

APPEAL NO. 000841

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 9, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fifth quarter, from December 14, 1999, through March 14, 2000. The appellant (carrier) appeals, contending the hearing officer erred in finding the claimant was entitled to SIBs because the claimant did not make a good faith job search during the qualifying period for the fifth quarter and because the claimant's unemployment during the qualifying period was not a direct result of his impairment from the compensable injury. The claimant responds that the hearing officer's decision and findings were supported by the evidence, including her findings that the claimant made a good faith job search and that his unemployment was a direct result of his impairment from his compensable injury.

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 sustained a compensable injury; that the claimant reached maximum medical improvement with an impairment rating of 15% or greater; that the claimant did not elect to commute any portion of impairment income benefits; that the fifth quarter qualifying period began September 1 and ended November 30, 1999; and that the fifth quarter began on December 14, 1999, and ended March 14, 2000. The claimant testified that he was injured when he slipped and fell at work. The claimant also testified that this injury resulted in two surgeries to his right ankle. The claimant stated that he is unable to return to his previous employment as a result of his injury. The claimant testified that he searched for work every day and sometimes into the night using the newspaper and the Internet to find job openings. The claimant would then send letters and resumes by facsimile transmission or by mail to prospective employers. The claimant listed 39 job contacts on his Application for Supplemental Income Benefits (TWCC-52). It is undisputed that using the job search method described by the claimant he did find employment on January 28, 2000, as a courier.

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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b))¹, the quarterly entitlement to SIBs is determined prospectively and depends on

¹The "new" SIBs rules which went into effect on January 31, 1999, control in the present case. See Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999.

whether the employee meets the criteria during the "qualifying period." Under Rule 130.101, "qualifying period" is defined as the 13-week period ending on the 14th day before the beginning of a compensable quarter.

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 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).

Rule 130.102(e) provides:

- (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 Texas Rehabilitation Commission;
- (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 Texas Workforce Commission; or
- (10) any other relevant factor.

Applying our standard of review, as well as the requirements of the 1989 Act and the rules cited above, we find no error in the hearing officer's determination that the claimant was entitled to SIBs for the fifth compensable quarter. The hearing officer found that the claimant's job search during the qualifying period constituted a good faith effort to seek employment commensurate with his ability to work. The carrier argues that the claimant only sought employment with 37 employers, criticizes the claimant's job search for relying on letters and faxes rather than searches in person, contends that the claimant had no job search plan, and argues that the claimant's job packet emphasized the negatives rather than the positives. These were matters for the hearing officer to evaluate in making her factual determination in regard to good faith job search. We note that it is not required by the rules that a job search take a particular form or that a specific number of job contacts be made. Also a job search plan is a factor to be considered, not an absolute requirement.

Nor is a claimant precluded from honestly stating his age or whether he has been off work due to an injury. Our decision affirming a hearing officer denying the claimant SIBs for the third compensable quarter in Texas Workers' Compensation Commission Appeal No. 992243, decided November 17, 1999 (Unpublished), does not preclude the hearing officer in the present case from finding the claimant searched for work in good faith during the qualifying period for the fifth compensable quarter. It was up to the hearing officer to weigh the evidence and the factors outlined in Rule 130.102(e) in making her factual determination concerning good faith job search. While the carrier argues that the claimant did not seek employment every week, the evidence regarding this was conflicting. We find sufficient evidence to support her findings and no error of law.

Nor do we find merit in the carrier's assertion that the claimant did not establish that his unemployment was a direct result of his impairment. 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. There is certainly such evidence in the present case.

We also reject the carrier's argument that the decision of the hearing officer should be reversed because the claimant's TWCC-52 is incomplete. We find no basis to find that the claimant's TWCC-52 is incomplete and agree with the claimant that is an argument that is being raised for the first time on appeal.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge