APPEAL NO. 000358

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 25, 2000. The hearing officer determined that respondent (claimant) is entitled to lifetime income benefits (LIBS) under Section 408.161(a)(2) based on the total and permanent loss of use of both feet at or above the ankle.

Appellant (carrier) appealed, contending that the medical evidence on total loss of use "was inconclusive" and that claimant's legs "are neurologically and muscularly intact." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

Claimant had been employed as a truck driver. The parties stipulated that claimant sustained a compensable injury on _____, when an 800-pound bundle of steel fell on claimant, crushing his pelvis and causing other injuries. Claimant's treating doctor, Dr. W, testified that claimant has had eight major surgeries and no other surgery was recommended as it would only make claimant worse. What is somewhat unusual in this case is that claimant's legs are not directly affected per se but rather it is the "connection to the rest of the body [that] has been disrupted by the pelvic injury." Dr. W testified that claimant could not "hold a job that required use of his legs." In a report dated July 8, 1999, Dr. W explains that claimant "has loss [sic, lost] the use of his legs due to the pubic bone that is missing which keeps the prosthesis in tact. This causes him to be unable to stand or walk . . . and is permanent."

By letter dated August 4, 1999, the Texas Workers' Compensation Commission (Commission) directed that claimant be examined by Dr. S, its required medical examination (RME) doctor. Dr. S, in a report dated September 5, 1999, was of the opinion that claimant "is permanently disabled at this time and do not feel that he is able to be an ambulator as his pelvis would not support his weight." In response to a Commission inquiry whether claimant possessed "any substantial utility of both of his legs," Dr. S replied by letter dated October 8, 1999:

> The patient no longer possesses a substantial utility of both of his legs because of his floating pelvis fracture and he is nonweightbearing.
>
> The patient's condition is such that he cannot get and keep employment requiring use of both legs because he is wheelchair bound and cannot bear weight on his legs due to his fractured pelvis.

In evidence are several reports from Dr. X, carrier's RME doctor. In a report dated July 21, 1999, Dr. X reviewed claimant's medical history and concluded that further surgery is not indicated, that claimant cannot return "to any type of laboring job," and that perhaps he could "work out of his home in a completely sedentary type position." In a supplemental report dated August 12, 1999, Dr. X stated that claimant "cannot walk (naturally entailing use of the feet) due to the unstable pelvis fracture" but he could "perform a desk-type job in which there is no standing." In answer to the specific question of whether claimant's "legs possess any substantial utility as members of the body as a whole," Dr. X replied on January 24, 2000:

> Due to the diastasis (spreading) of the pelvis, [claimant] is not ambulatory; so, in this sense, he has lost function of his legs. However, I believe he could sit and drive a car using his feet; so, in this instance, he has not lost the use of his legs. So, in summation, I am of the opinion that he can drive, but he cannot bear weight and walk and needs a wheelchair for mobility.

The hearing officer found that the great weight of the credible medical evidence established that claimant's legs no longer possess any substantial utility and concluded that claimant was entitled to LIBS "based on total and permanent loss of both feet at or above the ankle" referencing Section 408.161(a)(2). Carrier appeals, pointing out that Dr. W testified that claimant could stand for "three or four seconds at a time," that claimant's legs "are neurologically and muscularly intact" and that the medical evidence on total loss of use was "inconclusive."

Section 408.161(a)(2) provides, in part, that LIBS are paid until the death of the employee for "loss of both feet at or above the ankle" and Section 408.161(b) provides that for purposes of subsection (a), "the total and permanent loss of use of a body part is the loss of that body part." In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, a case involving bilateral leg paralysis, the Appeals Panel compared Sections 408.161(a) and (b) with the predecessor statutes, took note of the pertinent commentary in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM § 4b.31 at 4-135 footnote 468, and held that "total loss of use" of a member of the body means that such member no longer possesses any substantial utility as a member of the body or the condition of the injured worker is such that the worker cannot get and keep employment requiring the use of such member, the test set forth in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962). *See also* Texas Workers' Compensation Commission Appeal No. 941065, decided September 21, 1994; Texas Workers' Compensation Commission Appeal No. 983000, decided February 3, 1999.

In Seabolt, the Texas Supreme Court considered a workers' compensation case involving an issue over the permanent loss of use of the right hand and, after some discussion of different concepts of the phrase,"total loss of the use of a member," stated that the court was governed by the following proposition or statement of the law:

> A total loss of the use of a member exists whenever by reason of injury, such member no longer possesses any substantial utility as a member of the body, or the condition of the injured member is such that the workman cannot procure and retain employment requiring the use of the member.

In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, the Appeals Panel held that the standard for determining whether an employee is entitled to LIBS under the 1989 Act is the same as it was under the old law. Citing Seabolt, we stated that the test for total loss of use is whether the member possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the employee from getting and keeping employment requiring the use of the member. In Texas Workers' Compensation Commission Appeal No. 952100, decided January 23, 1996, the Appeals Panel noted that the Seabolt test is disjunctive and that an employee need only satisfy one prong of the test to establish entitlement to LIBS. *See also* Appeal No. 941065, *supra*; Texas Workers' Compensation Commission Appeal No. 941190, decided October 17, 1994; and Texas Workers' Compensation Commission Appeal No. 980831, decided June 3, 1998.

Whether an employee suffered a total loss of use of a member is generally a question of fact for the hearing officer to resolve. Appeal No. 980831. In this case, even though claimant's legs "are neurologically and muscularly intact," the hearing officer's finding that the great weight of the medical evidence established that claimant's legs no longer possess any substantial utility is supported by the testimony and reports of Dr. W, and the reports of Dr. S, and are essentially not even disputed by Dr. X. The hearing officer makes further findings that claimant "can not get and keep employment requiring the use of his legs." Those findings are supported by the evidence. We do not find the medical evidence in support of the hearing officer's decision "inconclusive." Further, Dr. X's opinion that claimant could do some type of sedentary activities is largely immaterial as even Dr. X does not suggest that claimant could find any kind of employment requiring the use of his legs. Seabolt, *supra*.

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 for that of the hearing officer.

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge