

APPEAL NO. 000674

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 March 1, 2000. The issues at the CCH were whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBs) for the second and fourth quarters. The hearing officer determined that the claimant was not entitled to SIBs for the second and fourth quarters. The claimant appeals, requesting that we reverse the hearing officer-s decision and render a decision in his favor. The respondent (carrier herein) responds, urging affirmance.

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 the claimant sustained a compensable injury on or about _____; that the claimant reached maximum medical improvement with an impairment rating (IR) of 15% or greater; that the qualifying period for the second quarter was from September 11, 1998, through December 10, 1998; and that the qualifying period for the fourth quarter was from February 27, 1999, through May 28, 1999. The claimant described his injury as taking place when he was struck by a box at work. The claimant's diagnosis included a cervical sprain/strain; left shoulder sprain/strain; left rotator cuff sprain/strain; bilateral knee sprain/strain, and cephalalgia secondary to contusion. The claimant testified that during the qualifying period for the second quarter he was unable to work at all due to his injuries. The claimant put into evidence an off-work slip dated December 4, 1998, from Dr. C, D.C., his treating doctor, to this effect. There was also in evidence a functional capacity evaluation dated June 22, 1999, which stated that the claimant was functioning at a medium physical demand level.

The claimant testified that he did not seek employment during the qualifying period for the second compensable quarter. He testified that he sought employment as a welder with two employers during the qualifying period for the fourth compensable quarter, following up with these employers over 40 times during this filing period.

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

An employee is entitled to [SIBs] if on the expiration of the [IIBs] period computed under Section 408.121(a)(1) the employee:

- (1) has an [IR] 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 [IIBs] under Section 408.128; and
- (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(b) (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 "filing period."

Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBs] for any quarter claimed." On January 31, 1999, Rule 130.102 was changed with the passage of the "new" SIBs rules. Pursuant to Rule 130.100(a), entitlement or nonentitlement to SIBs shall be determined in accordance with the rules in effect on the date a qualifying period begins. We addressed the question of how to calculate a quarter subject to the old as opposed to the new SIBs rules in Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999. Applying the precepts set out in that case, the "old" SIBs rules apply to the second compensable quarter and the "new" SIBs rules apply to the fourth compensable quarter. The hearing officer recognized this at the CCH.

Under the "new" SIBs rules, Rule 130.102 provides that an injured employee who has an IR of 15% or greater and who has not commuted any IIBs is entitled to SIBs if, during the qualifying period, the claimant has earned less than 80% of the employee's preinjury wage as a direct result of the impairment from the compensable injury and has made a good faith effort to obtain employment commensurate with the employee's ability to work. "Qualifying period" is defined in Rule 130.101 as the 13-week period ending on the 14th day before the beginning of a compensable quarter.

The fact that the claimant met the first and third of the requirements of Section 408.142(a) was established by stipulation. The hearing officer found that the claimant met the second requirement and neither party has appealed this determination. The hearing officer found that the claimant did not make a good faith effort to seek employment during the filing period for the second compensable quarter and during the qualifying period for the fourth compensable quarter. The claimant appeals these determinations. We have previously held that the question of whether the claimant made a good faith job

search is a question 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 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). 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).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is "firmly on the claimant" and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred." We have likewise noted that medical evidence affirmatively showing an inability to work is required if a claimant is relying on such inability to work to meet the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability

to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool, *supra*; Cain, *supra*.

Applying this standard, we find no error in the hearing officer's denial of SIBs for the second compensable quarter. The hearing officer found the claimant had ability to work during this period and it is undisputed that the claimant did not seek employment during this period. The claimant argues on appeal that he was unable to work during this filing period and had presented medical evidence to this effect. It was up to the hearing officer to decide what weight to give this evidence and we do not find her determination contrary to the overwhelming evidence.

Nor do we find error in the hearing officer's determination that the claimant was not entitled to SIBs for the fourth compensable quarter. The claimant only sought employment with two employers during the qualifying period for this quarter. While the claimant testified that he followed up on over 40 occasions during the filing period with these two employers, this evidence did not compel a finding of a good faith job search by the hearing officer. Again, it was the province of the hearing officer to determine what weight to give this evidence. Also, the hearing officer specifically found that the evidence failed to establish that the claimant sought employment every week during qualifying period as is required by Rule 130.102(e).

The claimant alleges that the hearing officer took the side of the carrier and did not allow him to explain his case. Our review of the record does not indicate any bias on the part of the hearing officer or that the claimant was prevented from presenting his case. The translator was requested to translate into the record some of the carrier's exhibits that were in Spanish. This was to allow the hearing officer to review this evidence and we find no error in this procedure.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR :

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge