APPEAL NO. 000783

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 22, 2000. (Hearing officer 1) determined that the appellant (claimant) did not have disability from September 7, 1999, through the date of the CCH resulting from the injury he sustained on _____. The claimant appealed, contending that a prior hearing officer had erroneously granted a continuance and allowed the respondent (carrier) to engage in additional discovery and that the decision was otherwise contrary to the law and the evidence. The carrier replied that the decision was correct and should be affirmed.

DECISION

Affirmed.

This case has a tortured procedural history. The claimant sustained a compensable back injury on _____. The carrier paid temporary income benefits (TIBs) from some undisclosed time thereafter through the date of the second CCH on March 22, 2000. A first CCH was held on February 16, 2000, with (Hearing Officer 2) presiding as hearing officer. At this proceeding, the claimant introduced his documentary evidence, consisting of documents involved in the spinal surgery approval process. The spinal surgery was approved, but the claimant has so far declined surgery.[1] At this first CCH, the carrier offered into evidence a surveillance report and two assumed name certificates which named the claimant as proprietor.[2] These documents were not admitted because they were not timely exchanged. The carrier succeeded in introducing into evidence only the job description where the claimant worked when he was injured.

The claimant then announced that he would not testify and rested. The carrier requested to call him as an adverse witness. Hearing Officer 2 sustained the claimant's objection to his own testimony on the grounds that his name had not been exchanged by the carrier as a person with relevant knowledge. At this point, the carrier requested a continuance, which was granted over the objection of the claimant. In granting the continuance, Hearing Officer 2 stated that he had an obligation to develop the record. The carrier assured him that TIBs would not be stopped until the hearing officer finally ruled on the disability issue. The CCH was reset to March 22, 2000, with Hearing Officer 1 presiding. In the interim between the two CCHs, Hearing Officer 1 signed a subpoena ordering the claimant to produce his financial records and the carrier served interrogatories on the claimant specifically directed to the financial aspects of the proprietorship. The claimant refused to comply with either on the

[1]He speculated at the second CCH that he expected to have it done by late summer 2000.

[2]One of these certificates was issued on September 7 and the other on September 8, 1999. This caused the carrier to dispute disability from September 7, 1999, onward.

grounds that he believed the continuance was only to allow the carrier time to organize its case, not for further discovery.

At the second CCH, the claimant reintroduced his evidence from the first CCH. The carrier was again unsuccessful in having admitted the surveillance report and assumed name certificates for the same reason as before. The carrier was able to introduce a copy of an exchange letter, the unanswered interrogatories, and another facsimile to the ombudsman inquiring whether the interrogatories would be answered. The claimant acknowledged at the second CCH that he received the subpoena and interrogatories and commented that the carrier already had the information sought. At that point, Hearing Officer 1 commented that the claimant "seems to be trying to hide something." She immediately swore him in and asked him about his proprietorship. The claimant said it was an "investment business" and that he never gave information about its earnings to the carrier. Hearing Officer 1 said that she would then limit his testimony to matters not sought in the interrogatories.

The ombudsman then made an opening statement and announced the claimant would not testify. The carrier had nothing more to offer. After the ombudsman made his closing statement, the claimant announced he would testify because Hearing Officer 1 earlier commented he was trying to hide something. The claimant said he earned no money and had no profits in his business and could not return to his former work because no light duty was available. He did not testify to what his work restrictions were. He described his proprietorship as an auto repair facility with four employees; he did not recall when he last saw a doctor; admitted he did not have the surgery yet; and said the money to invest in the business came from an inheritance.

In her decision and order, Hearing Officer 1 commented that the claimant did not provide any records "explaining his wages, if any." She also observed that while the business may not be generating a profit, she still had no way of knowing if he earned any wages. She then found that he did not have disability from September 7, 1999, through the date of the CCH. In his appeal, the claimant argued that Hearing Officer 2 abused his discretion in granting a continuance; that Hearing Officer 1 erred in issuing the subpoena; that Hearing Officer 1 erred in not leaving the record open or setting a date for him to supply the information requested in the subpoena and interrogatories; and that the proprietorship was an investment with which he did not have an employment relationship.

We observe, first, that Hearing Officer 2 erred in refusing to allow the carrier to call the claimant as a witness on the grounds that his name had not been exchanged by the carrier. We have held that the claimant is always presumed to be a person with knowledge of the relevant facts and that the claimant need not exchange his or her name as a condition to calling him or herself as a witness. Texas Workers' Compensation Commission Appeal No. 91049, decided November 8, 1991; Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992. This principle applies equally when a claimant declines to testify and is called by the carrier as an adverse witness. Under the circumstances, a carrier need not have previously exchanged the claimant's name. Had the claimant testified at the first CCH, much of the later confusion may have been avoided. Second, we believe it

unfortunate that the parties failed to focus on the precise statutory definition of disability, that is, "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Third, the claimant had the burden of proving disability for any period claimed. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994.

Collateral source income, such as from a passive investment, generally has little or no impact on the ability to earn the preinjury wage and is not relevant to a disability question. Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. In this case, the claimant described his business as an investment even though it was a proprietorship. The hearing officer could have inferred from the organization of the business that it involved some personal activity or labor on the part of the claimant, and was not merely a passive investment vehicle. The proper framework for analysis in this case was not in terms of investment income, but whether the claimant was engaged in a self-employment activity and whether the reasons for not earning the preinjury wage was his compensable injury or the nature of the business. *See* Texas Workers' Compensation Commission Appeal No. 982415, decided November 30, 1998. In such an analysis, evidence about what the claimant actually did to conduct and develop the business became as critical as financial data about the business. For his own reasons and despite the fact that he had the burden of proof on the issue of disability, claimant declined to present any such evidence. His unwillingness to share this information with the carrier under these circumstances was at his own risk of not prevailing on the merits, which is precisely what happened in this case. 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 find the evidence sufficient to support the determination of the hearing officer that the claimant failed to prove disability from September 7, 1999, through the CCH, and we affirm that determination.

The claimant also appeals Hearing Officer 2's granting of a continuance of the original CCH, contending that it was an abuse of discretion to allow the carrier more time to prepare its case. As noted above, the immediate reason for the request was the hearing officer's erroneous refusal to permit the carrier to call the claimant as a witness. The carrier's representative also asserted that the case file had gotten lost or delayed while being transferred from the former carrier who was taken over by the current carrier and she could not establish what had taken place by way of discovery. The hearing officer justified this continuance on his responsibility to insure an adequate development of the record. *See* Section 410.163(b) which provides that the hearing officer "shall ensure . . . the full development of facts required for the determinations to be made," and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 142.2(10) (Rule 142.2(10)), which authorizes the hearing officer to "request additional evidence." Given the posture of the case at the time of the first CCH with very little evidence adduced by either party, the hearing officer agreed that a continuance was appropriate because additional discovery was needed. In doing so, he clarified that the

claimant was at the time still receiving TIBs and the carrier represented that TIBs would not be terminated while the continuance was in effect. Under these circumstances, he found no harm to the claimant in granting the continuance.

We review action on requests for continuance under an abuse of discretion standard; that is, whether the decision was reached without regard to controlling rules or precedent. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 952131, decided January 30, 1996. We question whether problems in the file transfer can, in themselves, justify a last-minute request for continuance, when the problems should have been obvious earlier. However, we are unwilling to find an abuse of discretion in granting the continuance in this case because the combination of the claimant's tactics in presenting, at best, a minimal case, even though he had the burden of proof, and the carrier's inability to account for what had happened before in the resolution of this dispute left the hearing officer with little choice if a decision were to be reached on the merits.

Interestingly, despite the grant of a continuance and the issuance of a subpoena to the claimant and interrogatories, the evidence available to Hearing Officer 1 was essentially the same as that presented to Hearing Officer 2. This happened largely because the claimant refused to answer the interrogatories or comply with the subpoena on the mistaken grounds that they violated the terms of the continuance. The carrier was again unsuccessful in obtaining admission of the same evidence it failed to have admitted at the first hearing and the additional evidence it submitted was essentially non-probative. The claimant, in his appeal, expressed a willingness to finally comply with the subpoena and to answer the interrogatories now that he realizes that the continuance was not contingent on no further discovery and argued he should have been given more time to comply. Such cooperation comes too late.[3] Again, we stress that he had the burden of proof on the disputed issue and acted at his own peril in presenting a minimal case. For the claimant to prevail, it was not so much a question of what the carrier did or did not know, but what evidence the claimant was willing to present. Under these circumstances, his resistance to the subpoena and interrogatories seemed largely pointless.

[3]We also believe the claimant's reliance on technical provisions of the rules which deal with delivery of the subpoena and certification of delivery is misplaced in light of his acknowledgment that he received the subpoena and elected to ignore it.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge