

APPEAL NO. 001238

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 May 1, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter, from December 2, 1999, through March 1, 2000. The appellant (carrier) appeals, contending that the claimant failed to establish a good faith job search. The carrier points to the fact that the claimant applied for work during the qualifying period at some of the same businesses he had previously unsuccessfully sought employment, that the claimant did not provide resumes to all the businesses at which he sought employment and that some of the jobs for which the claimant applied were not ones which he was physically able to perform. The claimant responds that there is sufficient evidence to support the finding of the hearing officer that he attempted in good faith to seek employment commensurate with his ability to work.

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 with an impairment rating of 15% or greater; that the claimant had not commuted any portion of impairment income benefits; that the third quarter qualifying period began August 20 and ended November 18, 1999; and that the third quarter began on December 1, 1999, and ended March 1, 2000.

The hearing officer summarized the evidence as follows in her decision:

The Claimant maintained that he was entitled to SIB's for the third quarter. During the qualifying period the Claimant made approximately seventy-eight contracts. The Claimant lives in (city) and looked for employment there and the surrounding towns from contacts out of the newspaper and cold calls. The Claimant explained that some of the places he had contacted in the past, but recontacted them again to see if there was an opening because of the limited job opportunities where he lives.

The Carrier contended the Claimant was not entitled to SIB's for the third quarter. According to the Carrier, the Claimant did not make a good faith effort to seek employment because he was only attempting to qualify for SIB's and not attempting to go to work. The Claimant contacted several places he had already contacted during the second quarter.

The carrier called Mr. S, its vocational consultant, to testify concerning the claimant's job search. Based upon criteria used by Mr. S, it was Mr. S's opinion that the claimant did not make a good faith job search.

The hearing officer made a factual finding the claimant made a good faith job search. The carrier challenges this finding, primarily arguing on appeal that the hearing officer should have applied the criteria outlined by Mr. S.

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 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 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). 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

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.

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 third 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 four employers when applying the criteria for a valid job search used by Mr. S, criticizes the claimant's job search for not always using resumes and applications, contends that the claimant sought employment outside his physical limitations, and argues that the claimant sought employment with businesses with whom he had applied in previous quarters. 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. The hearing officer was not required to apply the criteria set out by Mr. S and could give his testimony little or no weight. 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. We find no error of law in her application of Rule 130.102(e).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Susan M. Kelley
Appeals Judge