APPEAL NO. 990232

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 5, 1999, a hearing was held. She (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits for the seventh compensable quarter. Claimant asserts that he has had 22 surgeries after his injury and had to seek a truck driving job that would be the safest for him in his condition, and therefore his unemployment is a direct result of the impairment. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant testified that on _____, when he was injured, he worked for (employer). His job entailed driving a truck as a relief driver, shuttling trucks, and warehouse work. His injury occurred when he was thrown from a forklift. He said that counting such things as putting in drainage tubes, he has had 22 surgeries. The hearing officer found that he has an impairment rating of 45% and that determination was not appealed. There was no commutation of benefits.

The evidence showed that claimant had a job driving a truck at the beginning of the filing period, which ran from February 1 through May 1, 1998, with the seventh quarter itself beginning on May 2, 1998. He also testified that he got another truck driving job in early May 1998, just after the filing period ended.

Claimant testified that the company for which he worked the majority of the time in the filing period of the seventh quarter, (Employer A), was not responsive to repairing body mounts that hold the cab on the framework of the truck. He looked for work elsewhere and, when he found it with (Employer B), he quit Employer A. The truck he drove for Employer B had air brakes that needed repair, the front end needed alignment, a tire was "about to fall out," and injectors were stopped up. However, he also testified that "they fixed all that." But, when the hearing officer then asked claimant, "[l]et me ask you a question. Why did you quit [Employer B]? See if you can tell me succinctly," the claimant replied, "they wouldn't fix the truck." (Claimant added many more words to his answer, including that he talked to mechanics (apparently about the truck involved) and was told, "they ain't going to fix the truck.")

After quitting Employer B, claimant was not employed for either the last four or five weeks of the filing period. He lists the last four weeks at the end of the filing period as providing no income, but testified that he received his pay a week after the work performed.

The hearing officer found that claimant attempted in good faith to find work during the filing period of the seventh quarter, and that determination was not appealed.

During direct examination, when asked if he still had problems because of his injuries, claimant testified, "none at that time." He testified that he started having some problems after the filing period in June, describing "truck driver's arm." Later, also in direct examination, claimant was asked if he saw his doctor during the filing period (with the filing period accurately described). Claimant replied similarly to what he earlier said: "no, I was fine. I had no problems." We note that claimant did not testify to any problem with his truck seat that jarred him, any problem with too many hours required in either employment that caused pain to his many injuries, or to any problem of lifting or moving material in and out of the truck. He only described the bad mounts, the brakes, the alignment, and the injectors; the only other cause for lessened earnings claimant described involved some waiting, while employed, for a load to be ready before he could drive the truck.

The carrier specifically argued the question of direct result at the hearing without putting any emphasis on the question of attempting in good faith to find work.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The evidence before her indicated that claimant has returned to truck driving, which was basically the same job he had before he was injured. Claimant testified to quitting two jobs in the filing period involved, which in some instances could be justified as relating to the impairment. However, claimant did not testify to any aggravation, exacerbation, pain, or even a flare-up of his impairment due to the demands of either employment, but rather that he quit each job because of the repair (or lack of repair) standards of the two employers–matters which the hearing officer could consider would apply to any other driver, whether having been injured in the past or not. While claimant, in his appeal, states that he must seek the safest truck driving job because of his past injuries and that this forces him to be selective, he did not mention this point at the hearing for the hearing officer to consider. On appeal, we therefore do not have to determine whether his concern for safety could be considered as providing evidence of the underemployment as a direct result of the impairment. Since claimant could have developed this point at the hearing, the case will not be remanded. The evidence developed in this case sufficiently supports the determination that claimant did not show that his underemployment was a direct result of the impairment.

Finding that the decision is sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge