APPEAL NO. 990298

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 22, 1999, a hearing was held. He determined that the respondent (claimant) was entitled to supplemental income benefits for the seventh compensable quarter. Appellant (carrier) asserts that the claimant did not attempt in good faith to find work, that his unemployment was not a direct result of the impairment, and that he did not cooperate with the Texas Rehabilitation Commission (TRC); carrier also stated that the hearing officer did not let it present its evidence. The appeals file does not contain a response from claimant.

DECISION

We reverse and remand.

Claimant worked for (employer) on _____, when, he testified, a carton of overalls struck his arm, apparently injuring his shoulder and neck. The parties stipulated that claimant has 20% impairment, that he did not commute any benefits, and that the seventh quarter began on July 25, 1998, and the filing period for the seventh quarter began on April 25, 1998.

The hearing officer found that the claimant has significant lasting effects of the injury and cannot do the type of work (truck driver and dock worker) he did at the time he was injured. This finding of fact is sufficiently supported by claimant's past work as a truck driver and the April 1997 functional capacity evaluation supplied by Dr. O, which the carrier provided for this hearing, limiting claimant to frequent lifting of 20 pounds.

In addition, carrier asserted that claimant did not cooperate with the TRC, but the evidence does not show any letter in the filing period telling claimant to work with the TRC and it does not show that claimant failed to cooperate in the filing period. The record does show that claimant said he quit going to classes, offered through the TRC, in the summer of 1997 with a stated reason of pain from sitting in class and inability to concentrate because of medication. Under these circumstances the hearing officer was not obligated to make a finding of fact regarding cooperation with the TRC relative to the filing period in question.

The hearing officer also determined on the record that claimant had good cause to miss the earlier scheduled hearing. A finding of fact to this regard would be appropriate. The evidence that claimant left town later in the day of the prior hearing to visit a sick relative of his wife was sufficient to support the determination.

The hearing officer as fact finder is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. However, either party should be able to provide evidence, relative to the issue(s) at the hearing. That was not allowed in this hearing. That is the basis for this remand.

Carrier provided the testimony of PT. She was addressing information she obtained from employers whom claimant said he contacted during the filing period in question. She had stated that 16 of the employers named by claimant stated that they had no applications or resumes from claimant. She had named four of those employers and the person with whom she spoke when the claimant interrupted by declaring, "that's a flat lie." (This was not claimant's only outburst at this hearing.) The hearing officer responded by questioning the witness about whether she had any doubt (apparently about the efficacy of the responses from the employers she contacted) when claimant again interrupted by stating, "on the first three –." The questioning of the witness by the hearing officer continued and the witness replied that some people with whom she spoke were in personnel but others' jobs she was not sure of. The witness agreed that the responses she received could mean that no application had been filed or that an application was lost or destroyed. She also agreed that there were "other possibilities" for the reports she received that no application or resume was on file. A misstatement was then made that 16 applications were confirmed. Then the hearing officer stated:

> [S]till all I have is a disputed fact issue. I have to resolve that. That means either I'm going to <u>believe or not believe</u> and I have to work with that. (Emphasis added.)

Carrier's attorney then said that he was going to have PT go down what her findings --, but the hearing officer said, "I don't think it's going to be beneficial . . . . I don't see how anything else that she can say is going to absolutely prove this correct one way or the other . . . ." After some discussion of burden of proof, the hearing officer then stated, "[b]ut the lady can't tell me any more that's going to be helpful to me . . . ." The remaining 12 employers who were contacted but who did not have an application or resume on hand were not named, nor were the people named who carrier contacted, so obviously no information that any may have conveyed (perhaps a contact knew claimant [in that relatively small town] or perhaps one remembered something claimant said about really wanting, or not wanting, this job, etc.) was brought to the hearing officer's attention. In addition, the documentary evidence in the record does not contain any report from PT about the employers she contacted based on claimant's submitted list of contacts he made.

As the fact finder the hearing officer has to judge the factual issues. As he stated, he will believe it or not. But he may not reach a decision until he has heard or examined all the admissible evidence. We point out that the evidence not presented was not excluded by a ruling on admissibility. He would not be expected to either believe or not believe claimant's statement that he contacted 34 employers without claimant being allowed to describe how he went about it or even relate conversations he had with an employer, which might lend credence to his testimony and indicate good faith. On the other hand, the carrier should be able to present its evidence that may question claimant's credibility. As stated, this point does not involve testimony or evidence that strays from the issue and it does not involve repeated rehashing of the same evidence by a number of witnesses saying the same thing. (When on issue, some repeated testimony should be allowed when determining the weight to give a particular point, but too much repetition can reach a point of unreasonableness.) In addition, in the case under review, and in most other cases, we

point out that a fact finder must make factual decisions based on evidence that undoubtedly falls very short of that which would "absolutely prove" a point one way or the other. To dismiss evidence as not worth his time, because it does not rise to a level where it would "absolutely prove," is arbitrary on the part of the hearing officer.

We reverse the decision and order of the hearing officer and remand for another hearing to be held. The carrier will be allowed to provide the testimony of PT, through direct examination by carrier's attorney, without interruptions by claimant, except for objections to a question, but not for comment about the truthfulness of a witness' answer. When direct examination is concluded, claimant may cross-examine PT and the hearing officer may certainly, at that time, question the witness to clear up any point he chooses.

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

_____
Tommy W. Lueders
Appeals Judge