APPEAL NO. 991976

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 August 18, 1999. The issue at the CCH was whether the respondent (claimant herein) was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. The hearing officer found that the claimant was entitled to these benefits, and the appellant (carrier herein) files a request for review, asking that we reverse this decision. The carrier argues that the hearing officer's findings and conclusions that claimant was entitled to SIBS are not sufficiently supported by the evidence, specifically questioning whether the claimant's self-employment met the requirement that the claimant seek employment in good faith commensurate with his ability to work. The claimant responds, arguing that the carrier misconstrues the facts and the law in its appeal and that we should affirm the decision of the hearing officer.

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 suffered a compensable injury; that the claimant reached maximum medical improvement on February 7, 1996, with an impairment rating of 27%; that the claimant has not commuted any portion of his impairment income benefits; that the qualifying period for the eighth compensable quarter began on February 12, 1999, and ended on May 13, 1999; and that the compensable quarter began on May 27, 1999, and ended on August 25, 1999. The claimant testified that he was injured working as an ironworker when he fell and landed on a steel beam. The claimant testified that his job as an ironworker was very labor-intensive and required him to lift 60 to 70 pounds regularly. The claimant testified that his average weekly wage (AWW) at the time of his injury was $1,154.99. As a result of his injury the claimant had a two-level lumbar fusion in April 1995. The claimant testified that Dr. M, his treating doctor, restricted him from doing anything that causes pain. The claimant saw Dr. S, the carrier's medical examination doctor, on July 14, 1999, who stated that the claimant "cannot return to work as an iron worker."

The claimant testified that following his injury he began a self-employment venture which involves managing and renting rental property in his hometown. The claimant testified that his duties include advertising for tenants, performing minor repairs, hiring contractors for major repairs, yard work and general maintenance of the units as well as administrative duties and collecting rents. Dr. S noted in his report that "the kind of work he is presently doing, namely some repair, but otherwise managing properties is very appropriate for him." The claimant testified that he worked in his self-employment between

35 and 40 hours each week. The claimant reported earnings on his Statement of Employment Status (TWCC-52) of $5,205.62 for the qualifying period for the eighth compensable quarter. The claimant testified that this amount represents gross receipts of this period and does not take expenses into account. The claimant testified that expenses were high for this period as one of the rental units partially burned and had to be repaired. The claimant testified that during the qualifying period for previous quarters he had six properties and now has added a seventh property, a warehouse, and continues to look for other potential rental property.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

2. Claimant's [AWW] is $1154.99.

3. During the qualifying period for the eighth compensable quarter:

   A. Claimant's earnings were $5205.62.

   B. Claimant's earnings were less than 80% of Claimant's [AWW] as a direct result of his impairment.

   C. Claimant attempted in good faith to obtain employment commensurate with his ability to work.

CONCLUSION OF LAW

3. Claimant is entitled to [SIBS] for the 8th compensable quarter.

We note at the outset that the hearing officer recognized that the "new" SIBS rules that went into effect on January 31, 1999, and which are found at Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100 (Rule 130.100) through Rule 130.108, apply to the present case. In the present case, the carrier raises the argument that the claimant's self-employment constitutes an investment scheme rather than employment. We note that the carrier raised this argument in regard to the fourth compensable quarter and we rejected it, affirming the hearing officer's finding of entitlement to SIBS for the fourth compensable quarter, in Texas Workers' Compensation Commission Appeal No. 981895, decided September 28, 1998 (Unpublished) (Judge E dissenting).

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's AWW as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work.

Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "qualifying period." Under Rule 130.101(4), the "qualifying period ends on the fourteenth day before the beginning date of the quarter and consists of the 13 previous consecutive weeks."

We have previously held that both the question of whether the claimant made a good faith job search and 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 a good faith job search. The claimant is working full time in employment that the carrier's own medical examination order doctor says is appropriate to his limitations. The carrier argues that this activity involves investment and not employment and cites to the federal income tax calculations concerning depreciation and expenses to try to establish that the claimant is not earning wages in self-employment. We note that the federal income tax laws involve completely different considerations from the Texas workers' compensation laws and the two statutory schemes were set up to further two entirely different purposes. We find nothing in the carrier's argument to depart from our decision in Appeal No. 981895, *supra*, where we found sufficient evidence to support the hearing officer's factual determination that the claimant met the good faith job search requirement by working full time managing rental property. The carrier is obviously concerned that the claimant is not, in its view, increasing his income sufficiently quickly as to no longer qualify for SIBS. The 1989 Act, by allowing workers who return to work earning less than 80% of

preinjury wages to be eligible for SIBS, implicitly recognizes that employment at less than the preinjury wage might not be uncommon among workers injured severely enough to qualify for SIBS, which is only potentially available to workers who suffer a 15% or greater whole body impairment. This would appear to be particularly true of workers, like the claimant in the present case, who have relatively high preinjury wages.

Finally, and perhaps most importantly, the "new" SIBS rules address this type of situation. Rule 130.102(d) provides in relevant part as follows:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work; . . .

There is evidence that the claimant has met this requirement, particularly in light of Dr. S's report.

The carrier disputes the hearing officer's finding of direct result, arguing that the claimant's failure to look for work other than self-employment, rather than his impairment, is the reason for his earning less than his preinjury wage. 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. In light of Dr. S's statement that the claimant cannot return to his prior job as an ironworker, as well as the claimant's own testimony in this regard, there is ample evidence to support the hearing officer's statement regarding direct result.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge