

APPEAL NO. 001273

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held May 1, 2000. The hearing officer found that during the qualifying periods for the fifth and sixth quarters for supplemental income benefits (SIBs) the appellant's (claimant) unemployment was not a direct result of his impairment from the compensable injury and that he did not in good faith seek employment commensurate with his ability to work and concluded that he is not entitled to SIBs for the fifth and sixth quarters. The claimant filed a request for review that will be treated as a general appeal that the evidence is not sufficient to support the decision of the hearing officer. The respondent (carrier) replied, contended that the document filed by the claimant is not sufficient to be an appeal, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reverse two findings of fact made by the hearing officer and affirm her decision and order.

The claimant speaks Spanish and a translator was used at the CCH. It is obvious that the claimant has difficulty understanding the workers' compensation system and dispute resolution and is not pleased with the services he has received from the Texas Workers' Compensation Commission (Commission). Lack of understanding of the requirements for entitlement to SIBs is not an excuse for not meeting the criteria for entitlement for SIBs set forth in Sections 408.142 and 408.143.

Section 408.142 provides that an employee is entitled to SIBs if, on the expiration of the impairment income benefits (IIBs) period, the employee has an impairment rating of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment; has not elected to commute a portion of the IIBs; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Section 408.143 provides that an injured employee initially determined by the Commission to be entitled to SIBs will continue to be entitled to SIBs for subsequent compensable quarters if the employee, during each qualifying period, has not returned to work or has returned to work earning less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury and has made good faith efforts to obtain employment commensurate with the employee's ability to work. The claimant has the burden to prove entitlement to SIBs. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The claimant worked as a welder when he was injured. An Application for [SIBs] (TWCC-52) indicates that during the qualifying period for the fifth quarter the claimant sought employment with five employers on 14 occasions beginning on June 24 and ending

on July 15, 1999. A TWCC-52 indicates that during the qualifying period for the sixth quarter the claimant sought employment on eight occasions with three employers during an eight-day period starting on August 25, 1999. The claimant testified that he worked in lawn maintenance during the qualifying period for the sixth quarter, that the TWCC-52 for that quarter showed that he earned \$720.00, that he earned more than that, and that he did not have records with him to show how much he earned during the qualifying period. He did not indicate the time that he worked. He said that he contacted the Texas Rehabilitation Commission (TRC) and for two or three months during the qualifying period for the fifth quarter he attended classes to attempt to learn to speak English. A report of a functional capacity evaluation (FCE) dated June 22, 1999, states that the claimant injured his head, neck, chest, and left shoulder while working as a pipewelder; that his job description requires him to function at a medium physical demand level; that the claimant is able to meet the job's physical demand level; and that the claimant needed to address his chronic pain issues and should undergo a work hardening program to increase his stamina and endurance.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) and (e) (Rule 130.102(d) and (e)) provide that a claimant has made a good faith effort to obtain employment commensurate with his ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work, has been enrolled in and satisfactorily participated in a full time vocational rehabilitation program sponsored by the TRC, has met requirements for establishing that he was unable to perform any type of work in any capacity, or looked for employment commensurate with his ability to work every week during the qualifying period and documented the search efforts.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. The evidence is clear that the claimant did not look for employment each week during the qualifying periods. In addition, he did not meet his burden to establish that he was enrolled in and satisfactorily participated in a full-time vocational rehabilitation program sponsored by TRC or returned to work in a position which is relatively equal to his ability to work. The evidence is sufficient to support determinations that during the qualifying periods for the fifth and sixth quarters the claimant did not in good faith seek employment commensurate with his ability to work.

The report of the FCE stating that the claimant could perform the type of work he was doing when he was injured is sufficient to support the determination that his unemployment during the qualifying period for the fifth quarter was not a direct result of his impairment from the compensable injury. Finding of Fact No. 11 that the claimant did not return to work during the qualifying period for the sixth quarter is so against the great

weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and is reversed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In her statement of the evidence in her Decision and Order, the hearing officer stated that the evidence was insufficient to show that the claimant earned less than 80% of his preinjury AWW during the qualifying period for the sixth quarter, but she did not make a finding of fact so stating. She made Finding of Fact No. 16 which states that the claimant's unemployment during the qualifying period for the sixth quarter was not a direct result of the impairment from the compensable injury. Clearly, the claimant was employed during the qualifying period for the sixth quarter. We reverse Finding of Fact No. 16 because it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Because the findings of fact that establish that during the qualifying period for the sixth quarter the claimant did not in good faith seek employment commensurate with his ability to work are sufficient to support the conclusion of law that the claimant is not entitled to SIBs for the sixth quarter, we do not remand for the hearing officer to make additional findings of fact concerning whether the claimant established that he met the direct result criteria during the qualifying period for the sixth quarter.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge