

APPEAL NO. 000704

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 13, 2000. The issue at the CCH was whether the respondent (claimant) was entitled to his fourth quarter of supplemental income benefits (SIBs). The hearing officer agreed that he was so entitled, having made a good faith search for employment.

The appellant (carrier) has appealed, challenging the evidence and documentation supporting the claimant's job search. The claimant responds that the hearing officer's decision is supported by the record.

DECISION

We affirm the hearing officer's decision based upon our standard of review.

Mr. L testified that he was a vocational rehabilitation counselor. However, it became clear that his job placement assistance provided to the claimant was limited to downloading job listings from the Texas Workforce Commission (TWC) website and sending the claimant lists of those that appeared to be sedentary to light-duty capacity with restrictions. Mr. L's primary involvement was investigation of the job contacts listed by the claimant on his Statement of Employment Status (TWCC-52); he said that he was able to verify that roughly half of the listed employers verified applications had been placed, while others either could not find an application on file or did not have a job that matched the listed description on the TWCC-52. Of several listed as "not hiring," Mr. L said that jobs sent to the claimant might only be open for a few days before filled and that in some cases the claimant waited a few weeks to follow up.

Mr. L faulted the claimant for not registering with the TWC for job placement. Although Mr. L was already providing jobs listed with the TWC, he pointed out that going to the TWC office on a frequent basis would yield the most current pool of viable jobs. He said that the local TWC field office was four miles from claimant's home. Mr. L said that jobs were not listed by physical capabilities but by type of job.

Mr. L said that his investigation indicated that claimant applied for services at the Texas Rehabilitation Commission (TRC) in December 1998 and was initially rejected from an English as a Second Language GED course he attended. Claimant was put on "extended evaluation" status by the TRC in August 1999, which was a status reserved for those for whom it was not clear that TRC programs could offer assistance. Mr. L said that a TRC counselor had apparently photocopied the yellow pages listings for florists and gave them to the claimant after advising him that he could probably do flower delivery. Mr. L testified that because the current job market should yield employment fairly quickly for one who was sincerely looking for a job, he had concluded that claimant's nearly year-long search was not made in good faith.

Mr. L had also testified in previous quarters and verified claimant's job applications. He said that the claimant had improved his appearance and dress from previous quarters, but he was essentially still walking in, asking a general question as to whether the employer was hiring, and then asking for a card to show that he had been there. Mr. L said that the carrier did not have the funds to enable him to investigate the particulars of each job (beyond reference to the job title and what the Dictionary of Occupational Titles said about that title) so it was possible that some jobs to which claimant was sent would turn out to involve heavier duties than he could perform.

Mr. L was asked on cross-examination if he realized that "most SIBs people" try to "spread the job searches." Mr. L said that he could not speak for all SIBs applicants, but that it appeared to him that claimant's job search appeared spread out rather than focused and directed at finding employment.

The claimant testified that he was 53 years old and had only a sixth-grade education in Guatemala. He could read English "about 50 or 60 percent." He worked as a diesel engine mechanic at the time of his injury. He injured his neck and lower spine and had surgery for the lumbar area. He talked about his involvement with TRC-referred programs, but this occurred after the qualifying period under review, which ran from May 13 through August 11, 1999.

He commented on the jobs that had been provided to him by Mr. L and said that they were beyond his capabilities and were not light duty. He agreed he visited several flower shops as referred by the TRC, but that he did not visit all shops located together on a single day, as opposed to several days, because Mr. L had told him he should look for work every day. Although the claimant was asked about a few specific jobs and identified several positions as ones provided by Mr. L, it was not made clear what his overall search plan was separate and apart from any jobs provided by Mr. L. There were 16 prospective employers he had located through his own efforts. The claimant agreed that he had sought employment for 32 days out of the 90-day quarter. He was on Social Security disability. The evidence includes a physical assessment form filled out by claimant's treating doctor which limits him to 10 pounds lifting, and evaluates the frequency with which he may perform various activities.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(e) (Rule 130.102(e)) states:

- (e) 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 [TRC];
- (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 barriers to successful employment searches;
- (9) registration with the [TWC]; or
- (10) any other relevant factor.

It is clear that the Texas Workers' Compensation Commission intended a finder of fact to separate those searches done "pro forma" to qualify for SIBs, and those done with the purpose of finding employment. While searching every week is required, a weekly search in and of itself is but one fact to consider. As employment commensurate with the ability to work only need be sought, search for full-time employment will not be mandated in every case. There was no evidence presented here, however, that the claimant was limited or restricted in the hours he could work, only in the level of demand.

We cannot endorse the implication made by the claimant's attorney that a SIBs applicant should be expected to stretch out a job search; this would bear the hallmark of a search undertaken to get benefits rather than employment. Mr. L made a cogent point that the current economy in Texas should yield employment for the diligent searcher much more rapidly than has been the case in the past.

However, the hearing officer could consider that the claimant's education and skills were limited and this would affect the type of job search that would be undertaken to identify potential jobs. We cannot agree that she did not consider the factors she was required to consider under Rule 130.102(e), which we cannot read as a "checklist" in which every listed factor must be satisfied. They are factors for the hearing officer to review in considering the totality of the evidence. She could consider that, after the qualifying period under review, the

claimant availed himself of services through the TRC and during the quarter followed the suggestion of a TRC counselor in identifying one type of job he might do. He has also followed up on leads provided by the carrier's vocational counselor (although a shorter wait between receiving the lead and acting on it would appear to be desirable for future efforts).

As it stands, although the fact finder could have drawn different inferences, we cannot agree that her resolution of conflicting evidence was so against the great weight and preponderance of the evidence presented for this quarter as to be manifestly unfair or unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We accordingly affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge