

## APPEAL NO. 991163

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 26, 1999, a contested case hearing (CCH) was held. With regard to the only issue before him, the hearing officer determined that appellant's (claimant) underemployment was not a direct result of his impairment, that claimant had returned to work earning more than 80% of his preinjury average weekly wage (AWW) and that claimant failed to prove that he attempted to obtain employment commensurate with his ability and, therefore, claimant was not entitled to supplemental income benefits (SIBS) for the eighth compensable quarter.

Claimant appealed a number of the hearing officer's findings, contending that the impairment need only be a direct cause (not the only cause) of the underemployment, that the medical evidence supported an inability to return to his preinjury job, that findings that claimant was earning more than 80% of his preinjury wage were not supported by the evidence, that interrogatories exceeded the scope allowed and were "overly broad and an infringement on his right of privacy," that findings on the earned wages are not supported by the evidence and that claimant was employed as allowed by his impairment. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, setting out its position, and urging affirmance.

### DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's AWW as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable scalp, cervical, right arm and bilateral knee injury on \_\_\_\_\_, with a 27% impairment rating (IR), that impairment income benefits were not commuted, that the preinjury AWW was \$776.60 and that the filing period for the eighth quarter was August 20 through November 18, 1998.

Claimant was a truck driver for (employer) and, in attempting to place a tarp over some crates, he fell 16 feet to the ground, striking his head on the trailer in the process.

Claimant sustained a broken right arm, cervical spinal fracture (which apparently did not require surgery), a scalp laceration and bilateral knee injuries, which were treated conservatively. It appears relatively undisputed that claimant can do some work. Dr. BO, claimant's treating doctor, released claimant to "limited employment" with a 10-pound lifting restriction in his right arm in June 1995. A December 21, 1998, report from Dr. BO notes claimant has some restricted motion in his right elbow and that claimant's knees bother him. In a functional capacity evaluation (FCE) performed on February 15, 1999 (well after the filing period at issue), Dr. BL places claimant in the medium duty category. However, the crux of this case appears to be claimant's current employment.

At some time prior to his injury, claimant, and one or two others, formed a trucking company (a Subchapter S Corporation), (CTI). It is not clear how active CTI was prior to claimant's injury; however, after claimant's injury, the employer went out of business and CTI was "reopened." The following facts are generally undisputed. Claimant and his business associates have 10 trucks and claimant has become a salaried employee of CTI. Claimant is employed as the office manager and dispatcher on a full-time basis, working substantially more than 40 hours a week and being on call 24 hours a day, seven days a week. Claimant's salary was determined by what other dispatchers in the area make. Claimant testified that his salary was set at \$467.50 a week (other dispatchers apparently were making between \$450.00 to \$550.00 a week). Business decisions and pay rates are set by a majority of the three owners, including claimant. All of the other employees to CTI are paid on an hourly basis. Not included in claimant's weekly pay is the use of a new (1998) pick-up truck that is owned by CTI and used by claimant and perhaps others for both claimant's business and personal needs. The other owners do not receive any pay or have the personal use of a CTI vehicle. Carrier filed interrogatories which, in addition to the regular questions, asked claimant to list what activities he was previously doing for the employer that he is no longer able to perform and to "complete and return the attached IRS [Internal Revenue Service] authorization so that Carrier can confirm your [AWW]" (presumably with CTI, since the AWW with employer was stipulated). Claimant (or claimant's attorney, in that claimant denied knowledge of the answer) replied:

I object to this interrogatory and will not permit the inspection and/or copying of the entire income tax forms for the requested years which were filed with the [IRS] because such request is overly broad. Furthermore, this interrogatory constitutes an unwarranted infringement on my right of privacy as guaranteed under the United States and Texas Constitutions.

I will only produce said documents to the Worker's Compensation Commission [Texas Workers' Compensation Commission] for inspection by the hearing officer for a determination on relevancy, if so directed by the Commission.

Additionally, I object to the interrogatory on the ground that it seeks information previously exchanged or readily derived from evidence previously exchanged pursuant to Rule 142.13.

The hearing officer, in his Statement of the Evidence, recites the evidence and testimony in great detail and provides commentary too lengthy to summarize here. The appealed factual findings were:

### FINDINGS OF FACT

4. Claimant's unemployment or underemployment during the filing period for the eighth compensable quarter of [SIBS] was not a direct result of Claimant's impairment.
5. Claimant had returned to work during the filing period for the eighth compensable quarter earning more than 80% of Claimant's pre-injury [AWW].
6. Claimant failed during the filing period for the eighth compensable quarter of [SIBS] to keep good business and tax records, document efforts to attract new business, and provide evidence of good faith efforts to solicit business.
7. Claimant has not in good faith attempted to obtain employment commensurate with Claimant's ability to work during the filing period for the eighth compensable quarter of [SIBS].

Claimant appeals Finding of Fact No. 4, citing Appeals Panel decisions that hold that the direct result may be found if there is a serious injury with lasting effects and that the claimant has an inability to return to his preinjury work. Although claimant cites his injury, that Dr. BO says he "would never improve," that he has a 27% IR and that Dr. BL even says he has a serious injury, all of which meet the direct result test, there is little evidence, other than claimant's testimony, that he could not return to his preinjury job. Claimant's argument is that Dr. BL's FCE "would appear to clearly establish that Claimant would be unable to climb into the cab of a heavy truck, shift gears with his right hand for hours per day, and raise and lower the dollies on a trailer." Very obviously, the hearing officer did not interpret the FCE in that manner. We have frequently noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer commented that claimant's "testimony for the most part was not credible." The FCE could be interpreted differently than the interpretation given by claimant. The degree of control claimant had of CTI was also a matter of the credibility that is given to the claimant's testimony. We will

reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

As noted in claimant's Statement of Employment Status (TWCC-52), he lists his earnings with CTI as being \$467.50 a week. Attached to this TWCC-52 for the eighth quarter are copies of checks and check stubs showing payments of \$476.50 a week. The hearing officer, in his Statement of the Evidence, latches on to this discrepancy to conclude that claimant was getting two checks from CTI per week; one for \$467.50 and one for \$476.50. This point was never raised during the CCH and carrier has appeared to accept a payment of \$467.50 a week. Claimant, in his appeal, asserts that this "discrepancy was merely a simple transposition." Even in its response, carrier does not urge acceptance of the hearing officer's determination that claimant was receiving two weekly checks from CTI.

Consequently, we find that the hearing officer's commentary on this point is not supported by the evidence. However, the hearing officer could, and did, still find that claimant's underemployment was not a direct result of his impairment and that claimant's impairment would not have prevented him from returning to his preinjury employment. What part of the hearing officer's decision was based on claimant's refusal to provide a tax return and failure to detail what portions of his preinjury job claimant could not have done during the filing period is unclear. As we have noted, the hearing officer's finding of a lack of direct result is supported by other evidence. Similarly, while the hearing officer's commentary that claimant was in business for himself and that "it was incumbent upon Claimant to provide good business records, tax records and document efforts to attract new business" does not strictly apply to this case, it was incumbent on claimant to prove, by a preponderance of the evidence, that he was earning less than 80% of his preinjury AWW. In light of the carrier's request for tax records, the claimant's refusal to authorize them and the discrepancy between the \$467.50 figure and the \$476.50 figure, the hearing officer apparently believed that claimant had not met that burden. Although another fact finder may well have reached a different result under the evidence presented, this is not a sound basis on which to substitute our judgment for that of the fact finder on a factual issue. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Although we would disassociate ourselves with some of the hearing officer's commentary as not being supported by the evidence or not applicable to the case at hand, we cannot hold the hearing officer's factual findings and conclusions of law as being so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The decision of a hearing officer can be affirmed on any reasonable theory supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied). In the present case, we find the hearing officer's denial of SIBS for the eighth compensable quarter to be sufficiently supported by the evidence.

Accordingly, the hearing officer's decision and order are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge