

## APPEAL NO. 991483

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 21, 1999. The issue at the CCH involved whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for the third compensable quarter, which began on March 4, 1999, and ended on June 2, 1999.

The hearing officer found that the claimant's underemployment was the direct result of his impairment, but that he had not made a job search commensurate with his ability to work. In connection with the latter finding, the hearing officer noted that there was no medical evidence, or scant evidence, to support the claimant's contention that he was physically limited to only part-time work.

The claimant has appealed. He argues that the hearing officer's decision is against the great weight and preponderance of the evidence. The respondent (carrier) replies that the hearing officer correctly weighed credibility and that the decision in its favor should not be disturbed.

### DECISION

Affirmed.

The claimant was injured on \_\_\_\_\_, while employed by (employer). He was employed as a driller and roughneck. The claimant had two back surgeries, in July 1996 and in December 1997, and was released to return to work in October 1998. He was certified as having reached maximum medical improvement on October 1, 1997, with a 16% impairment rating. The claimant's treating doctor was Dr. M. Claimant said, at this time, he obtained a job with (new employer) within his restrictions. He worked part time in the deli food preparation area.

The claimant said that he was actively seeking retraining through the Texas Rehabilitation Commission (TRC), but he was not actually in a retraining program during the time in issue. His active pursuit consisted of telephone contacts with the TRC counselor to generally discuss his options. He had told the counselor that he could not go to school full time, and she had indicated that he would have to in order to qualify for their programs. The claimant also described how the counselor had contacted him about a seven-day training session at a local computer retailer and he declined, stating that he doubted a seven-day program would have a decent job associated with it. In June 1999, claimant returned to school as a full-time student.

The claimant had gone on a standby status with the new employer as of May 2 or 3, 1999. He said he had not sought other employment during the filing period because he was "very satisfied" with the new employer. He also said he did not look because he was not released by his doctors to full-time employment. However, the claimant did perform

extra work, doing process serving for a number of attorneys. When asked to examine his Statement of Employment Status (TWCC-52) for the filing period, he changed his testimony and noted that it appeared he had not served process during that three-month period, and all the earnings reflected on the TWCC-52 were from the new employer.

The claimant was asked to describe his restrictions. He responded:

I guess it was going to revolve around the minimal lifting, you know, five or ten pounds max, and everything else would be determined by the amount of activity at the job, and . . . and determine what level of pain I was at and report it to the doctor and go from there. But overall, it was minimal lifting, no climbing of ladders, things of that sort.

He said that he worked seven hours a day, three or four days a week, every other day, but on occasion he worked consecutive days. He did not accept additional hours because he was trying to determine how his body was going to react when the activity was increased. However, the claimant agreed that Dr. M did not limit his hours and left it to claimant's discretion. The claimant said he was released back to full duty by Dr. M on March 4, 1999.

The claimant also described his participation in a family car remodeling business, and noted that he bought a car in February, remodeled it, and sold it on April 28, 1999. There was testimony offered that was somewhat hard to follow concerning paycheck stubs from the new employer that indicated that claimant was working nearly 40 hours a week when he first started working for the new employer. The claimant explained that he did not, but some of these hours were, in fact, a retroactive payment for some mistake in entering him into the new employer's computers.

The April 29, 1999, letter from Dr. M that claimant said detailed his restrictions retroactively merely stated that claimant "had been working" part time for new employer and then had his hours increased after March 4th. It was agreed by the parties that the wages claimant earned were less than 80% of his preinjury average weekly wage.

Although the claimant has appealed the "direct result" provision, this SIBS criteria was actually found in claimant's favor and an appeal appears to have been inadvertently filed on this point. With respect to the job search requirement, and with the evidence in this posture, we cannot agree that the hearing officer's decision is not sufficiently supported in the record. It was incumbent upon the claimant to prove that he was under restrictions, and what those restrictions were, at the time that he was required to seek employment, so that it could be determined whether he fulfilled the requirement, in Section 408.143(a)(3), to search in good faith for employment commensurate with his ability to work. In this case, the hearing officer evidently concluded that claimant's restrictions were primarily subjective, and that he had the capacity to work more than he was for the new employer. The letter from Dr. M merely recites what claimant had been doing, and the trier of fact could believe

that this stops well short of setting forth actual medical restrictions bearing on the ability to work.

The hearing officer is the sole judge of the relevance, 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, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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.). 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 affirm the hearing officer's decision and order.

---

Susan M. Kelley  
Appeals Judge

CONCUR:

---

Tommy W. Lueders  
Appeals Judge

---

Dorian E. Ramirez  
Appeals Judge