

APPEAL NO. 990950

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 April 5, 1999. The issue at the CCH was whether the respondent, who is the claimant, was entitled to supplemental income benefits (SIBS) for his 11th quarter of eligibility.

The hearing officer found that the claimant's underemployment was the direct result of his impairment. He further found that the claimant satisfied the requirement to make a good faith effort to find employment commensurate with his ability to work.

The appellant (carrier) has appealed, arguing that the number of applications placed, 13, was insufficient to establish a good faith job search. The carrier also says that these contacts for the most part constituted follow-up contacts with employers who had earlier refused to hire the claimant. The carrier states that any restrictions due to a back injury would not be related to the compensable injury. The carrier asserts that other reasons than the injury, for example the claimant's age, are the reason he has not been hired. The claimant responds that the decision should be affirmed, with a brief recitation of supporting facts.

DECISION

Affirmed.

The claimant, who was 71 years old at the time of the CCH, was employed in the mailroom by a self-insured school district, the carrier herein, on _____, when he sustained repetitive trauma injury to his hands. The claimant said that his job entailed the receipt and processing of equipment and supplies as well as mail. The claimant had three surgeries on his hands, and on a finger, in 1992, 1993, and 1994. He stated that while his right hand was pretty well resolved, he continued to have left-hand problems, including numbness of two fingers. He said he was restricted to a 10-pound lifting limit, which would not allow him to do heavy lifting as he had done in his job at the time for the carrier. The filing period encompassed October, November, and December 1998 (through December 31st).

The claimant did not receive a Statement of Employment Status (TWCC-52) for the quarter in question until December 29, 1998, when it was provide by the Texas Workers' Compensation Commission (Commission). Although he listed 13 contacts made the last two days of the quarter, he said that he contacted these employers, and several others, throughout the quarter, in addition to regular contacts he made once and often twice a week with the Texas Workforce Commission (TWC). The claimant agreed that each of the 13 prospective employers listed on the TWCC-52 was a company he had previously contacted, that did not have a job opening earlier. He agreed that he was being told that there were no positions as the reason for not hiring him, and no one had specifically said they were not hiring him because of his impairment. He said he believed his age was a

reason he could not get a job. The claimant said that several employers told him applications were on file 60 days, and he would re-apply after this time.

A required medical examination performed by Dr. G yielded an assessment of the claimant. Dr. G refers to another injury occurring on May 3, 1993, and that he also examined the claimant later in August 1993 for a back problem. Dr. G substantiated loss of sensation and decreased range of motion in the claimant's hands. However, it was his interpretation of the claimant's subjective statements and other medical records that the claimant's limitations from work were due "mainly" to his back problem, not his hands. Although the claimant identified Dr. D as his treating doctor, the only brief record from Dr. D substantiates the impairment rating and is silent on a return to work.

An injured employee is required to search for employment commensurate with the ability to work in good faith in order to continue to qualify for SIBS. Section 408.143(a)(3). We have held that the good faith effort necessary for SIBS is to obtain employment commensurate with the ability to work, not to obtain employment at a certain wage scale. Texas Workers' Compensation Commission Appeal No. 960946, decided July 1, 1996. Self-employment, as well as a search for employment with third persons, may fulfill the good faith requirement. Texas Workers' Compensation Commission Appeal No. 951356, decided September 27, 1995; Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997. Furthermore, we would agree that a search may encompass a number of activities other than the actual placing of applications. Although carrier asks us to consider only 13 applications, the claimant also stated that he contacted the TWC once or twice a week, regularly through the filing period, to ascertain job leads. It has been noted before by the Appeals Panel that the lack of a discussion with the prospective employer that the impairment is the reason the employee was not hired, given the constraints of the Americans with Disabilities Act, is not necessarily dispositive of the "direct result" criterion one way or the other. See Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995. As noted before, Texas Workers' Compensation Commission Appeal No. 950298, decided April 10, 1995, the Appeals Panel observed that it is unreasonable to expect a potential employer to say, much less write, that it is not hiring an employee because of an impairment or handicap. Insofar as the carrier argues that the claimant's age was the reason he has not been hired, rather than his impairment, we will not fault the hearing officer for declining, in the absence of proof, to attribute unlawful motives to the employers with whom the claimant has placed applications.

The underemployment or unemployment of an injured worker must directly result from his impairment, but the impairment need not be the sole cause. Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996. The fact that the claimant also has other conditions limiting his scope of available jobs does not automatically override the impairment from the compensable injury as a factor. A finding of "direct result" will be supported by evidence that a claimant has sustained a serious impairment with lasting effects that preclude return to the type of work performed at the time of injury. Texas Workers' Compensation Commission Appeal No. 93559, decided

August 20, 1993. Here, the hearing officer found, and is supported by the record, that the claimant's unemployment was the direct result of the continuing effects of the impairment to his hands, which, while not the sole cause, was a cause. We do not agree with the carrier's argument that the hearing officer has issued an advisory opinion finding a causal connection between the claimant's back and his compensable injury.

Concerning the assertion of the carrier that the economy was also a reason that the claimant could not find employment, there is not sufficient factual support for this in the record. As the Appeals Panel has before stated, the experience of a single job seeker, and the responses of a handful of employers, do not a depressed economy prove. See Texas Workers' Compensation Commission Appeal No. 950849, decided July 7, 1995. There must be evidence of the impact of economic conditions on the workforce in general. Texas Workers' Compensation Commission Appeal No. 951019, decided August 4, 1995. As noted in Texas Workers' Compensation Commission Appeal No. 951624, decided November 15, 1995, the burden to prove the state of the economy is not an arduous one given public resource documents that would be expected to exist to support such a contention.

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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ). We accordingly affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. In Texas Workers' Compensation Commission Appeal No. 990015, decided February 18, 1999, we affirmed this hearing officer who found no good faith job search effort in the filing period for the 10th quarter of supplemental income benefits (SIBS) based on 27 job applications and, essentially, the same peripheral job search activities that the claimant engaged in during the filing period for the 11th quarter. Now, the hearing officer finds a good faith job search based on 13 contacts. I recognize that each SIBS quarter is decided on its own merits, but when the evidence is virtually identical or reflective of even less job search efforts, the decisions should be virtually identical, or at least the inconsistency explained. I would remand to the hearing officer for an explanation of the different results in the 10th and 11th quarters.

I am also troubled by the fact that actual job contacts were limited to two days. While clearly, there is more to a job search than submitting applications, only by an application could one hope for a job. Failure to make job contacts for more than two days of the filing period is, in my opinion, excused by no amount of contemporaneous study and preparation.

Alan C. Ernst
Appeals Judge