

APPEAL NO. 991187

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 11, 1999, a hearing was held. He (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits for the third compensable quarter. Appellant (carrier) asserts that hearing officer erred in finding that claimant's underemployment during the filing period for the third quarter was a direct result of the impairment, saying that the underemployment was the direct result of claimant's failure to prove his citizenship. Claimant's attorney replied that claimant is "reviewing" intensive medical treatment, looked for work during the filing period of the "11th" quarter, and his "employment" was a direct result of his impairment.

DECISION

We affirm.

Claimant worked for (employer), on _____. He had been a truck driver for 20 years. On _____, his right arm was jerked in some manner while working. The parties stipulated that the injury was compensable, that claimant has a 22% impairment rating, that no benefits have been commuted and that the filing period for the third quarter began on November 28, 1998, and ended on February 25, 1999. There was no appeal of the determination that claimant attempted in good faith to find work commensurate with his ability.

The focal part of the hearing from carrier's point of view was that claimant lost a job during the filing period in question for reasons other than the impairment. The Appeal is also brought on that ground.

Claimant was born in (Country) of U.S. parents. He began a job with (employer), at the (Company) on December 16, 1998. He testified that he worked in a warehouse and this employer accommodated his restrictions of a 30-pound lifting limit and no repetitive movement with his hands. Claimant had cervical spine surgery in May 1996, right carpal tunnel surgery in January 1997, and left carpal tunnel surgery in March 1997. His statement, in evidence, indicates that on December 21, 1998, he was told that since he was born in (Country) he had to prove his citizenship. Claimant testified that employer was security conscious because the U.S. government with whom employer contracted was very security conscious in regard to this work. Claimant also said that the last day he worked was December 22, 1998. His statement gives more specific dates, but claimant's testimony was consistent with the statement. For instance, he testified that he was given two and one-half weeks to get a birth certificate. The statement says he was given until January 18, 1999. He obtained the birth certificate which both the statement and his testimony indicate satisfied the personnel manager, but both also indicated that when he took it to the Chief of Security, he was told he needed a statement from Immigration and Naturalization Services (INS) that he was a citizen. Claimant stated that he obtained a form from INS and returned it to INS. He testified he then came to (City) and "got it done in a week" but by then the job

was "gone." His statement indicates that the birth certificate arrived on January 16, 1999, and that the meeting with the personnel manager and the Chief of Security occurred on January 17, 1999; he then called INS on January 18th asking for the forms. They arrived on January 25th, and he mailed them "the following day." On February 16, 1999, he received a response from INS asking him to come to (City) to fill out other forms. His statement indicated that he would be going to (City) on February 24, 1999. He concluded the statement by saying that employer has given the job to someone else. This statement indicates that it was written between February 16th, when he received a response from INS, and February 24th, when "I am traveling to (City)." Neither party developed the evidence to identify the date that employer severed its employment with claimant. As stated, claimant expeditiously took action to get the corroboration (from INS) which the Chief of Security told him was needed on January 17, 1999. From the statement as written, the hearing officer could reasonably infer that after claimant presented his birth certificate within the original time limit, employer extended the original January 18, 1999, deadline, or else the Chief of Security would not have bothered to tell claimant on January 17th what else was needed and claimant would not have responded to that request so expeditiously.

While claimant testified that he did not work after December 22, 1998, he did not testify when he lost the job. Since there is no evidence of the date claimant lost the job, the hearing officer could reasonably infer from the evidence set forth in the preceding paragraph that he lost his job at the time he prepared the statement, which occurred between February 16 and February 24, 1999. As stated, the filing period in question ended on February 25, 1999.

Carrier's appeal talks in terms of the citizenship question being the "reason for his termination from employment," not the reason why he did not work after December 22, 1998, but as shown, the evidence supports that claimant was not terminated until the last week of the filing period.

In addition, Texas Workers' Compensation Commission Appeal No. 990048, decided February 18, 1999, states that the carrier has the burden of proof to show that underemployment was "the" direct result of a disease other than the compensable injury which gave rise to the impairment or "nonwork related conditions." Appeal No. 990048 is not inconsistent with Texas Workers' Compensation Commission Appeal No. 960008, decided February 16, 1996, which said that the "direct result" test is met if the underemployment or unemployment is "a" direct result of the impairment. Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996, said that there were no adjectives such as "primary" grafted onto the requirement that the underemployment be "a" direct result.

Claimant testified that he could not return to truck driving as he had done prior to his accident. A document from his doctor, Dr. S, indicates that claimant is in the "light" duty level of work. This is consistent with claimant's testimony about a lifting limit and restricted use of his hands. With the claimant having sustained serious injury, with lasting effects, causing him to be unable to return to the type work he was doing when injured, the hearing

officer was faced with a factual determination when evidence of the loss of job due to a question of citizenship was raised. The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. He had to determine whether the question of citizenship overrode the continued impaired condition of the claimant so that claimant's underemployment was or was not "a" direct result of the impairment. In considering this question of fact, the hearing officer could consider that carrier has not shown when claimant's employment ceased in attempting to show that the underemployment was "the" direct result of the citizenship question, and could conclude that claimant did not lose employment with employer until the last week of the filing period; the hearing officer could then take into consideration that claimant was employed (albeit without significant wages received) until the last week of the filing period. Under all the facts of the case, we cannot say that the determination of the hearing officer that the claimant's underemployment was "a" direct result of the impairment is against the great weight and preponderance of the evidence.

Finding that the decision and order are 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:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge