APPEAL NO. 980141
FILED MARCH 10, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE § ANN. § 401.001 *et seq*. (1989 Act). On December 30, 1997, a contested case hearing was held. He (hearing officer) determined that appellant (claimant) was not entitled to supplemental income benefits for the first compensable quarter. Claimant asserts that his doctor, (Dr. S) stated he was unable to work and he could not drive to be retrained or to seek work. Respondent (self-insured) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for. (employer) in _____ when he was injured. While claimant did not describe how his injury occurred, the designated doctor's report provided in September 1995 does state that claimant "was assualted by several assailants while driving his truck." The parties stipulated that claimant was compensably injured with vestibular, spinal, and head injuries, that his impairment rating was 42%, that no benefits were commuted, that the filing period for the first quarter ran from June 26 to September 23, 1997, and that claimant did not try to find a job during that time.

Claimant testified that he has not been released to work by his doctor. He stated that he cannot work, referring to his migraine headaches and lack of memory. He also discussed the revocation of his driver's license that occurred after one or more mishaps while driving which could have resulted from blackouts. Claimant also said that while he contacted the Texas Rehabilitation Commission (TRC) and "followed through" with that agency, he did not enroll in a program because of his inability to drive. He agreed that his last blackout was in January 1997 and that at the beginning of October 1997, just after the end of the filing period, when he was taken to a hospital, it was because he was hit in the head by a baseball, hit on a line drive, which he had just pitched to the batter.

The medical evidence provided that indicates claimant cannot work is contained in a letter, "To Whom It May Concern" from Dr. S dated December 16, 1997, which says:

> [Claimant] has been under my care for treatment of his closed head injury since August 31, 1994. Because of his episodes of loss of consciousness, dizziness, and headaches, I believe that he was unable to work from June 1, through September 30, 1997.

The carrier introduced Dr. S's progress notes which show treatment several times a month, monthly, and approximately every other month. The notes indicate that claimant has been conscientiously and professionally followed by Dr. S, with careful use of prescription medication. While Dr. S's December 1997 letter was labeled as "conclusory"

by the self-insured, it does state a basis why claimant was said to be unable to work, *i.e*., loss of consciousness, dizziness, and headaches. The loss of consciousness especially could be a valid basis for a determination that a person could not do any work, but in this instance, the claimant testified that he had had no such event since January 1997, at least five months prior to the beginning of the filing period.

Dr. S's progress notes are anything but conclusory, providing details as to various plans of treatment and stating reasons when modification was necessary. Dr. S in January 1995 said that claimant was unable to work. In May 1996 Dr. S said claimant reported a blackout in (injury date 2) in which he had a car accident; Dr. S also noted approval for his referral of claimant to a psychiatrist, (Dr. T). On October 4, 1996, claimant was admitted to a hospital with impaired memory and his car "scratched up" after he had left his home to make some deliveries. Dr. S on October 15, 1996, mentions "restrictions" on claimant's driving and says retraining with TRC will be difficult, but adds, "he is certainly capable of performing some type of work, if he can be retrained, although I believe he will have restrictions on heights, dangerous or moving machinery and driving."

Dr. T saw claimant on August 14th and October 15, 1996. He questioned the October 4, 1996, account of events. Dr. T referred to an underlying personality disorder and questioned whether there was malingering; he added that there was "no reason why this gentleman should be disabled from a psychiatric or psychological standpoint."

On January 24, 1997, there was an episode of unconsciousness that resulted in hospitalization, with Dr. S on February 5th, noting that he told claimant that he had "no explanation for his episodes of altered consciousness other than that they are on an emotional basis." Then on February 10th, Dr. S states that he learned that the day before the unconsciousness, claimant had learned of an unrelated, highly stressful future event that could affect him.

After the last episode of unconsciousness and much nearer to the beginning of the filing period in question, Dr. S on April 22, 1997, recorded that he would like for claimant to work with TRC to "find a job" and noted a possible earlier return of claimant's driver's license. He then said, "I think [claimant] needs to get in a training program and get a job." Near to the end of the filing period, on September 16, 1997, Dr. S said in a letter that he was not "optimistic that this gentleman will be able to find a job or hold a job."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could question the basis for Dr. S's statement in December 1997 that claimant was unable to work during the filing period when it referred in part to loss of consciousness but claimant said no episode had occurred since January and Dr. S had also provided other opinions since the January episode. Even his September 1997 statement does not rule out work, but expresses the doctor's doubt that claimant will be hired, or if hired, will remain in the job for a period of time. The hearing officer may certainly give weight to Dr. S's other comments, such as the one in April 1997, after the last unconscious episode, in which he thought that claimant needed to get a job, and the

hearing officer could consider that the context in which that point was made would indicate that Dr. S was not just saying that, while claimant would benefit from work, he was medically unable to do any work of any type. The April 1997 statement is also consistent with Dr. S's October 1996 comment that claimant was able to do some type of work. The hearing officer could even consider that Dr. S was attempting to assist claimant by providing the December 1997 opinion and could conclude further that Dr. S's observations and opinions made at the time of various examinations/adjustments of treatment of claimant should be given more weight than the December 1997 opinion. The evidence sufficiently supports the finding of fact that claimant had some ability to work during the filing period.

Claimant acknowledged that although he had lost his driver's license, he had repeatedly driven in the small town in which he lived, (city 1), (state 1), but acknowledged that he never sought work there.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge