APPEAL NO. 001616

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 June 26, 2000. The hearing officer determined that the respondent (claimant herein) is entitled to supplemental income benefits (SIBs) for the 11th quarter. The appellant (carrier herein) files a request for review contending the hearing officer erred in finding that the claimant made a good faith job search. The carrier argues that the hearing officer erred in reaching this determination by applying an incorrect standard in that he considered the fact the claimant searched for and found a job after the end of the qualifying period. The claimant responds that the hearing officer did not err in finding he made a good job search and was entitled to SIBs.

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 claimant testified that he sustained a compensable injury on _____, when he fell at work and that his injury resulted in two surgeries to his left shoulder. The claimant also testified that he had a 17% impairment rating and had not commuted any portion of his impairment income benefits. The claimant testified that he looked for a number of jobs during the qualifying period for the 11th quarter and put into evidence a search log. The carrier put into evidence a report indicating it was unable to confirm by checking with places the claimant asserted to have searched for work that the claimant actually sought employment. The claimant testified that his job search during the qualifying period resulted in his being hired after the end of the qualifying period and that he was still working at this job at the time of the CCH.

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.

The only dispute in the present case was whether or not the claimant met the good faith job search requirement. We have previously held that the question of whether a claimant made a good faith job search is a question of fact. Texas Workers' Compensation

[1]The "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.

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 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:
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> (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 made a good faith effort to seek employment commensurate with his ability. We do find that this factual determination was sufficiently supported by the evidence. It was up to the hearing officer to weigh the evidence and the factors outlined in Rule 130.102(e) in making his factual determination concerning a good faith job search. We find sufficient evidence to support his findings.

We do not find the fact that the hearing officer mentions that the claimant obtained a job after the qualifying period meant that he applied the wrong legal standard in the present case. There was evidence that the claimant made a job search during the qualifying period and the hearing officer found he made a good faith job search. The hearing officer did, in his discussion, state the question to be a close one and that the fact the claimant found a job was evidence of good faith. With sufficient evidence to support his finding of good faith job search, we find no basis to reverse his decision.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge