APPEAL NO. 001785

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 June 22, 2000. The hearing officer determined that the appellant (claimant herein) is not entitled to supplemental income benefits (SIBs) for the fourth quarter (May 25, 1999, through August 23, 1999), the fifth quarter (August 24, 1999, through November 22, 1999), the sixth quarter (November 23, 1999, through February 21, 2000), or the seventh quarter (February 22, 2000, through May 22, 2000) and that the claimant has permanently lost entitlement to SIBs because he was not entitled to them for 12 consecutive months. The claimant appeals, contending the hearing officer erred concerning his not being entitled to SIBs for the fifth, sixth, and seventh quarters. The claimant contends that since he was entitled to SIBs for the fifth, sixth, and seventh quarters, he had not permanently lost entitlement to SIBs. The respondent (carrier herein) replies, requesting we check the timeliness of the claimant's appeal and arguing that the determinations of the hearing officer were sufficiently supported by the evidence.

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 carrier questions whether the claimant timely filed his request for review. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was mailed to the claimant on July 14, 2000. The claimant does not recite when he received the decision. We note that receipt was deemed on July 19, 2000, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)). The claimant mailed his request for review to the Commission postmarked July 31, 2000, and the Commission received it on August 2, 2000. Thus, since he mailed his request for review to the Commission within 15 days and it was received within 20 days of the claimant's receiving the hearing officer's decision, the claimant's request for review is timely. *See* Section 410.202(a); Rule 143.3(c).

The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement on July 21, 1997, with an impairment rating of 19%; that the claimant has not commuted any portion of his impairment income benefits; that the claimant was not entitled to SIBs for the fourth compensable quarter; that the qualifying period for the fifth quarter began on May 12, 1999, and ended on August 10, 1999; that the fifth quarter began on August 24, 1999, and ended November 22, 1999; that the qualifying period for the sixth quarter ran from August 11, 1999, through November 9, 1999; that the sixth quarter began on November 23, 1999, and ended on February 21, 2000[1]; that the qualifying period for the seventh quarter ran

[1]The hearing officer's decision stated February 21, 1999, but this is obviously a typographical error and we reform her decision to read February 21, 2000.

from November 10, 1999, through February 8, 2000; and that the seventh quarter began on February 22, 2000, and ended on May 22, 2000. The hearing officer summarizes the evidence in her decision and we adopt her rendition of the evidence. We will only briefly touch on the evidence germane to the appeal.

The claimant testified that in his compensable injury, which took place when the trailer separated from the truck he was operating, he injured his left arm, neck, and left shoulder. The claimant testified that as a result, he underwent two surgeries on his left arm, the second surgery taking place in 1997 or early 1998. On _____, the claimant fell from a six-foot ladder while hanging Christmas lights and injured his lumbar spine. The claimant underwent spinal surgery the next day and later underwent a second spinal surgery. The claimant presented medical evidence stating he was unable to work as a result of his compensable injury during the qualifying period for the fifth compensable quarter and part of the filing period for the sixth compensable quarter. There was also medical evidence that the claimant was unable to work due to his noncompensable spinal injury. The claimant was released to return to restricted duty on October 1, 1999, and testified that he began working delivering newspapers. The claimant testified that he delivered newspapers one day a week and that it took him five to six hours to deliver these papers. The claimant did not look for any other work.

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 Rule 130.102(b), 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 both the question of whether the claimant made a good faith job search and whether the claimant's unemployment/underemployment was a direct result of his impairment are questions 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(d) provides as follows, in relevant part:

> (d) Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> * * * *
>
> (4) 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[.]

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 not entitled to SIBs for the fifth, sixth, and seventh compensable quarters. We find sufficient evidence to support the finding of the hearing officer that the claimant had an ability to work during the qualifying periods for each of these quarters. The hearing officer also found that the claimant failed to seek employment commensurate with his ability to work and that his unemployment during the qualifying period for the fifth compensable quarter and his underemployment during the qualifying periods for the sixth and seventh compensable quarters were not a direct result of his impairment. The hearing officer obviously believed the claimant was able under the restrictions he had been given to do more than deliver papers one day a week. The hearing officer also believed that the claimant's restrictions were a result of his noncompensable fall rather than his compensable injury. While under the evidence the hearing officer could have reached other conclusions, we do not find the overwhelming evidence to be contrary to her findings.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge