

APPEAL NO. 001444

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 originally held on October 22, 1999. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 992737, decided January 21, 2000, remanded the case back to the hearing officer on the matter of whether the appellant (claimant) made a good faith search for employment commensurate with his ability to work. A hearing on remand was held on May 16, 2000. The hearing officer determined that the claimant is not entitled to supplemental income benefits (SIBs) for the eighth quarter.

The claimant appealed, arguing that the Appeals Panel had not called for further development of the evidence and that claimant's testimony, solicited by the hearing officer at the remand hearing, should not be considered. The claimant complains that the hearing officer has "flip-flopped" and come up with a reason for finding lack of a good faith job search that is different from his reason before. The respondent (carrier) responded that the hearing officer still had the obligation to weigh the evidence and assess credibility.

DECISION

We affirm the hearing officer's decision.

The claimant sustained a carpal tunnel syndrome injury on _____, and he said that he had emotional and psychological components along with this injury.

At the CCH on remand, the parties announced that they did not intend to offer new evidence but would present argument. However, the hearing officer asked additional questions of the claimant. The claimant stated that he felt he could do the light mechanical work he applied for. He asserted that he had personally visited "every one" of the listed job contacts, but did not place applications at several because they were not hiring. He said he had been given a run-around from the Texas Rehabilitation Commission when he sought services, and he had not contacted the Texas Workforce Commission at all.

As noted in our earlier decision, the testimony of the claimant had been that he went in person to over one-half of the listed businesses and contacted about five or six by telephone. At the previous hearing, a private investigator for the carrier told how he made calls to verify the filing of applications only, and contacts that did not involve applications were noted only if the information was volunteered. Only four of the prospective employers with whom the investigator made contact were able to verify applications.

In the previous decision, there were no findings or determinations that were affirmed by the Appeals Panel. We noted that the hearing officer appeared to have based his determination that claimant did not make a good faith search for employment on his belief that claimant overwhelmingly searched for jobs beyond his ability to perform. We noted that the private investigator who had been hired by the carrier to follow up on the job

contacts listed on the claimant's Application for [SIBs] (TWCC-52) was under the inaccurate assumption that claimant had been released only to light duty and that this misunderstanding caused the investigator to conclude that the claimant had made a search for jobs he could not do. The hearing officer was asked to review his assessment that the claimant applied for jobs beyond his capability, as well as the extent of "contact" made with prospective employers.

The decision to hold another hearing was within the hearing officer's discretion. Both parties agreed that the broad issue that was remanded was whether the claimant was entitled to SIBs for the eighth quarter of eligibility. We have reviewed our previous decision and do not believe that a fair reading limited the hearing officer to only considering on remand whether the claimant sought jobs within his physical capacity to work. The hearing officer was still faced with considering, from the totality of the evidence, whether the claimant's job search was made in good faith.

The hearing officer had the authority to ask questions of the claimant to further develop the record. Section 410.163(b). We note that only the hearing officer asked questions and the carrier was not permitted to cross-examine the claimant. The claimant's testimony during the remand was cumulative of what he had testified to previously and favorable to him because he was able to underscore his ability to perform the jobs he sought. We cannot agree that the hearing officer erred in asking the claimant to testify or that he went beyond the scope of the remand by making other findings of fact in support of his conclusion of law that the claimant was not entitled to SIBs.

The hearing officer evidently went back over the claimant's TWCC-52 and accepted what the claimant had checked himself on that form with regard to the type of contact he made with each prospective employer. He does not appear to have considered the testimony given on remand as critical on the nature of the contacts made by the claimant. From the TWCC-52, he ascertained that claimant placed 12 applications out of 56 contacts, had contacted 13 in person, 1 by "fax" and 9 by telephone. The hearing officer noted that no form of contact was specified for the rest. Although the hearing officer reconsidered and now agrees that the claimant searched for jobs within his capability, he was not automatically required to find that the job search was made in good faith, for the purpose of finding employment. He could consider the other relevant factors listed in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here, and we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge