

APPEAL NO. 002618

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 October 20, 2000. The hearing officer determined that respondent (claimant) had disability from December 14, 1999, to June 8, 2000, and from July 9, 2000, through the date of the hearing. The hearing officer also determined that appellant (carrier) is not entitled to recoup any of the temporary income benefits (TIBs) it paid to claimant because there was no overpayment of TIBs. Carrier appealed these determinations on sufficiency grounds. The file does not contain a response from claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant had disability from December 14, 1999, to June 8, 2000, and from July 9, 2000, through the date of the hearing. Carrier asserts that: (1) claimant's doctors took him completely off work, but he was still able to do some work; (2) claimant was videotaped trimming trees on his second job, contradicting the disability claim; and (3) claimant's doctors should have been made aware of the videotape and claimant's true work abilities.

The applicable law and our standard of review are discussed in Texas Workers' Compensation Commission Appeal No. 001790, decided September 15, 2000. There was evidence in the record which supports the hearing officer's disability determination. Claimant testified that he was able to perform self-employment, tree-trimming duties at his regular concurrent employment even though he could not do the heavy work involved in his employment with (employer). There was evidence that the work with employer involved repetitive heavy lifting of over 50 pounds, but that claimant's heavy tree-trimming work was done by machines and claimant's employees'.

We have reviewed the videotape of claimant performing tree-clearing duties, and we conclude that the hearing officer could find that the work did not involve heavy lifting or strenuous labor. Claimant said he had sought to return to light duty for employer, but that none was available. Dr. L, claimant's surgeon, noted in August 2000 that claimant was "now" able to do light-duty work; that he could not lift over 50 pounds or lift overhead; that claimant was "unable to work from 12/14/99 to 8/15/00 due to a rotator cuff tear l. shoulder"; and that "light duty was unavailable." Medical records indicate that Dr. WI, who claimant described as the "company doctor," also took claimant off work. Claimant said Dr. WI told him that since there was no light duty available, claimant was on "no-work" status. Claimant underwent rotator cuff repair surgery in June 2000. After reviewing the record, including the videotape evidence, we conclude that the hearing officer's disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 981568, decided August 26, 1998; Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Carrier contends that the hearing officer erred in denying a request for a deposition of written questions. Carrier sought to ask Dr. WH disability-related questions regarding claimant's videotaped activities. However, Dr. WH's reports were written to carrier and he indicated that carrier asked him to write his report. If carrier wanted more information from its own reviewing doctor, it could have sent the videotapes and asked him for another report without seeking a deposition on written questions. We conclude that there was no abuse of discretion and also that carrier has not established that any possible error constituted reversible error.

Carrier contends the hearing officer erred in excluding its exhibits which show a criminal indictment of claimant and which it sought to offer regarding credibility. Carrier stated several times on the record what the indictment pertained to. The hearing officer noted that carrier did not have evidence of a conviction and that there was nothing to show that claimant was in jail during the period of claimed disability. We perceive no abuse of discretion. See Texas Workers' Compensation Commission Appeal No. 980686, decided May 21, 1998.

Carrier contends the hearing officer erred in determining that carrier is not entitled to recoup any of the TIBs it paid to claimant because there was no overpayment of TIBS. Carrier sought to establish that claimant continued with his concurrent self-employment during the claimed period of disability, that he made more money with his concurrent employment during that period because he was not working for employer, and that it was entitled to an offset against TIBs for claimant's earnings during that period. However, the evidence supported a determination that carrier did not establish that claimant made more money from self-employment during the period he was not working for employer. See Texas Workers' Compensation Commission Appeal No. 990827, decided May 19, 1999. We conclude that the hearing officer's determination in this regard is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge