APPEAL NO. 001888

Following a contested case hearing (CCH) held on July 11, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) was not entitled to supplemental income benefits (SIBs) for the third quarter, but was entitled to SIBs for the fourth quarter. The appellant (carrier) files a request for review arguing that the claimant was not entitled to SIBs for the fourth quarter.

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 parties stipulated that the claimant sustained a compensable injury to her cervical and thoracic spine; that the claimant was assessed at maximum medical improvement on June 14, 1999, with an 18% impairment rating; that the claimant had not elected to commute her impairment income benefits; that the fourth quarter for SIBs began on March 27, 2000, and ended on June 25, 2000; and that the qualifying period for the fourth quarter began on December 14, 1999, and ended on March 13, 2000. The claimant was released to work under restrictions on October 28, 1999. The claimant testified that her restrictions restricted her from doing any computer work, which is the only type of work she had ever done previous to her injury. The claimant testified that she sought employment after being released to restricted duty and contacted the Colorado Department of Human Services Division of Vocational Rehabilitation to obtain assistance in finding employment. The claimant testified that on March 3, 2000, she obtained employment within her restrictions doing telephone counseling.

The hearing officer found that the claimant did not return to work during the qualifying period for the fourth compensable quarter as a direct result of her compensable impairment and that the claimant made a good faith effort to seek employment during the filing period of the fourth compensable quarter. The carrier contends that these findings were not supported by the evidence. The main thrust of the carrier's argument, both at the CCH and on appeal, is that the claimant is not entitled to SIBs because she failed to seek employment during every week of the qualifying period.

In her decision, the hearing officer cites Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d))[1] which provides in relevant part as follows:

> (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:

[1]There is a typographical error in the hearing officer's decision. While quoting from Rule 130.102(d), her decision refers to it as Rule 130.102(e).

(1) has returned to work in a position which is relatively equal to the injured employee's ability to work;

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period; . . . .

Rule 130.102(e) provides in relevant part as follows:

(e) Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsection (d)(1), (2), (3), and (4) 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.

The carrier argues that the weekly job search of Rule 130.102(e) applies to the present case. It argues that this requirement applies even where a claimant meets one of the requirements of Rule 130.102(d). We have explicitly rejected this argument in the past. *See* Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000, and Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000. We do not see how Rule 130.102(e) could have been more explicitly stated that it does not apply where a requirement of Rule 130.102(d) is met when Rule 130.102(e) begins with the phrase, "Except as provided in subsection (d)(1), (2), (3), and (4) of this section, . . ."

As far as the carrier's factual sufficiency arguments are concerned, we have previously held that both the question of whether the claimant made a good faith job search and whether the claimant's unemployment 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). Applying this standard of review, we find sufficient evidence in the record to support the hearing officer's findings of good faith job search and direct result.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge