

## APPEAL NO. 001294

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 8, 2000. The hearing officer concluded that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 16th and 17th compensable quarters. The claimant's appeal asserts the insufficiency of the evidence to support the legal conclusion and all but one of the non-stipulated findings of fact. The respondent (carrier) urges, in response, that the evidence is sufficient to support the challenged findings and conclusion.

### DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; reached maximum medical improvement on November 4, 1994, with an impairment rating (IR) of 19%; did not commute any portion of his impairment income benefits (IIBs); and that the 16th quarter qualifying period ran from May 21 through August 19, 1999, and the 17th quarter qualifying period ran from August 20 through November 18, 1999. Not disputed is the finding that the claimant's unemployment during the filing periods in issue was a direct result of his impairment from the compensable injury.

The claimant testified that following his compensable injury, he underwent two lumbar spine operations, the last being a fusion in November 1996 which has failed; that his doctor, Dr. B, has recommended a third operation but that the spinal surgery approval process has not begun because the carrier refuses to authorize a requested myelogram; that he has low back pain which radiates down his right lower extremity; and that his medications make him drowsy.

The claimant acknowledged that, as his Application for Supplemental Income Benefits (TWCC-52) forms in evidence reflect, he made three job search contacts on August 18, 1999, the last day of the 16th quarter filing period, and 29 job search contacts during the 17th quarter filing period; that all of his contacts sought truck driving jobs; and that most of these contacts were made on Mondays, Tuesdays, and Wednesdays. He stated that some of his contacts were made by telephone and the others in person; that he spent about one hour per telephone contact, including finding the job advertisement in a newspaper and making the call, and from one to two hours on contacts made in person. The claimant agreed that the total number of days spent in job search efforts during the 17th quarter filing period was 20 and said he spent the remaining 71 days of the qualifying period "at home doing what [he] could." The claimant, who is 41 years of age and a high school graduate who served in the Marine Corps, further testified that all of his job search efforts were made to companies for truck driving positions because he drove trucks for 20 years, enjoyed that work, and knew what it paid in terms of supporting his large family; that he completed applications at some but not all of the businesses; that the only documentation he had relating to his job contacts were some notes in his briefcase which was in his car; and that some of the businesses indicated that he was not hired because

of his back surgery while others simply never got back to him. He acknowledged not having followed up with any of the prospective employers he contacted, explaining that he saw no point in doing so given that they were aware of his back surgery. When asked about some of the unsuccessful efforts of the carrier to verify the job contacts on his TWCC-52, the claimant indicated that he was "not good" with dates and acknowledged that one of the dates was Labor Day.

The claimant further testified that he contacted the Texas Rehabilitation Commission (TRC) and was advised, by that agency's December 15, 1999, letter, that he was not available for that agency's services because of Dr. B's statement that the claimant is unable to return to his job or even seek other gainful employment because of his low back pain. The claimant also acknowledged that he had not registered with the Texas Workforce Commission. He denied the suggestion that he failed to be available for and cooperate with the carrier's vocational specialist. He also said he does drive his own auto, sometimes in pain. The claimant felt he could not perform security guard duties because sometimes such jobs involve standing for long periods and "getting physical." He felt he could not perform telemarketing work because he has "a speech problem from TMJ." He said he did not look for jobs other than truck driving because he would need training and the TRC is not going to provide him with training.

The claimant stated that it was his position that he was unable to work during the two qualifying periods at issue. As he put it, "No, I don't feel I was able to but I still go on the interviews to satisfy -- keep everybody happy. My personal opinion, I don't believe I'll be able to do any work with the pain that I'm having." He further stated that he underwent the job search "because its required by the workers' compensation to look for work."

The records of Dr. B, apparently the claimant's current treating doctor, contain more than 10 form letters dated during the period from October 21, 1998, to November 22, 1999, stating that the claimant is under Dr. B's care for chronic lumbar strain and is "currently unable to work."

The February 12, 1999, report of Dr. W, who examined the claimant for the carrier, states that Dr. B's notes of September 21, 1998, reflect that the claimant has no interest in the suggested additional surgery; that the claimant has a permanent disability; and that "return to work restrictions would be at a sedentary job description of lifting less than ten pounds."

Dr. B wrote on July 21, 1999, that the claimant requires additional surgery on his back and that as far back as August 1998 the claimant has been unable to return to work with the employer "or even to seek any other type of gainful employment because of the unrelenting severe pain he suffers on [a] daily basis in his lower back." The July 27, 1999, report of Dr. M, an orthopedic surgeon who reviewed the claimant's medical records, states that the claimant "should be capable of doing sedentary work, lifting 10 pounds or less, with or without surgery" and that Dr. M recommends that the claimant undergo a functional capacity evaluation (FCE) to determine his abilities.

Dr. B wrote on August 23, 1999, that the claimant has been unable to perform any job from May 21, 1999, through August 19, 1999, because of his on-the-job injury of \_\_\_\_\_, and that the claimant has severe back pain and is restricted to lifting no more than 10 pounds at a time and is also restricted in bending, stooping, squatting, and twisting his lower back. Dr. B reported on October 12, 1999, that the claimant underwent an FCE on October 7, 1999, which revealed that the claimant rated in the sedentary category for the leg lift, in the light category for the torso lift, and in the sedentary category for the arm lift and high near lift. Dr. B also stated that the claimant has a lot of restriction in his lumbar spine. Dr. B's notes of October 19, 1999, state that the FCE reveals restricted range of motion in the lumbosacral spine and the inability to lift more than 10 pounds safely.

The detailed October 22, 1999, report of Dr. W, who reexamined the claimant for the carrier, states that the claimant has two-level disc pathology; that surgical treatment on an elective basis is reasonable; and that the claimant "can return to a low level physical demand job description" with the 20-pound maximal lifting restriction demonstrated in Dr. B's testing.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work.

The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) then in effect provides in pertinent part that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work and no other records show that the injured employee is able to return to work[.]" Rule 130.102(e) provides, in pertinent 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. This rule goes on to list a number of factors which may be considered in determining whether a good faith effort was made including the number and types of jobs sought, the existence of applications or resumes to document the job search efforts, any job search plan, and the amount of time spent in attempting to find employment.

The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3) must be satisfied. See, e.g., Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; and Texas Workers' Compensation Commission Appeal No. 001153, decided June 30, 2000. The hearing officer made no specific findings of fact addressing the elements of Rule

130.102(d)(3). The Appeals Panel has repeatedly encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3). See, e.g., Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999; Appeal No. 001153, *supra*.

The hearing officer found, among other things, that during the qualifying periods at issue the claimant had the ability to work at least sedentary duties; that the job contacts he made were solely for driving positions which he asserted he was not capable of performing; that his job searches were made with the intent to qualify for SIBs rather than to find employment; and that he did not make a good faith effort to obtain employment commensurate with his ability to work. The claimant challenges the sufficiency of the evidence to support these findings.

The claimant had the burden to prove that during the two qualifying periods at issue he made a good faith effort to obtain employment commensurate with his ability to work. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

CONCUR IN RESULT:

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Gary L. Kilgore  
Appeals Judge