APPEAL NO. 980166
FILED MARCH 13, 1998

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 December 20, 1997, with hearing officer. The issues at the CCH were whether the respondent, (claimant) who is the claimant, was entitled to supplemental income benefits (SIBS) for his first compensable quarter, and the amount of his average weekly wage (AWW).

The hearing officer found that the claimant's AWW was $777.57, based on the stipulation of the parties, and that he was entitled to SIBS. The hearing officer found that the claimant made a good faith search for employment commensurate with his ability to work, and that he was unemployed during the filing period as the direct result of his impairment.

The appellant, who is the carrier, appeals both findings that were made to support the award of SIBS. First the carrier argues that if a claimant continues to seek work similar to that which he held at the time of his injury, then he cannot meet the direct result criteria. The carrier argues that the claimant is unemployed solely due to being fired for competency reasons which are the subject of litigation between the employer and the claimant. The carrier also argues that the hearing officer erred by finding that the claimant made a good faith search for employment. The carrier's argument appears to be based on its position that because the jobs that claimant sought were similar to what he had done before, drawing upon his education and experience, and because he could physically do these jobs, that he was not searching in good faith, no matter how many contacts were made. The carrier argues that the hearing officer erred by looking at the quantity of contacts made, rather than the quality. The claimant responds by reciting facts that he believes support the decision, including some matters beyond the testimony and documents submitted in this case concerning the circumstances of claimant's termination from the employer.

DECISION

Affirmed.

The claimant was employed as the risk manager for the (employer) when he was injured by tripping and falling on a rain-slick parking lot, on (injury date 2). Although it was brought out that he had sustained some injuries in (injury date 1) when he fell through a manhole, and for which he did not file a claim, there was no dispute that he received a 19% impairment rating (IR) for his (year) injury, which included an umbilical hernia, right knee injury, and lumbar spinal sprain. Claimant also said his neck was injured and being evaluated, although there was no discrete IR assigned for a cervical injury. Claimant had arthroscopic surgery on his knee in March 1996 and a hernia repair in July 1996.

Claimant said he had essentially been the first true risk manager hired by the (employer), which previously had a person occupying that job but concentrating for the most part on safety and workers' compensation. Claimant said he broadened that job to extend to all liability areas (including human resources or property and casualty, for example). He said he was a "hands on" manager consistent with what he regarded as professional risk management recommendations. As such, he participated in actual field inspections of potentially hazardous areas, sometimes involving climbing ladders to review higher areas, and going into tunnels. He said that after his injury, he could not have performed the job as he used to although he believed with reasonable accommodations he could have continued to serve. He was fired, according to his testimony, the day after he filed a workers' compensation claim for his (year) injury. This apparently occurred sometime in (month) (year). No evidence was offered by the carrier concerning any competency-based reasons for the termination or for any other cause. Claimant was a physicist by training.

The claimant said that although he was not released by his treating or referral doctors, that he needed to get back to work financially and therefore requested clearance to work. (Dr. D), claimant's previous treating doctor who left (state 1), wrote that he would support claimant's work efforts if he could review and assess proposed duties on any job. Claimant said his contacts with prospective employers did not get to the stage where he could carry something to Dr. D for his review. The claimant understood that he had limits on lifting, climbing stairs, bending, and prolonged standing or sitting. Some of these limits are set out in a memorandum written by claimant's current treating doctor, (Dr. H). Dr. H wrote his memo with reference to the filing period (spanning mid-May to mid-August 1997), and suggested that claimant have an updated evaluation of his ability to work "light duty."

Claimant's work seeking efforts (the continuation of which yielded a job in a later quarter not in issue here) consisted of looking in the newspaper for postings, reviewing the listings at the Texas Workforce Commission, and contacting his professional organization for risk management professionals. The claimant said he prepared several resumes, each of which emphasized aspects of his work history and experience, for openings in safety, risk management, and human resources. Claimant said that he also prepared a brochure detailing his credentials and experience and offering consulting services, and that he would make cold calls on businesses offering such services while claimant acknowledged that he did not have a consulting business per se, he said that to indicate that he had been idle and not working for several months, would hurt his chances. He said that this was a way of generating information about areas where those companies might be offering jobs in his area. Claimant said every company he listed on his Statement of Employment Status (TWCC-52) had an actual opening for which he applied. Claimant said his targeted contacts with over thirty companies yielded two sets of interviews. For one company, he had two interviews; on the second interview, his work-related injury came up, and discussion ensued about the fact that claimant might need some accommodation or have limitations. Claimant said the interviewer seemed to "sink in his chair" when information about his injury was developed. He said he subsequently was told that the company hired another applicant. Likewise, a restaurant chain interviewed him three times for its risk

management position; on the third interview, discussion ensued about his injury and while the employer stated that it could make accommodations, he was notified later that the company hired another person.

Carrier's witness was the current risk manager of the employer, (Mr. S), who stated that he was employed eight months after the claimant left the employer, and while he had not ever observed the claimant at work, he speculated what his responsibilities would have been based upon his reading of the job description. It was his impression that it was not "required" of claimant to personally inspect work sites and he could delegate activities such as climbing around or lifting. However, Mr. S agreed that "one of the main physical requirements of that job would be to go out in the field, to do risk analysis, risk assessments." Mr. S agreed that there had been some modifications in the job since the claimant had left, although he believed that the physical requirements of the job had remained the same. Except to say although that it was not part of the job description to carry ladders and climb on roof tops, no evidence was developed about what the physical requirements were for the job Mr. S currently performed.

We do not agree that there is little or no evidence to support the hearing officer's finding that claimant made a good faith search for employment; the evidence indicates that he actively searched for jobs targeted within several areas of experience. The carrier's argument which assigns error to the hearing officer's determination in this area is confusing, but asserts that the "quality" of the claimant's search for employment is wanting because he searched for positions with "similar" physical restrictions as his previous employment, and that if he is found to be unable to return to his previous employment for purposes of the direct result criterion, he cannot be found to have made a good faith search. First of all, there was no evidence that the search for employment involved only positions with "similar" physical restrictions as his previous employment; indeed, there was evidence that claimant in his two interviews discussed ways in which the duties would have to be somewhat modified to "accommodate" his restrictions. Second, we have held that the provision of "good faith search" and "direct result" will not be construed in an incongruous way. Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. We stated in that case that the fact that a claimant searches for jobs that he can do physically, cannot be used against him to find that his impairment has not directly resulted in continued unemployment. Neither do we believe it to be congruous to state, as carrier appears to, that a person whose unemployment directly results from his work-related injury cannot be found to be searching for replacement employment in good faith when he attempts to find similar work. We observe that seeking the type of work for which one is most qualified, and near salary levels, similar to that earned at the time of injury, could be considered supportive of a conclusion that the search was made in good faith. The carrier argues that the search cannot be considered as one made in "good faith" if the underlying purpose is to qualify for SIBS, but the record is devoid of any indication of such intent. The hearing officer's decision, that claimant made a good faith search for employment commensurate with his ability to work, is supported by the evidence, and carrier's appeal of these findings is without merit.

Concerning its appeal of the "direct result" finding, the case cited by the carrier, Texas Workers' Compensation Commission Appeal No. 971445, decided September 8, 1997, was correctly discounted by the hearing officer as inapplicable to this case. That decision was neither unanimous nor did it promulgate, as carrier argues here, a doctrine that direct result can never be found when an injured worker seeks employment comparable to that which he held at the time of his injury. The evidence brought forward by claimant concerning his job interviews with two prospective employers with whom he failed to obtain subsequent employment, his physical restrictions, his testimony about his limitations, the absence of evidence that he was terminated for performance reasons, all could be analyzed by the hearing officer to reach the determination that the claimant was unemployed as a direct result of his impairment.

The hearing officer is the sole judge of the relevance, the 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. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this was the case here, and the hearing officer's decision and order are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge