

## APPEAL NO. 990124

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 981477, decided August 13, 1998, the Appeals Panel remanded the case back to the hearing officer, to request documentation in the form of copies of the IRS Form 1099 (or other tax forms) which respondent (claimant) testified that she prepared and filed (either quarterly or for 1997) regarding her income during the relevant filing periods. (The filing periods at issue are for the ninth and 10th compensable quarters.) The hearing officer proceeded as directed and some 24 pages of tax documentation were provided under cover letter dated September 23, 1998, marked and admitted as Hearing Officer's Exhibit No. 1 on remand. Both parties were provided an opportunity to comment and rebut the newly admitted information, and did so; appellant (carrier), by letter dated September 24, 1998 (Hearing Officer's Exhibit No. 2 on remand) and claimant by letter dated October 23, 1998 (Hearing Officer's Exhibit No. 5 on remand). Carrier requested that the hearing be reopened in order that it could further cross-examine claimant on the tax returns. The hearing officer, in letters dated October 21 and 26, 1998 (Hearing Officer's Exhibit Nos. 3 and 6) found no reason to allow any additional development of oral testimony from the claimant and commented that the Appeals Panel had not directed any further oral testimony. The hearing officer determined no further hearing was necessary "and none was held" with the record closing on December 14, 1998. The hearing officer again found that claimant's earnings were less than 80% of her average weekly wage as a direct result of her impairment, that claimant had attempted in good faith to obtain employment commensurate with her ability, and that claimant was entitled to supplemental income benefits for the ninth and 10th compensable quarters.

Carrier appeals, contending that claimant was receiving "profits of the business 'owned'" by claimant's husband, that claimant was underreporting to carrier the value of her services to her husband's business and that claimant was "downplaying" the extent of her involvement in "her husband's business." Carrier requests that we reverse the hearing officer's decision "and render a judgment that the Claimant's suffered no disability as a result of his [sic, her] compensable injury." Claimant responds to the arguments raised by carrier and urges affirmance.

## DECISION

Affirmed.

The background facts and procedural history are recited in Appeal No. 981477, *supra*, as well as Texas Workers' Compensation Commission Appeal No. 970428, decided April 17, 1997, and Texas Workers' Compensation Commission Appeal No. 972052, decided November 24, 1997 (Unpublished). For purposes of this case, claimant had been injured in July 1994 while working as a bookkeeper/clerk for a home health agency. Claimant received a 24% impairment rating and subsequently began working part time for her father-in-law's moving business (BCMS) in 1996. Mr. C, the founder and principal

owner of BCMS testified in prior hearings how the business is run and how his three sons (including claimant's husband) participate in the operation. Claimant had previously testified about her restrictions and how doing bookkeeping and scheduling for BCMS meets her restrictions in that she could work at her own pace and lie down to rest as necessary while working at home. There was testimony and evidence that each of the three sons had his own truck and operated independent businesses, paying BCMS a percentage of each job. BCMS in turn hired claimant as "an independent contractor" to do bookkeeping and scheduling for the various businesses and was paid \$150.00 a week during the filing periods at issue here, being from August 31, 1997 (the start of the ninth quarter filing period) through March 1, 1998 (the end of the 10th quarter filing period). In Appeal No. 981477, *supra*, and other cases, claimant offered cash receipt slips and a copy of a check register to document the \$150.00 a week payments. Claimant testified that she had filed tax returns for herself showing her income and for BCMS but that those tax documents were not available at the contested case hearing. As we stated in Appeal No. 981477:

The hearing officer in this case noted the language in Appeal No. 970428, *supra*, the provisions of Rule 130.101(A) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(A)] requiring "supporting documentation," noted the "invoice receipts" for wages paid from BCMS for bookkeeping duties during the respective filing periods (apparently the same cash receipts, for a different period of time, found unpersuasive by the hearing officer in Appeal No. 972052, *supra*), further noted Mr. C's sworn testimony and concluded that "claimant has presented sufficient supporting documentation" to comply with Rule 130.101(A). Claimant's attorney, in his closing argument in this case, asked the question "What evidence does the carrier want in order to pay this claim?" Claimant's attorney then said that if the claimant is just told what is needed, "it will be produced."

That led to our remand in 981477 *supra*.

Claimant provided four Form 1099's and a copy of her (and her husband's joint) Form 1040 for tax year 1997, and included attachments for self-employment taxes, employer business expenses, depreciation on claimant's husband's moving van, and charitable deductions. The Form 1099's show income to claimant from BCMS and the other three moving companies owned by Mr. C's three sons of \$7,150.00 for 1997, which coincides with the \$150.00 a week claimant testified that she received for the last six months of 1997.

First, carrier contends that the hearing officer erred (in Appeal No. 981477, *supra*) in excluding Carrier's Exhibits Nos. 4, 5, and 6 which the carrier contends show that claimant "materially participated in 'her husband's business'." We have already addressed that contention in Appeal No. 981477 holding that the hearing officer had not abused her discretion in excluding those exhibits. We decline to revisit that contention now.

Carrier also argues that the tax return shows that claimant's husband's moving business grossed \$55,319.00--and netted \$40,010.00--in 1997. Carrier contends that a portion (half) of those earnings should be attributed to claimant and reported to carrier as wages earned either based on a community property basis or that claimant materially participated in "her husband's business." This argument was made (almost verbatim) to the hearing officer who, in her Statement of the Evidence, commented:

Claimant's weekly pay is charged to the family member for whom she booked jobs during a given week. Yet the [BCMS] actually pays the Claimant, as testified to by [Mr. C], Claimant's father-in-law. This correlates with [Mr. C's] testimony that [BCMS] retains 25% of each job.

The hearing officer's finding is supported by sufficient evidence.

Carrier next contends that the tax return shows that claimant is driving 8,000 miles a year in her bookkeeping operation and that that hardly shows "the picture of sedentary inactivity claimant paints" in her testimony. That fact is a point for the hearing officer to consider and was made to the hearing officer in carrier's commentary on the tax return. As such, it was something for the hearing officer to assess in assigning weight and credibility to the evidence. (See Section 410.165(a).) Carrier also speculates that the increase in taxable household income from \$49,668.00 ("in the year after [claimant's] injury") to \$76,936.00 in 1997 was "likely attributable to the claimant's increasing and *material participation* in the business." (Emphasis in the original.) This is total speculation and conjecture totally unsupported by any evidence.

In summary, claimant has provided documentation to support her testimony that she works part-time for BCMS earning \$150.00 a week. What her husband grosses, or nets in a separate business, a percentage of which is paid to BCMS, is not separately attributable to claimant as wages. It appears sufficiently supported that each son (including claimant's husband) pays a portion of the income from the different moving jobs to BCMS, which pays claimant \$150.00 a week for bookkeeping and scheduling services. The fact that some of the sons' businesses make more money than others, and consequently pay a greater share of the \$150.00 a week claimant receives, does not alter the fact that claimant has documented that she receives \$150.00 a week from BCMS for the services rendered the various moving companies.

The hearing officer complied with our remand, and upon review of the record submitted we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Alan C. Ernst  
Appeals Judge