APPEAL NO. 002147

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 August 8, 2000. With regard to the issues before him, the hearing officer determined that the appellant's (claimant) average weekly wage (AWW) was $1,070.00 and that the claimant had not sustained disability from _____, through _____.

The claimant appealed on a number of grounds, including that a report of her treating doctor supported disability; contended that financial documents were "proof of income"; objected to the fact that the hearing officer relied "on an unaudited transcribed statement that was taken when [claimant] was incoherent"; and disputed the description of the claimant's job duties. The claimant also appeals the fact that the hearing officer seemed to indicate that the CCH was left open for additional argument but was apparently closed without further comment by the parties, thereby denying the claimant a closing argument. The claimant offers additional information in her appeal, not presented at the CCH. We will disregard any information which was available at the CCH but is presented for the first time on appeal. The claimant requests that we reverse the hearing officer's decision on disability and order the respondent (carrier) to pay temporary income benefits (TIBs) "of $523.00 per week for a total of 25 weeks." (Emphasis in the original.) The claimant also requests that the carrier be ordered to pay the difference between $523.00 a week and the $315.00 per week that the carrier paid for the seven weeks "between 6-3-99 and 7-16-99." The carrier responds to most of the issues raised by the claimant and urges affirmance.

DECISION

Affirmed.

As the parties noted, this case is unusual in that the claimant is both the injured employee and the employer. The claimant is the owner and apparently sole proprietor of (employer), a carpeting and floor covering business. The claimant's duties as the owner include soliciting business, formulating proposals, handling mail, budgeting, working with blueprints, and other office functions. The actual work of laying the flooring is contracted out, with the claimant providing overall supervision. The parties stipulated that the claimant sustained a compensable (right wrist and upper extremity) injury on _____ (pulling baseboards off a wall).

The claimant apparently was initially treated at the (clinic) which, in a report dated December 3, 1998, diagnosed a right wrist sprain/strain and bilateral elbow tendinitis. The claimant was released to return to "limited type of work." S.O.A.P. notes indicate conservative treatment of the right wrist and bicep. X-rays of the right wrist were normal. Subsequent off-work slips limited the claimant to light duty with no lifting over five pounds, no pushing/pulling, and limited use of the right arm. A physical therapy (PT) program was begun according to a note dated December 28, 1998. Limited duty with PT was continued

as indicated in notes dated January 26, 1999, and February 4, 1999. In an orthopedic evaluation on January 13, 1999, the claimant was diagnosed with right wrist strain, "[r]ight wrist joint traumatic capsulitis and fasciitis" and right wrist "degenerative joint disease (osteoarthritis)." A follow-up report of February 10, 1999, had an impression of "DeQuervain's disease of the right thumb secondary to trauma."

The claimant was subsequently sent to Dr. M, the carrier's required medical examination doctor, who, in a report dated March 17, 1999, had an impression of "traumatic DeQuervain syndrome with tenosynovitis." Dr. M questioned the PT that the claimant had been receiving, recommended further testing and suggested surgery might be helpful. Dr. M concluded: "[claimant] is in fact fully employed at this time and there is no question about lost time at this moment." Dr. M became the claimant's treating doctor and performed surgery in the form of a "DeQuervain's release" on May 27, 1999. The carrier has paid income benefits from May 27, 1999, to July 18, 1999, when the claimant returned to work. Dr. M, in a "clarification" letter dated February 29, 2000, addressed to the claimant, stated:

> On the basis of the notes taken during my [original March 1999] interview, it was my understanding that you were working in some capacity. However, I will readily admit that I did not ask you if you were working in your regular capacity. If indeed there was a difference in the type of employment you were doing at that time and subsequently lost wages as a result of change in employment, I had simply failed to elicit that information from you.
>
> It is my opinion that the condition you had would prevent you from doing anything that would require repetitive heavy activity with your hand, such as laying flooring . . . .
>
> I would, therefore, say that from the history I obtained at that point you were not physically capable of either installing or uninstalling carpeting. I feel that you were physically capable of clerical or sedentary type activities only without repetitive use of your involved right wrist.

There was substantial testimony and documentary evidence regarding the claimant's and the employer's financial status. The matter was further confused by the fact that the claimant had only one bank account out of which she paid business expenses, personal expenses and paid herself cash. Also, a key point in the claimant's appeal is a 32-page transcribed statement the claimant gave to the carrier's adjuster on June 9, 1999. (The claimant testified that the statement was taken the day after surgery, May 28, 1999, while she was "heavily medicated"; however, the statement indicates it was taken at 12:40 p.m. on June 9, 1999.)

Without going through all the exhibits and reciting the claimant's testimony regarding her income, or lack thereof, we will note only the principal figures and how they were calculated. The claimant asserts her preinjury AWW is $1,930.00. This is based on a

"Statement of Income" for the "Periods August, 98 - November, 98" showing a "Net Income" of $25,080.50 by the employer, divided by 13. Similarly, the claimant alleges a negative postinjury AWW based on a "Statement of Income for the Year ended June, 99" (testimony was that that meant the six months of January through June 1999), showing a "Net Loss" of $7,240.53. The claimant explained that she continued to draw living expenses by using credit cards and from loans from "investors" which would have to be repaid. In evidence as Hearing Officer's Exhibit No. 4 is the claimant's 1999 U.S. Income Tax Return showing gross income of $17,958.00.

The hearing officer found that the claimant's AWW was $1,070.00. This is based on Claimant's Exhibit No. 9, the Employer's Wage Statement (TWCC-3) which shows the claimant's gross weekly pay as $900.00, plus $40.00 a week for health insurance, $30.00 a week for "laundry/cleaning" and $100.00 a week for "vehicle/fuel allowance."

The hearing officer, in his Statement of the Evidence and Discussion, commented regarding the disability issue:

> After reviewing all of the evidence, especially the Claimant's recorded statement taken on or about June 9, 1999, (Carrier's Exhibit B), I find that the Claimant did not sustain disability for the period requested. Her job duties as the owner of the business were soliciting business, formulating bids, handling mail, selling, etc. Apparently, the injury she sustained on December 3 [sic, _____], 1998, while pulling some material off a wall, is an isolated incident. Based on my review of the medical documents, as well as reviewing the Claimant's actual job duties, I find that she did not sustain disability.

The claimant points to Dr. M's "clarification" letter of February 29, 2000, as establishing disability. Disability is defined as the "inability because of a compensable injury to obtain and retain employment" at the preinjury wage. Section 401.011(16). The evidence on that point was certainly conflicting and, even if the hearing officer accepted Dr. M's clarification letter written almost a year after his initial examination as authoritative, Dr. M only states that the claimant was unable to "lay flooring" or either install or uninstall carpeting. The uncontradicted evidence was that those jobs were contracted out and the only function the claimant would have at a job site was purely supervisory.

The claimant also contends that the hearing officer's finding that the claimant's "inability to obtain and retain employment" was due to something other than the compensable injury was "offensive and insulting," citing that the claimant's "income has never been less than $40,000.00 a year." Whatever the reason for the claimant's decreased earnings from $40,000.00 to $18,000.00 for 1999, the hearing officer made a determination that the decrease was due to something other than the claimant's compensable injury. That was a factual matter for the hearing officer to resolve. 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.

The claimant objected on appeal to the 32-page "unaudited transcribed statement"; however, that exhibit was admitted without objection at the CCH. Although the claimant, at the CCH and on appeal, asserts that the statement was taken while the claimant "was incoherent," the statement, taken on June 9, 1999, does not reflect that to be the case. In any event, that was a matter for the hearing officer, as the sole judge of the weight and credibility of the evidence, to resolve. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The claimant also contends that there was additional information to be presented regarding her business but that she was precluded from giving this testimony. The claimant testified at the CCH and was in no way restricted from the information that she gave. It is true that the hearing ended quite abruptly, with the hearing officer asking for additional information and saying that he would be back in two weeks to "wrap up" the hearing when, in fact, apparently, no additional proceeding was held. At that time, both parties had presented their evidence and all that was left was closing argument. We note that closing argument is not evidence but only sums up the evidence that was in front of the hearing officer. While the hearing officer should have allowed the parties an opportunity to sum up their case, emphasizing what they considered important points, no new evidence could have been submitted and we do not consider the failure of the hearing officer not to take oral or written argument at this time reversible error.

Last, the issue of whether the claimant is entitled to additional TIBs for the period of time that the carrier paid disability based on a higher AWW was not an issue before the hearing officer. We affirm the hearing officer's determination on the AWW issue and the parties may either resolve any differences or may request a benefit review conference to resolve the issue.

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:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge