

APPEAL NO. 000774

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 22, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter, from December 3, 1999, through March 2, 2000. The claimant appeals the hearing officer-s determinations that his job search was not reasonably calculated to identify, apply for, and obtain jobs commensurate with his ability to work; that he did not make a good faith effort to seek employment commensurate with his ability to work; and that he is not entitled to SIBs for the third quarter. The respondent (carrier) replies that there is sufficient evidence to support the decision and order of the hearing officer and it should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable lower back injury on _____, when working as a cement mixer truck driver. The parties stipulated that the claimant reached maximum medical improvement on July 23, 1998, with an impairment rating of 15%; that the claimant did not commute any portion of the impairment income benefits; that the third quarter of SIBs was from December 3, 1999, through March 2, 2000; that the qualifying period for the third quarter for SIBs was from August 20, 1999, through November 18, 1999; and that during the qualifying period for the third quarter of SIBs, the claimant had no earnings. The claimant-s treating doctor has diagnosed lumbar syndrome, lumbar radiculopathy, myospasm, and lumbar spondylolisthesis-grade II. The claimant has an 11th grade education, has not obtained a GED, and has performed manual labor jobs in the past.

The claimant testified that his treating doctor released him to return to sedentary work with restrictions of no lifting more than 15 pounds, no climbing, no bending, and no squatting. The claimant testified that during the qualifying period he searched for jobs commensurate with his ability to work, but none of the employers were hiring. The claimant said that he obtained potential job leads in the Sunday newspaper, made cold calls, and sought employment at all of the places listed on his Application for Supplemental Income Benefits (TWCC-52). The claimant applied for jobs as a cashier, stocker, janitor, deliveryman, and ticket writer for a trucking company. The claimant testified that he applied for jobs which he did not know if he could perform, but that he was willing to try.

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 average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. The only issue in this case is whether the claimant made the required good faith job search effort. Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(4) (Rule

130.102(d)(4)), the version then in effect, provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "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." Subsection (e) further provides that the injured worker who "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." There follows a list of information that may be provided by the injured worker and considered on the question of a good faith job search. In Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999, we held that the documentation requirement of Rule 130.102(e) was mandatory and that a hearing officer could not consider nondocumented employment search efforts in arriving at the good faith determination.

The claimant had the burden to prove that he made a good faith effort to seek employment commensurate with his ability to work during the qualifying period. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(4), the hearing officer had to judge the credibility of the evidence before him.

The hearing officer considered all of the evidence and did not find the claimant's testimony credible. The hearing officer found that during the qualifying period the claimant made no more than two job contacts per week; that the claimant routinely waited to inquire about jobs advertised in the Sunday paper until late in the week; that of the jobs listed on the TWCC-52, the claimant may have had the physical ability to perform only one, working as a ticket writer for trucks; that the claimant applied for no more than one job on any given day; and that the claimant's job search was not reasonably calculated to identify, apply for, and obtain jobs commensurate with the claimant's ability to work. The hearing officer states that, given the lack of job contacts for positions which would be reasonably believed to be sedentary work, and the number and timing of the job contacts reported on the TWCC-52, the claimant's job search did not constitute a good faith effort to seek employment commensurate with his ability to work. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant did not make a good faith effort to seek employment commensurate with his ability to work and is not entitled to SIBs for the third quarter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge