APPEAL NO. 991768

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. '§ 401.001 *et seq*. (1989 Act). On July 19, 1999, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer determined that the respondent (claimant herein) was entitled to supplemental income benefits for the second compensable quarter from June 5, 1999, through September 3, 1999. The appellant (carrier herein) files a request for review arguing that the hearing officer erred in making this determination, specifically arguing that the claimant's unemployment during the qualifying period for the compensable quarter was not a direct result of her impairment and that the claimant did not make a good faith effort to seek employment commensurate with her ability to work during the filing period. There is no response from the claimant to the carrier's request for review in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement on March 13, 1998, with an impairment rating (IR) of 17%; that the claimant did not commute any portion of the impairment income benefits; that during the qualifying period of the second compensable quarter the claimant had no earnings; that the second compensable quarter for SIBS was from June 5, 1999, through September 3, 1999; and that the qualifying period for the second compensable quarter was from February 21, 1999, through May 22, 1999. The claimant testified that during the filing period she had physical restrictions (including an inability to use her left hand, which is her dominant hand, to grasp and hold objects), had an inability to speak English (she testified through a translator), and was unable to drive. The claimant submitted an a Statement of Employment Status (TWCC-52) which indicated she sought employment with 26 different employers from March 6, 1999, to May 18, 1999, inclusive. The hearing officer noted in his decision that the TWCC-52 which the claimant had been provided was in use prior to the effective date of the new rules concerning eligibility for SIBS and on the form the claimant was instructed to give information concerning her search for employment during the 90 days prior to the beginning of the benefit quarter. The claimant was asked during the CCH if she sought employment during the period from February 21, 1999, through March 5, 1999, and the claimant stated she was unable to recall.

The claimant's TWCC-52 reflected that she sought jobs mostly cleaning and cooking or as a cashier. The claimant testified that she lives in a small town and sought employment in her home town and a neighboring town. The claimant testified that her job search was hampered by transportation problems, including her inability to drive. The claimant testified that her education was in country 1 and limited to the equivalent of a ninth

grade education. The claimant testified that she believed she was able to perform the jobs for which she applied on a part-time basis.

Dr. A described the claimant's condition and limitations in a March 1999 letter as follows:

> [The claimant] has chronic neck and left shoulder pain due to cervical C5-6 & C6-7 disc diease [sic], and left arm injuries with improved but chronic brachial plexus stretch syndrome. Also left carpal tunnel syndrome. These problems will be permanent problems. However with restrictions she could return to work. 1) No repetitive use of her left upper extremity. 2) She should not lift greater than 5 lbs. 3) She should not have to bend her neck in a downward gaze for a prolonged period. She is able to stand, walk and is not restricted in her lower extremities.

Ms. F, the carrier's vocational rehabilitationist, testified that she had met with the claimant and provided counseling and testing. Ms. F testified that she counseled the claimant to not state on employment applications that her reason for leaving her prior employment was due to an injury on the job. Ms. F testified that she did not believe most of the jobs for which the claimant had applied were within her physical restrictions. Ms. F testified that she had been unable to identify any available jobs that were within the claimant's restriction within the claimant's geographic area (which she defined as a radius of 35 miles of the claimant's home), given the claimant's language barrier. Ms. F recommended that the claimant take English classes.

Section 408.142(a) outlines the requirements for SIBS eligibility as follows:

> 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 than 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 fact that the claimant met the first and third of these requirements was established by stipulation. This case revolved around whether the claimant met the second and fourth of these requirements. We have previously held that both the question of whether the claimant made a good faith job search and the question of whether the claimant's unemployment was a direct result of his impairment are questions of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994.

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).

Applying this standard of review there is certainly evidence to support the hearing officer's finding of good faith job search. The claimant testified that she looked for jobs at a number of places during the qualifying period and the hearing officer accepted this testimony. The carrier argues that the hearing officer's finding of a good faith job search by the claimant is contrary to the rules of the Texas Workers' Compensation Commission which went into effect on January 31, 1999, which require that a claimant seek employment during every week of the filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides as follows:

> Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(4) of this section, the reviewing authority shall consider the information from the injured employee, which may include, but is not limited to information regarding:

(1) number of jobs applied for throughout the qualifying period;

(2) type of jobs sought by the injured employee;

(3) applications or resumes which document the job search efforts;

(4) cooperation with the Texas Rehabilitation Commission;

(5) education and work experience of the injured employee;

(6) amount of time spent in attempting to find employment;

(7) any job search plan by the injured employee;

(8) potential barrier to successful employment searches;

(9) registration with the Texas Workforce Commission; or

(10) any other relevant factor.

Given the wide number of factors that the hearing officer may consider under the foregoing rule and in light of our standard of review of what is a factual determination of the hearing officer, we do not find a basis to reverse the determination of the hearing officer that the claimant made a good faith effort to seek employment. While Ms. F testified that most of the jobs sought by the claimant were outside her restrictions, the essential question is whether the claimant acted in good faith in seeking the positions she did. Indeed, Ms. F testifies she was not able to find an available job meeting claimant's restrictions. The hearing officer found that the claimant acted in good faith and we find no reason to hold as a matter of law that the claimant did not act in good faith.

The carrier also argues that the claimant did not establish that her unemployment was a direct result of her impairment. We note that the hearing officer specifically stated in his decision that the carrier did not argue direct result at the CCH. Assuming *arguendo* that this issue was preserved, we do not find the carrier's argument persuasive. The carrier cites the following language from the hearing officer's decision in support of its position:

> In addition to her physical restrictions, Claimant is hampered in her job search by an inability to speak english [sic], a lack of formal education, a lack of transferrable job skills, and limited transportation.

By its terms here the hearing officer appears to be addressing the barriers to a successful job search, Rule 130.102(e)(8), and not whether or not the claimant's unemployment was a direct result of her impairment. We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and

could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. We have also held that the claimant need only prove that her unemployment is a direct result of impairment and not solely caused by it. Texas Workers' Compensation Commission Appeal No. 991214, decided July 16, 1999. After all, prior to her injury the claimant was employed even though she had other limitations and would presumably still be employed with these limitations but for the impairment from her injury.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge