APPEAL NOS. 001674
AND 001675

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 June 22, 2000. With regard to the issues before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits for the sixth and seventh quarters. The appellant (carrier) appeals, contending that the claimant has returned to essentially his preinjury employment and that the claimant's underemployment is due to his own self-limiting efforts or the nonavailability of work and, therefore, the claimant's underemployment is not a direct result of his impairment. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds, urging affirmance.

DECISION

Affirmed.

The CCH for the sixth quarter was originally set for May 24, 2000; however, due to a misunderstanding, the claimant failed to appear. The CCH for the seventh quarter was set for June 22, 2000, at which time the claimant explained the reason for his absence on May 24, 2000. The hearing officer found good cause for the claimant's failure to appear and that finding has not been appealed. Both the sixth and seventh quarters were heard on their merits on June 22, 2000, and although the hearing officer wrote separate decisions, we consider both appeals in one opinion.

As may be obvious, this case has been contested on basically the same grounds from the second through the seventh compensable quarters. The carrier submits transcripts from the second and third quarters in its exhibits. All of those cases were appealed and have resulted in various Appeals Panel decisions, the most recent prior to the case under consideration here being Texas Workers' Compensation Commission Appeal No. 000705, decided May 12, 2000. The background facts and jurisdictional elements were recited in Appeal No. 000705, which also cited some of the other Appeals Panel decisions involved in prior quarters, and will not be repeated.

Basically, the claimant had been a bulldozer operator who suffered a compensable injury on _____, when he was struck in the left eye by a rock, causing him to have a complete loss of sight in that eye. The claimant returned to work for another construction company (C Company) (apparently at least partially because the employer is no longer working in the area) as a roller operator. The claimant's preinjury wage was $10.00 an hour and during the fifth quarter, as a roller operator, the claimant was earning $6.50 an hour. Since that time, the claimant has been hired by C Company as a bulldozer operator, first earning $7.00 an hour and then getting an increase to $8.00 an hour. The claimant, during the seventh compensable quarter, was still earning less than 80% of his preinjury

wage because he had been working 59 plus hours a week for the employer while he only works slightly over 40 hours a week with C Company.

The claimant testified that his preinjury job was as a "finish" bulldozer operator, finishing "blue tops" which required him to handle a large bulldozer blade "in order to cut one or two inches" and with the loss of his left eye he no longer has the depth perception to do that kind of work. The claimant's present bulldozer work consists of clearing brush. The stipulated dates of the qualifying quarter began on October 2, 1999, for the sixth quarter and ended on April 2, 2000, for the seventh quarter. The hearing officer, in her Statement of the Evidence, summarizes the testimony, including the dates of the claimant's pay raises and the carrier's contentions, and comments:

> The Claimant testified that before his injury he was working as a finisher, which consisted of operating a bulldozer using the blade to level surfaces. This requires precise measurements and the operator relies heavily on his eyesight in performing the task. Due to the loss of sight in his left eye he can no longer perform this type of work. His current duties consist of operating a bulldozer to clear away brush and debris. This Hearing Officer found the Claimant's testimony to be credible, accepts the Claimant's rendition of the facts, and finds that the Claimant's current underemployment is a direct result of the impairment from his compensable injury.

The carrier contends that there must be "medical documentation restricting the type of bulldozing work" the claimant can do (and there is–*see* summarized medical reports in Appeal No. 000705, *supra*) and that the "only factor presently causing the claimant's underemployment status is a reduction in the number of hours of work available on a weekly basis." The carrier contends that the claimant should have looked for bulldozer work earlier than he did and that the "reductions in claimant's wages [were] due to his own self-restrictions rather than his impairment." As we noted in Appeal No. 000705, all of these arguments were presented to the hearing officer. Clearly the claimant has some depth perception problems. Exactly how they affect the claimant's ability to operate a bulldozer were factual determinations for the hearing officer to resolve, which she did in the claimant's favor.

Upon review of the record submitted, we find no reversible error. 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:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge