

APPEAL NO. 002163-S

This appeal is brought 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 August 25, 2000. The appellant (carrier) and the respondent (claimant) stipulated that the qualifying period for the third quarter for supplemental income benefits (SIBs) began on November 19, 1999, and ended on February 17, 2000, and that the qualifying period for the fourth quarter began on February 18, 2000, and ended on May 18, 2000. The hearing officer found that during the qualifying period for the third quarter the claimant made at least 45 job searches, that he made a job search on a weekly basis, that he attempted in good faith to obtain employment commensurate with his ability to work, and that his unemployment was a direct result of his impairment from the compensable injury and concluded that he is entitled to SIBs for the third quarter. Concerning the fourth quarter, the hearing officer found that the claimant made at least 41 job searches during the qualifying period, made essentially the same findings concerning the good faith and the direct result criteria, and concluded that he is entitled to SIBs for that quarter. The carrier appealed, challenged the claimant's job-seeking efforts, contended that the claimant failed to make a job search during each week of the qualifying periods, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBs for the third and fourth quarters. A response from the claimant has not been received.

DECISION

We affirm the part of the decision that the claimant is entitled to SIBs for the fourth quarter. We reverse the part of the decision that the claimant is entitled to SIBs for the third quarter and render a decision that he is not entitled to them.

At the CCH and on appeal, the carrier contended that the job searches by the claimant were not adequate and that the claimant did not seek employment each week of the qualifying periods. The Decision and Order of the hearing officer contains a statement of the evidence. Only a brief summary of the evidence will be included in this decision. At the request of the carrier, Dr. H examined the claimant. In a report dated August 27, 1999, Dr. H reported that based on a functional capacity evaluation performed on August 16, 1999, the claimant was capable of doing very light to sedentary type work. The claimant testified that on the Application for [SIBs] (TWCC-52) forms he listed only the first job contact for each week, but that he listed all job contacts that he made during the qualifying periods on pieces of paper that he attached to the TWCC-52s. During the qualifying period for the third quarter, the claimant made forty-five job contacts with nine employers. He made seven contacts with one employer, six separate contacts with four different employers, five separate contacts with two additional employers, four separate contacts with two different employers, and two separate contacts with another employer. With each calendar week starting on a Sunday and ending on a Saturday, the claimant made job contacts each full calendar week in the qualifying periods; but at times there were more than seven days between job contacts. For example, the claimant contacted one

employer on Monday, December 20, 1999, and next contacted another employer on Wednesday, December 29, 1999. There were two other similar situations in which there are seven or more days without a job contact during the qualifying period for the third quarter and two similar situations during the qualifying period for the fourth quarter. The claimant made 42 job contacts with 12 different prospective employers during the qualifying period for the fourth quarter. He testified that he looked in the newspaper and talked with friends and had his son use the Internet to find employers to contact. He said that he looked for jobs that he thought he had the physical ability and knowledge from his work experience to perform. He said that he kept checking with the same employers, hoping that a position would be available. He gave an example of one business advertising a job, he applied, was told nothing was available, and the business continued to advertise the job. Information in his TWCC-52 and advertisements from newspapers are consistent with that testimony. The claimant testified that most of his contacts were made by telephone.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) provides in part:

[A]n 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 pointed out that neither the 1989 Act nor the Texas Workers' Compensation Commission's rules concerning SIBs define "week." It stated that Section 311.005(10) of the Texas Government Code defines week as a seven consecutive day period. The carrier contended that it was not sufficient for the claimant to conduct at least one job search during each calendar week of each qualifying period, but contended that at least one job search must be conducted during each seven consecutive day period during a qualifying period. We agree that a claimant must look for work every week of the qualifying period, but do not agree that there can never be more than six days between job contacts to comply with the requirement that an employee shall look for employment commensurate with his or her ability to work every week of the qualifying period. If the carrier's contention prevailed, it could result in starting weeks in a qualifying period on different days of the week depending on when a claimant made a job search. Clearly, nothing in Rule 130.102(e) indicates such intent.

However, rejecting that argument does not resolve the carrier's contention that the claimant did not look for employment each week of the qualifying period. The parties stipulated that the qualifying period for the third quarter began on Friday, November 19, 1999. The first week of the qualifying period began on that day and ended on Thursday, November 25, 1999. The first job search by the claimant during the qualifying period for the third quarter was made on Friday, November 26, 1999, and after the end of the first week of the qualifying period. In January 2000, the claimant looked for a job on Thursday, the 20th, and next looked for a job on Friday, the 28th, and did not look for a job during the week that began on Friday, the 21st. During the qualifying period, the claimant did not look for work during two weeks of the qualifying period.

The hearing officer made findings of fact that “[c]laimant job searched on a weekly basis during the third quarter qualifying period” and that during that qualifying period the claimant attempted in good faith to obtain employment commensurate with his ability to work and made a conclusion of law and rendered a decision that the claimant is entitled to SIBs for the third quarter. We reverse those determinations and render findings of fact that the claimant did not look for work commensurate his ability to work during every week of the qualifying period for the third quarter and that during that qualifying period he did not in good faith seek employment commensurate with his ability to work and a conclusion of law and a decision that the claimant is not entitled to SIBs for the third quarter.

The parties stipulated that the qualifying period for the fourth quarter began on Friday, February 18, 2000, and ended on Thursday May 18, 2000. During that qualifying period, the claimant first looked for work on Wednesday, February 23, 2000, and looked for work at least once during each of the weeks in the qualifying period for the fourth quarter.

We next address the determination that during the qualifying period for the fourth quarter the claimant attempted in good faith to obtain employment commensurate with his ability to work. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness’s testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness’s testimony, and resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref’d n.r.e.); Texas Workers’ Compensation Commission Appeal No. 93426, decided July 5, 1993. The hearing officer considered the evidence related to the job search made by the claimant. Comments she made in her statement of the evidence indicate that she considered the carrier’s arguments concerning the adequacy of the claimant’s job search efforts. The hearing officer’s determinations that during the qualifying period for the fourth quarter the claimant in good faith sought employment commensurate with his ability to work and that he is entitled to SIBs for the fourth quarter are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King’s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer concerning the qualifying period for the fourth quarter and entitlement to SIBs for the fourth quarter, we will not substitute our judgment for hers. Texas Workers’ Compensation Commission Appeal No. 94044, decided February 17,

1994. We affirm the part of the decision that the claimant is entitled to SIBs for the fourth quarter.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge