APPEAL NO. 000061

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (City 1), Texas, on December 15, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the qualifying period for the 15th quarter for supplemental income benefits (SIBS) began on May 7, 1999, and ended on August 5, 1999. The hearing officer determined that during that qualifying period the claimant's underemployment was a direct result of the impairment from his compensable injury. That determination has not been appealed and has become final under the provisions of Section 410.169. The hearing officer also found that during the qualifying period the claimant earned substantially less than the minimum wage for a full- time job, was underemployed, was not enrolled as a full-time student, maintained only minimal employment, and did not make a good faith effort to seek employment commensurate with his ability to work and concluded that the claimant is not entitled to SIBS for the 15th quarter. The claimant appealed; stated that he followed the adjuster's guidance, the carrier did not object to his activities, and the Texas Rehabilitation Commission (TRC) approved his schedule; contended that he carried out a good faith effort to seek employment; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for the 15th quarter. The carrier responded, stated that the claimant's appeal is partially based on how the adjuster handled the claim and not on the requirements for entitlement to SIBS, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The claimant worked driving a truck and delivering beer, injured his low back in _____, had three surgeries on his back, and received a 19% impairment rating. He testified that during the qualifying period for the 15th quarter he attended school during the spring semester at a university under a TRC program; that the spring semester ended after May 7, 1999, but he did not know the ending date; that he registered for 12 hours for the spring semester; that he withdrew from one three-hour course; that he failed another three-hour course; and that he made a B in one three-hour course and a D in another three-hour course. He said that the first session of summer school started in May or June 1999; that he took a three-hour course in the first summer session and another three-hour course in the second summer session. The claimant stated that during the qualifying period he worked for Ms. C, a friend of the family; that he worked 12 hours a day and 24 hours a weekend three of the four weekends of a month; that he was paid $300.00 a month; that he was paid minimum wage for the part-time job; that he drove from (City 2) to (City 3) where Ms. C's house is; and that he made arrangements to have her yard taken care of and paid the people who cared for the yard. He testified that the adjuster told him he needed to be employed and the job working for Ms. C met the requirements.

A document from the university the claimant attended states:

> Any student registered for 12 semester hours or more during the fall or spring semester or six hours in a summer session is considered a full-time student.
>
> The normal student-hour load is 15 to 19 semester hours during the fall or spring semester and six or seven hours in summer terms.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) provides:

> 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;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period;
>
> (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; or
>
> (4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

The claimant appealed a finding of fact that he was underemployed during the qualifying period. That finding of fact is necessary to support the hearing officer's unappealed determination, favorable to the claimant, that during the qualifying period the claimant's underemployment was a direct result of the impairment from the compensable injury. Since that finding of fact appealed by the claimant is favorable to him, we will not address it.

The claimant did not present evidence on the specific beginning and ending dates for the times that he attended university classes during the qualifying period for the 15th quarter for SIBS. From his general testimony, it appears that the majority of the qualifying period coincided with the two summer school sessions. In each summer session, he took three semester hours. The university considers a student who takes six hours in a summer

session to be a full-time student. The hearing officer determined that the claimant was not enrolled as a full-time student during the qualifying period.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. There is no indication that the hearing officer did not properly apply the provisions of the 1989 Act and Texas Workers' Compensation Commission rules to the evidence before him. The appealed determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge