APPEAL NO. 931147

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was held on November 23, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was whether the respondent (claimant herein) was entitled to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer found that the claimant was entitled to SIBS for the first compensable quarter, even though she did not seek employment, because she had not been released to return to work by her treating doctor, and thus had not returned to work pursuant to her doctor's recommendation. The appellant (carrier herein) files a request for review arguing that the 1989 Act and the Rules of the Texas Workers' Compensation Commission (Commission) require a claimant to attempt to obtain employment to be eligible for SIBS and that in this case the claimant failed to meet this requirement for her first compensable quarter. The claimant did not file a response to the carrier's request for review.

DECISION

We affirm.

It is undisputed that the claimant was employed by (employer) as a machine operator on (date of injury), when she suffered a compensable injury.[1] (Dr. H), M.D., an orthopedic surgeon and the claimant's treating doctor, certified on a Report of Medical Evaluation (TWCC-69) that the claimant reached maximum medical improvement (MMI) on October 7, 1992, with a 19% whole body impairment. The carrier disputed this impairment rating and the Commission selected a designated doctor, (Dr. A), to resolve this dispute. It is undisputed that Dr. A assessed the claimant's impairment at 15% and the carrier paid income impairment benefits (IIBS) pursuant to that rating.

The claimant filed a Statement of Employment Status with the Commission on August 6, 1993, requesting SIBS from the period of August 23, 1993, to November 20, 1993, her first quarter of eligibility for these benefits. The claimant stated in this form that she had not returned to work, but did not indicate that she had sought employment. The claimant attached a note from Dr. H and a letter from the Texas Rehabilitation Commission (TRC) to this form. The note from Dr. H stated in relevant part as follows:

[Claimant] was under active care for lumbar disc syndrome and thoracic sprain. Was unable to complete work hardening program (sic) because of back pain. Was found not to be able to go back to previous type of employment. Patient will be seeking alternate work with private industry council or TRC.

[1]The exact mechanism of the claimant's injury is not clear from the record. The treating doctor characterizes the claimant's injury as lumbar disc syndrome and thoracic sprain. The carrier concedes in its request for review that the injury was compensable.

The letter from TRC stated that the claimant had contacted TRC and had appointment scheduled on September 23, 1993, to make an application for vocational rehabilitation services. The claimant's request for SIBS was denied with the following notation:

> Application fails to indicate or support any efforts to look for any employment in line w/your ability to work as your medical note indicates from [Dr. H].

The claimant testified at the CCH that she had not sought employment prior to filing the Statement of Employment Status.[2] She gave several reasons for not doing so, including the fact that Dr. H had not released her to return to work.[3] In support of this contention she offered into evidence off-duty notes from Dr. H dated June 14, 1993; July 14, 1993; and October 6, 1993, in which Dr. H stated that the claimant was unable to return to work.[4] The claimant also put into evidence records from the (vocational school) showing that she was following a course of study beginning in January 1993 and to continue until August 1994 to train her for secretarial work. The Employability Development Plan included in these records indicate that barriers to the claimant's employment included lack of job seeking skills, inability to speak English, lack of training and experience, and lack of basic education.[5] These records indicated that her course of study included lessons in English, courses toward a Graduate Equivalency Degree (GED), typing lessons and job search courses. The claimant further put into evidence letters from the TRC showing that she was continuing to work with that agency in October and November 1993 to develop an individualized written rehabilitation program. There were also records admitted into evidence showing that the claimant continued to report her medical status to the employer to maintain her medical leave status quarterly, reporting on April 15, 1993; July 15, 1993; and October 15, 1993. The claimant testified that she still believed she was an employee

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[2]The claimant was the only witness who testified live at the hearing and she testified through a translator. While the translation was audible, full understanding often required that it be reviewed more than once due to the fact that the translator was either not speaking distinctly or was not in sufficient proximity to the tape recorder. We mention this so that in future the hearing officer may make adjustments to avoid this difficulty.

[3]Other reasons included that she still believed she was employed by the employer, as she was reporting her medical condition to the employer periodically, that she was going through a rehabilitation plan that involved her taking classes to retrain her to do clerical work, and that no one had told her that applying for work was a requirement for SIBS. The claimant testified that at the time of the hearing she had pending a request for SIBS for the second compensable quarter for which she had filed another Statement of Employment Status in which she had listed jobs for which she had applied.

[4]June 14, 1993, note stated "pt is unable to return to work at this time;" July 14, 1993, note stated "[h]e/she is presently unable to return to work . . .;" October 6, 1993, note stated, "patient is unable to return to work due to complaints of back pain."

[5]The claimant testified at the CCH that she had worked as a machine operator for 23 years and her education consisted of seven years of schooling in M.

of the employer at the time of the Benefit Review Conference (BRC) in this case which took place on September 29, 1993.

The carrier put into evidence records showing that Dr. H had referred the claimant to a work hardening program in July 1992. The discharge summary from the work hardening program stated that the claimant could return to work if she did light work with no overhead lifting and lifting restricted to no more than 20 pounds on an occasional basis, with no repetitive shoulder motion greater than 90 degrees of shoulder flexion or abduction, with no prolonged crouching or squatting and with wearing her lumbosacral support belt during lifting activities. The discharge summary indicated that the claimant feared reinjury if she tried to return to her previous employment and that she requested a referral to the Private Industry Council, which was the organization which the claimant testified placed her in the retraining at the vocational school. The claimant testified that she never requested the employer provide her light duty employment and that she was never offered such employment by her employer.

The hearing officer's Findings of Fact and Conclusions of Law included the following:

FINDINGS OF FACT

7.CLAIMANT'S treating doctor did not release CLAIMANT to return to work nor did he inform her that she could look for light duty work.

8.CLAIMANT'S work experience and education limited CLAIMANT as to the areas that she could seek employment.

9.CLAIMANT has not returned to work pursuant to her doctor's recommendations.

10.CLAIMANT is entitled to SIBS for her first compensable quarter which began on August 23, 1993, and ended November 20, 1993.

CONCLUSIONS OF LAW

2.CLAIMANT is entitled to Supplemental Income Benefits for her first compensable quarter which began on August 23, 1993, and ended on November 20, 1993.

Section 408.142 provides in relevant part:

SUPPLEMENTAL INCOME BENEFITS.

(a)An employee is entitled to supplemental income benefits if on the expiration of the impairment income benefit period computed under Section 408.121(a)(1) the employee:

(1)has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
(2)has not returned to work or has returned to work earning less that 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
(3)has not elected to commute a portion of the impairment income benefit under Section 408.128; and
(4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

The carrier argues that the hearing officer erred in finding that the claimant is entitled to SIBS during the first compensable quarter because she did not comply with Section 408.142(a)(4) in that she testified that she did not attempt at all to obtain employment prior to that time. The carrier further cites Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993 and Texas Workers' Compensation Commission Appeal No. 93636, decided September 3, 1993, for the proposition that this failure to attempt to obtain employment bars her from SIBS. This argument does not take into account the modifying language of Section 408.142(a)(4) which provides that the claimant seek work "commensurate with the employee's ability to work." According to the work status notes from Dr. H the claimant was unable to work at all. If this is true the claimant had an inability or no ability to work. Seeking employment commensurate with this inability to work would be not to seek work at all. We implicitly recognized this in Appeal No. 93636, *supra*, when while holding that a claimant who had not sought work but who had been released to light duty work was not entitled to SIBS, we stated as follows:

This is not to say that in all cases the employee must seek employment, regardless of the employee's physical condition or how futile that effort might be.

In fact both Appeal No. 93636 and Appeal No. 93181, *supra*, are clearly distinguishable from the present cases in that in both of those cases the claimants were able to return to light duty work according to the medical evidence. In Appeal No. 93636, the claimant had not only been returned to restricted duty work, but his employer had offered him a job within those restrictions. In that case, the claimant relied solely on the fact that the Social Security Administration had found him disabled to show his inability to seek work. As we stated in Texas Workers' Compensation Commission Appeal No. 931045, decided December 28, 1993:

Any determination made by the Social Security Administration is governed by whatever definitions of disability exist in its own enabling legislation, and cannot be considered as "res judicata" over a Commission proceeding.

The carrier argues that in the present case that the claimant was released to light duty by the work hardening program to which her treating doctor had sent her. There was also evidence from the treating doctor that the claimant was totally unable to work. This evidence created a conflict in the evidence concerning the claimant's ability to work. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer resolved the conflict in the evidence concerning the claimant's ability to work and we do not believe that his determination is contrary to the overwhelming weight of the evidence and therefore we should not overturn it. Accepting the hearing officer's factual determination of this issue, it follows that in the present case the claimant sought employment commensurate with her ability to work or rather did not seek employment commensurate with her inability to work. Thus the hearing officer's decision that she was entitled to SIBS is consistent with both Section 408.142(a)(4) and our prior decisions.

The carrier also attacks the hearing officer's Finding of Fact No. 8, quoted verbatim above, in which the hearing officer finds that the claimant's work experience and education limited her in seeking employment. The carrier argues that this finding is both irrelevant to entitlement to SIBS and factually incorrect. The relevancy of this issue is that it reflects on the good faith of the claimant in not seeking work while undergoing retraining. We have previously found that retraining is a factor that may be considered by the hearing officer when determining whether, under the circumstances of a particular case, a claimant has

made a good faith effort to seek employment. *See* Texas Workers' Compensation Commission Appeal No. 931063, decided January 4, 1994; Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993; Texas Workers' Compensation Commission Appeal No. 93936, decided November 29, 1993. As to factual accuracy, this is a question of fact within the province of the hearing officer and there was certainly evidence to support his finding in the records from the work hardening program (which recommended the retraining referral) and in the records from the vocational school which discussed the claimant's barriers to employment.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur with the well written and reasoned opinion of the author judge. However, I feel the need to record several thoughts on this case. There is certainly conflicting evidence about the claimant's ability to return to work at all. Her treating doctor has various notes in the record indicating the claimant was unable to return to work, one of which was dated after an earlier note dated August 5, 1993, indicating only that the claimant could not go back to her previous type of employment, but would be seeking alternate work. Also, the claimant had been enrolled in a physical therapy/work hardening program almost a year earlier, and in the discharge report dated September 18, 1992, a recommendation was made to return to light duty work with restrictions on lifting, repetitious motion, crouching or squatting and the wearing of a lumbosacral support belt. This is, to me, significant evidence that the claimant could perform some lighter type work which would mandate a good faith effort to seek employment commensurate with her ability to work. However, it is for the hearing officer to resolve conflicts in the evidence and we have stated we do not substitute our judgement for that of the fact finder. And, even though the evidence can reasonably support inferences different (which I find to be the situation here regarding the claimant's ability to work at all) from those of the hearing officer, this is not a sound basis to set aside or otherwise disturb the decision where there is evidence to support his determinations. *See* Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991.

I also share the carrier's concern with the finding involving claimant's experience and education limitation as affecting her ability to find employment. There is nothing to indicate that situation was altered by the injury. I can, at best, only see some very remote relevance in this factual finding and in my opinion it does not diminish or affect the requirement to otherwise make good faith efforts to seek employment commensurate with the ability to work.

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Stark O. Sanders, Jr.
Chief Appeals Judge