than a leadman job and the hearing officer determined that he had the ability to perform a superintendent job. The claimant said that during the filing period he had two or three opportunities to work as a superintendent but that he could not take the positions because he was unable to contact the employers who had contacted him about superintendent positions. He explained that his leadman job did not allow him to return telephone calls or follow up with the two or three employers who wanted to hire him as a superintendent. He said that by the time he returned each call the

position had been filled. The claimant's request for appeal states "I found superintendent's jobs, one I turned down because I felt that I could not afford a new truck, the other I had until I could no longer handle."

The hearing officer determined that the claimant's underemployment was the direct result of his self-limitation to a leadman position, not his impairment. We have held that an employee's self-limitation during the filing period may support a finding that he has not satisfied the direct result criterion. Texas Workers' Compensation Commission Appeal No. 970163, decided March 7, 1997. The hearing officer determined that the claimant had the ability to perform the tasks required of a superintendent and that he either failed to follow up on or rejected offers of employment as a superintendent. A hearing officer may consider why an employee rejects offers of employment that he is physically able to perform in determining whether his unemployment or underemployment is a direct result of his impairment. The hearing officer's explanation with regard to why the claimant's underemployment was not a direct result of his impairment resolves the incongruity that concerned us in remanding the case. Therefore, the finding that the claimant's underemployment was not a direct result of his impairment and the determination that he is not entitled to twelfth quarter SIBS are supported by the evidence and are not so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge