

APPEAL NO. 001140

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 May 1, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth and ninth quarters. The claimant appeals, contending that he made a good faith effort to seek employment commensurate with his restrictions during the qualifying periods. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant contends that his job search efforts during the qualifying periods constituted a good faith effort to obtain employment commensurate with his ability to work. The claimant had been employed as a precision machinist and sustained a compensable spinal injury on _____. The claimant testified that he had cervical spinal surgery in the form of a two-level C5-7 discectomy and fusion in late 1995. The parties stipulated to the compensable injury; that the claimant had a 37% impairment rating; and that the qualifying period for the eighth quarter was from September 8 through December 7, 1999, and the qualifying period for the ninth quarter was from December 8, 1999, through March 7, 2000.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). There was no appeal of the hearing officer's findings that the claimant's underemployment and unemployment during the qualifying periods were direct results of his impairment from the compensable injury. The SIBs criterion in dispute is whether the claimant attempted in good faith to obtain employment commensurate with his ability to work during the qualifying periods. Section 408.142(a)(4) and Rule 130.102(b)(2).

Medical evidence establishes that the claimant had been released to return to work full time (eight hours a day) with a lifting restriction of no more than 35 pounds and the stipulation that he be allowed to take stretch breaks every two hours. During the qualifying period for the eighth quarter, the claimant was employed part time by a pizza restaurant as a delivery driver working from 5:00 or 6:00 p.m. until released or until closing. The claimant worked anywhere from 12 to 25 hours a week. In addition, the claimant listed some 52 job contacts on his Application for Supplemental Income Benefits (TWCC-52) for "any position" during the eighth quarter qualifying period. Some of the contacts were temporary employment agencies. The claimant testified that in late December 1999, the weather was cold, which affected his neck injury, causing him to miss some work and ultimately leave that job. The claimant said that the city where he was living was relatively small and he decided to relocate to San Antonio where, he believed, the job opportunities

would be better. The claimant moved to San Antonio on January 16, 2000, and had no earnings during the ninth quarter qualifying period. The claimant made approximately 38 job contacts in the ninth quarter qualifying period with many of the job contacts being with temporary employment agencies. The claimant is 38 years old and has a college degree. The claimant's job plan was to contact the Texas Workforce Commission (TWC) once a week and obtain job listings. In addition, the claimant attended two job fairs during the ninth quarter qualifying period and used the Internet to get job leads. The carrier conducted a verification check of the claimant's job contacts with only a small portion of the businesses confirming the claimant's contact and others denying any contact or neither confirming nor denying such contact.

Rule 130.102(e) provides, in part, that 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. That subsection also provides that information that may be considered includes, among other things, cooperation with the Texas Rehabilitation Commission. The hearing officer, in his Statement of the Evidence, commented:

The evidence indicated that the Claimant was merely making blind contacts, even with the staff leasing companies and the [TWC]. His lists of contacts in each TWCC-52 reflected that he looked for employment at least once every week, as required by Commission [Texas Workers' Compensation Commission] Rule 130.102(e). However, it also showed that generally he would make two or three contacts in one day, then take no action until about six days later, when he repeated the process.

* * * *

Claimant did not show that he had any system or method or plan for his job search in [city]. . . . Most of the evidence indicated to this Hearing Officer that the Claimant was merely going through the motions, especially in the eighth qualifying period.

The hearing officer found that during the eighth and ninth quarter qualifying periods the claimant's efforts did not amount to good faith attempts to obtain employment commensurate with his ability to work for the reasons stated. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that the hearing officer's decision that the claimant is not entitled to SIBs for the eighth and ninth quarters is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge