APPEAL NO. 000705

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 2, 2000. In response to the only issue before her, the hearing officer determined that respondent's (claimant) underemployment was a direct result of his impairment and that claimant was entitled to supplemental income benefits (SIBs) for the fifth compensable quarter. The appellant (carrier) appealed, asserting that claimant's restrictions and impairment do not preclude him from returning to his preinjury job as a heavy equipment operator, operating a bulldozer, and that claimant does not have any restriction from operating "any type of motorized vehicle, including a bulldozer." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant urges affirmance.

DECISION

Affirmed.

The facts are not much in dispute and claimant did not testify at the CCH; however, the transcript of a previous CCH for the fourth compensable quarter (which resulted in Texas Workers' Compensation Commission Appeal No. 992015, decided November 3, 1999 (Unpublished)) is in evidence. Further, Texas Workers' Compensation Commission Appeal No. 991103, decided July 5, 1999, which dealt with this claimant's SIBs for the third quarter also has essentially the same facts. Claimant had been employed as a bulldozer or heavy equipment operator when, on _____, "a rock jumped up" and hit claimant in the left eye, causing a complete loss of sight in that eye. The parties stipulated that claimant sustained a compensable injury; that claimant has a 24% impairment rating (IR); and that the qualifying period for the fifth quarter was from July 4 through October 3, 1999. It is further undisputed that claimant has returned to full-time employment, working 40 to 50 hours a week, as a "roller operator" at a substantially lesser wage than his preinjury average weekly wage (AWW). Claimant testified at the previous hearing that anyone can operate a "roller" because it "just go[es] back and forth compacting soil."

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's AWW as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (2), whether claimant's earnings of less than 80% of his preinjury AWW was as a direct result of his impairment. The hearing officer made a finding that the good faith requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(1) (Rule 130.102(d)(1)) was satisfied when claimant returned to work in a position which was relatively equal to his ability to work and that finding was not appealed.

Dr. M, in a report of January 29, 1997, commented that claimant "is monocular with only the right eye functional. His work should be limited to activities where peripheral vision is not required." A report dated March 26, 1997, from Dr. B, an optometrist, objected to the way claimant was doing his job (exactly what he means is uncertain) and states that claimant's "depth perception must be relearned" and that many patients "drive with one eye and work with little or no difficulty." Dr. J, apparently in a record review, comments that claimant is monocular but he should still be able to drive a car and a bulldozer.

The hearing officer found that claimant's injury had significant lasting effects, with a permanent restriction. Regarding claimant's ability to return to his preinjury job, the hearing officer commented:

> The question then is, was his inability to return to his previous employment a result of his impairment from his injury. The Claimant is currently earning $6.50 an hour driving a roller, which he indicated can be done by anyone since all that is required is forward and backward movement. The duties involved in driving a bulldozer are obviously more difficult since the average hourly wage is $10.00-$11.00. According to Claimant's testimony at the prior [CCH], the duties in managing a bulldozer include driving back and forth, but not necessarily in a straight line, and using the tractor to cut to precise measurements, which the Claimant can't do because of his lack of depth perception. Based on the facts of this case, it is this Hearing Officer's finding the Claimant's underemployment during the filing period for the 5th quarter was a direct result of his impairment.

Carrier's appeal emphasized that he has been released to full duty but has not sought employment as a bulldozer operator and that his impairment would not preclude his operating a bulldozer. Carrier cites Dr. J's opinion (in a record review) that even with monocular vision, claimant is able to drive a car or a bulldozer and that no medical evidence was presented that claimant's underemployment is a direct result of his impairment. All of this evidence was presented to the hearing officer, including the results of a prior CCH involving claimant on substantially the same evidence. Clearly, claimant has some depth perception problems and exactly how they affect his ability to operate a bulldozer was a factual determination for the hearing officer to resolve.

As we have frequently noted, although another fact finder could have drawn different inferences from the same evidence which would support a different result, that does not provide a basis to disturb the decision. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). In this case, different hearing officers have reached different results on substantially the same facts and however inconsistent that may appear, that fact alone does not constitute a basis on which to reverse this decision. We find the hearing officer's inferences to be supported by the evidence and not incorrect as a matter of law.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge