APPEAL NO. 020505
FILED APRIL 15, 2002

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 February 13, 2002. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third and fourth quarters (July 27, 2001, through January 24, 2002). The claimant appeals, as will be set forth below. The respondent (carrier) replies, urging affirmance.

DECISION

Affirmed.

PRELIMINARY MATTERS

The claimant asserts that he was denied witnesses and was not allowed to question anyone in his defense. Prior to the hearing, the claimant requested that 10 named individuals (in addition to himself) be subpoenaed as witnesses at the CCH. The request for subpoenas for the 10 individuals was denied, on the basis that there was no good cause for the subpoenas. The claimant moved for reconsideration of the denied subpoena request at the hearing. The hearing officer questioned the claimant concerning what, if anything, the requested witnesses could tell her about the two issues in the case, but the claimant did not provide any such information, and the hearing officer again denied the request for subpoenas. Rulings on motions are within the discretion of the hearing officer and will be overturned only for an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 91041, decided December 17, 1991. Neither the first request nor the request for reconsideration made on the record contained much in the way of justification for the issuance of subpoenas. The sparse assertions of what the witnesses could talk about related to delays in disposition of the case, rather than to issues relating to SIBs entitlement. We discern no error in the hearing officer's ruling.

During the course of the hearing in this case, the claimant presented his exhibits, then rested his case on the documentary evidence, without presenting any testimony. The carrier then called the claimant as a witness. The claimant objected to being called as a witness, as he had not been named as a witness by the carrier. He stated that he wanted to call the carrier's attorneys, and was told he had to list them as witnesses, and subpoena them, otherwise they could not be called. The hearing officer initially agreed with the claimant's position, but during a recess contacted someone at the Texas Workers' Compensation Commission (Commission) Central Office, and learned that the carrier is not required to designate the claimant as a witness before he can be called as a witness. She then retracted her earlier ruling and permitted the carrier to question the claimant. The claimant objected at the CCH and again on appeal. The hearing officer correctly decided this issue. In Texas Workers' Compensation Commission Appeal No. 000783, decided May 22, 2000, we said:

> 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.

We adhere to our previous decision. The hearing officer did not err in requiring the claimant to testify.

The claimant's appeal contains many irrelevant matters, as well as personal attacks on the hearing officer and other named individuals. We will only comment on those matters which have relevance to this proceeding. The claimant alleges it was improper for the hearing officer to contact someone during the hearing. Under the circumstances of this case, we disagree. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.3(c) (Rule 142.3(c)) permits hearing officers to communicate with other Commission employees. Although the name of the individual contacted is not clear on the audiotape, the context of the discussion is that the hearing officer contacted someone at the Central Office who was knowledgeable about the legal question of whether the claimant could be called as a witness by the carrier. The information was on a minor procedural point, it was accurate, and it was authorized under Rule 142.3(c). We discern no prejudice or harm to the claimant from the hearing officer's action.

APPEALED ISSUES

In his appeal, the claimant asserts: (1) that he is participating in a full-time vocational rehabilitation program with the Texas Rehabilitation Commission (TRC); (2) that he works everyday in pursuit of employment under the TRC program; (3) that he has always made a complete and good faith effort to return to employment; and (4) that he continues to be denied needed medical treatment. As to this last point, denial of needed medical treatment is not a proper issue for the Appeals Panel. Medical treatment issues are within the purview of the Medical Review Division.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Rule 130.102. Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater and who has not commuted any impairment income benefits is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work. At issue in this case is both the direct result and the good faith effort requirements. The burden of proof is on the

claimant.

The claimant appealed the adverse finding on the direct result criterion for SIBs entitlement. The hearing officer made the finding of fact that the claimant's underemployment during the relevant qualifying periods (April 14 through October 12, 2001) was not a direct result of the impairment from his compensable injury. In Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995, we stated that "[w]e have held that a finding of 'direct result' is sufficiently supported by evidence that a claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury." Some evidence bearing on the direct result criterion was presented through the testimony of the claimant in the instant case. He testified that he has a 26% IR; that he has had spinal surgery; that he continues to have pain in his back and ankles; that he has some (unspecified) restrictions due to his injuries; that he faces possible further surgery in the Fall; that he has been seeking treatment through the Veteran's Administration, but his most recent appointment was canceled due to limited doctor availability; that he used to work construction, but cannot do so anymore because of his injuries; and that he would still be doing construction if it were not for the injuries that he sustained. Another aspect of "direct result" is whether the claimant has earned less than 80% of his AWW during the qualifying periods. The hearing officer discusses some of the problems and confusion surrounding the accuracy of the claimant's self-employment financial records, and her conclusion that the claimant has failed to meet his burden of proof regarding the amounts earned during the qualifying periods is supported by the evidence. Whether a claimant has been unemployed or underemployed as a direct result of the impairment from the compensable injury is generally a fact issue for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 950819, decided July 6, 1995. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The record in this case presented conflicting evidence for the hearing officer to resolve. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The next appealed issue relates to the good cause criterion and the claimant's participation in vocational rehabilitation through the TRC. The hearing officer found that the claimant "did not participate in a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period for either of the quarters in question." In her discussion of the claimant's participation in the TRC program, the hearing officer states the following:

> The Claimant provided documentation from the [TRC] in order to support his claim of participation in a full time vocational rehabilitation program. The documentation contained an amended individualized plan for employment. The plan indicated the Claimant was to purchase vocational certification for training in business management between 4/11/01 and 5/31/03[1]. The Claimant provided certificates of completion for two courses taken at Austin Community College [ACC]. The course and completion dates were International Trade Regulation (October 16, 2001) and Introduction to Electronic Spreadsheets (Excel Introduction) (October 25, 2001). While both courses were completed outside of the 4th quarter qualifying period, the Claimant testified he underwent the training for the courses in September. The certificates on their face stated the Claimant attended 7 and 9 hours of training respectively. According to the Claimant's testimony he took the courses over a period of time, indicating to this Hearing Officer that he did not attend a full time program. Therefore, the Claimant has failed to prove by a preponderance of the evidence participation in a full time vocational rehabilitation program sponsored by the [TRC].

From this summary of the evidence, we conclude that the hearing officer has not correctly applied our decision in Texas Workers' Compensation Commission Appeal No. 010483-S, decided April 20, 2001. As we said in that case:

> Rule 130.101(8) defines the phrase "full time vocational rehabilitation program" as follows:
>
> > Any program, provided by the [TRC] . . . , for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. A vocational rehabilitation plan includes, at a minimum, an employment goal, any intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee's responsibilities for the successful completion of the plan.
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[1] The hearing officer has misstated the evidence on this point. The claimant's Individualized Plan for Employment (IPE) provides: From: 4/11/2001 To: 5/31/2003, the service of "Purchase vocational certification for training in [Business Management], pay up to $3,000.00" would be provided by ACC, with the method (by which it was to be provided) listed as "Purchased." Clearly, TRC was signing up to "pay up to $3,000.00" as part of the claimant's IPE. The claimant was not required to pay for the training he was going to get through TRC. The claimant also testified that the TRC had previously paid $3,000.00 for his training on computers, and that TRC had agreed to another $3,000.00 under this amended IPE.

> To determine what programs are to be considered full-time vocational rehabilitation programs, we have previously turned to the preamble and comments to Rule 130.102(d)(2). As we noted in Texas Workers' Compensation Commission Appeal No. 000001, decided February 16, 2000, the preamble to Rule 130.102(d)(2) states that <u>any</u> program provided by the TRC should be considered a full-time program. The preamble further states that "[t]his concept precludes an insurance carrier from requiring an injured employee to participate in a vocational rehabilitation program sponsored by the TRC . . . and then expect the injured employee to continue to seek employment commensurate with the injured employee's ability over and above the rehabilitation plan requirements; seeking employment may be a part of the rehabilitation program." In this instance, the evidence, and more specifically, the IPE, the TRC letter, and the claimant's testimony, clearly establish that the claimant was enrolled in a vocational rehabilitation program sponsored by the TRC and, based upon the unambiguous language in the preamble, that program was to be considered a full-time program. The hearing officer erred in determining that the claimant's program was not a full-time program, based upon her apparent disagreement with the time table set by the TRC for the claimant's progression through vocational rehabilitation.

We believe that the evidence is sufficient to show that the claimant was enrolled in a full-time vocational rehabilitation program, and that the hearing officer erred in determining that he was not participating in a full-time program. However, the claimant must also prove that he <u>satisfactorily participated</u> in the program, and whether he has done so is a question of fact for the hearing officer to resolve. We provided extensive guidance in Appeal No. 010483-S, *supra*, and subsequent cases, including Texas Workers' Compensation Commission Appeal No. 010952-S, decided June 20, 2001, and Texas Workers' Compensation Commission Appeal No. 011536-S, decided August 28, 2001, on how claimants can meet their burden of showing satisfactory participation. The strongest evidence of satisfactory participation would be documentation from the TRC. In Appeal No. 010952-S, *supra*, we cautioned that, in the absence of documentation that the claimant is satisfactorily participating in a full-time vocational rehabilitation program, the fact finder could "well discount uncorroborated testimony of TRC sponsorship." Even though the claimant has presented evidence of enrollment in a TRC program, and testimony concerning what he had done as part of the program, his testimony was largely uncorroborated, leaving the hearing officer with no evidence which she found to be credible from which she could determine that he was satisfactorily participating in the TRC program. In sum, we cannot say that the claimant failed to meet his burden of proof because of lack of effort, but we can say that the hearing officer could determine there was a lack of adequate and persuasive documentation of satisfactory participation in the TRC program. The hearing officer's determination that the claimant did not meet his burden is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. <u>Cain v. Bain</u>, 709 S.W.2d 175, 176 (Tex. 1986).

Finally, with respect to the good cause criterion, the claimant presented evidence that he is self-employed. Based on the facts in evidence, the hearing officer determined that the claimant's self-employment did not amount to a return to work in a position that is relatively equal to his ability to work, and that the claimant did not make a good faith effort to seek employment during the qualifying periods. 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 or unjust. Cain, *supra*; 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 witness and the weight of the evidence for that of the hearing officer.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **SAFECO INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEON CROCKETT
1600 NORTH COLLINS BLVD., SUITE 300
RICHARDSON, TEXAS 75080.

Michael B. McShane
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

Terri Kay Oliver
Appeals Judge