

APPEAL NO. 002216

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 August 15, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for his third quarter of eligibility.

The hearing officer found that the claimant was not entitled to SIBs in that he had not made a good faith search for employment commensurate with his ability to work. He found that the claimant's unemployment was the direct result of his impairment.

The claimant appeals and disputes several fact findings made by the hearing officer as against the great weight and preponderance of the evidence. The claimant argues that the hearing officer has erred in characterizing his search for full-time work and his preference on some applications to work during regular business hours as a "restriction" by which the claimant limited his job search. The claimant argues that the hearing officer erred in finding that he did not have a job search plan. He argues that there is no support in the evidence for the finding that he did not actively pursue a general equivalency diploma (GED) during the qualifying period, when the GED certificate was actually obtained during that period. The claimant also argues that he was participating in a program sponsored by the Texas Rehabilitation Commission (TRC). He argues that the respondent (carrier) did not dispute that the claimant made a good faith search for employment in general, and only argued that he did not return calls for interviews, which is not proven by the evidence in the record. The carrier responds that the decision is supportable. While the carrier argues about exclusion of exhibits, these points have not been made in the context of a timely appeal.

DECISION

Reversed and rendered in part and reversed and remanded in part.

Because we do not find the summary of the evidence complete on some salient facts, we will summarize here. The qualifying period for the quarter under review ran from February 19 through May 20, 2000. The claimant injured his back on _____; had two surgeries; and received an 18% impairment rating. At the time of his injury, he worked as an electrician for a mobile home manufacturer. He said that he could not return to this job. The claimant said that when he obtained his restrictions from his doctor, the vocational counselor provided by the carrier, Ms. H, contacted his old employer about a return to light duty, but was told there was no light duty available, and was terminated six weeks later.

The claimant's treating doctor was Dr. S; the restrictions in evidence from Dr. S state that the claimant should not lift more than 10 pounds, and should not bend, squat, or stoop. On June 7, 2000, Dr. S wrote a letter stating that the claimant could attend the local junior college in a nursing program but that the requirement for lifting of patients would have to be monitored. He stated that classwork itself should not be a problem. There were no restrictions offered into evidence that showed that the claimant could only work part-time rather than full-time.

The claimant described his job search efforts. The claimant did not have his own car and borrowed one. He said that this consisted of reading the local newspaper job listings on Wednesday and Saturday, for 45 minutes to an hour; that he followed up on about half of the leads sent to him by Ms. H; and that he looked for help-wanted signs posted on area businesses. The claimant was clearly confused when asked by the hearing officer as to whether he had written down this program as a job plan. It was pointed out to the claimant that he had only supplied the identity of his most recent employer although various applications asked him for a five-year work history. The claimant had essentially no explanation for this except that he could not exactly recall all pertinent dates of previous employment.

The claimant was not registered with the Texas Workforce Commission (TWC) during the qualifying period. He said that he did not call to follow up on applications because he assumed that if the employer found him qualified for a position, he would be contacted for an interview. He said that he had voice mail except for a brief period when the telephone company had cut his phone line. The claimant denied that he had failed to return any calls left on his voice mail because there were no messages. The claimant said he had no sales experience but had experience as a stocker and experience in fast-food restaurants. On one application to a fast-food restaurant, he indicated he had worked for them once before. Where the applications asked about the reason he left his previous job, the claimant would put "back injury."

The claimant said that he decided to seek his GED. He offered into evidence the certificate of completion of the required examination for GED certification dated April 14, 2000. This showed that he took the examination on a date in April that begins with a "1" but the second digit is illegible but appears to have a rounded bottom (a zero or a three). He said that in preparation for his certification, he reviewed materials at home, but when it became apparent to him that he might have trouble with the math portion, he also took a GED preparation class in February and March 2000. Soon after the last day of the qualifying period, he had begun class at a local community college which he said was paid for through the TRC. A letter he obtained from the TRC as to his case status was not admitted into evidence upon an objection that it had not been timely exchanged.

We observe that when asked on applications filed prior to April 14 if he graduated from high school, the claimant truthfully put he was not. There are a few applications filed from April 18 through May 8 where the claimant indicated he had not graduated but no GED was indicated. On four applications, he indicated he was working toward his GED. On all applications filed on and after May 10, the claimant indicated that he already had his GED. There was no evidence developed as to when he received the copy of his certificate indicating he passed the GED examination, but the claimant said that as soon as he received it, he took it to the TRC.

After the attorney for the carrier had questioned the claimant, the hearing officer asked additional questions which ranged to some extent beyond the job search efforts and into his daily living activities and recreational activities. The claimant said that he went to a coffee café every day for about one hour to one and one-half hours, that he had been

fishing with a friend three times during the qualifying period, and that he went to the racetrack essentially every Friday night. He said that he contacted at least two prospective employers a week, and that his contacts, including driving time, ranged from twenty minutes to one and one-half hours per employer. The claimant estimated that his job search time in which applications were placed ranged from three to four hours a week. (Newspaper searching was additional to this.)

The claimant's Application for [SIBs] (TWCC-52) and attached applications show 33 documented job searches during every week of the qualifying period. Copies of applications are attached. Asked about why he had indicated on some job applications that he wanted to work full-time, or during regular business hours (called "daylight hours" by the hearing officer in his decision), the claimant said that this was his preference but that he would have considered other alternatives. There were nine applications where the claimant indicated availability from 7:00 a.m. until times ranging from 3:30 to 5:00 p.m. Most of these were grocery stores or fast food restaurants. On nine applications, he indicated that he was available for any hours. On five applications, ranging throughout the qualifying period and not just at the end of it, the claimant put that he would consider full-time or part-time work. The claimant, for the most part, applied for "any" available jobs. He also listed his preferred salary on most applications as \$6.00 an hour, less than he made while working for the employer at the time of his injury.

Although the hearing officer stated as a major part of his consideration that the claimant was called for several interviews, but never returned such calls, there is only one employer for whom any admitted evidence of this was offered. Ms. H, the vocational consultant, filed a report on June 8, 2000, of her handling of the claimant's case. Ms. H noted that she had contacted 10 employers to verify that applications were placed. She verified five applications, with other employers' contact people stating that they "could not locate" the applications. Although she stated that five of these employers "invited" the claimant for an interview, it is clear from reading her notes on each individual contact that this invitation was made to her when she contacted the employers, and had not been made to the claimant. There was only one employer (a men's gym) that she stated had called and left messages for the claimant that were not returned. Ms. H stated that she had been urging the claimant to obtain his GED since January 1999, when she first started working with him. While she had closed his file in March 2000, it was reopened when the claimant expressed job search assistance. She indicated that the claimant contacted her in late May and said he had followed up on a lot of her job search leads, but he could not travel to Temple because of limited availability of transportation. Ms. H stated that many of the contacts listed on the claimant's TWCC-52 were from leads she provided.

The claimant has the burden of proving that he is entitled to SIBs by proving that he has made a good faith search for employment commensurate with his ability to work and that his underemployment or unemployment is the direct result of his impairment. The carrier does not have to disprove the authenticity of an asserted search for employment.

The hearing officer found that the claimant had the ability to do full-time or part-time work during the period in question (we would note that a full-time work release could generally be said to be inclusive of part time). Some appealed findings of fact in the decision are:

4. Claimant restricted a majority of his job searches with the prospective employers to a full-time job with restrictions and restricted his work hours to the daylight hours during the qualifying period of the 3rd quarter of [SIBs].
5. Claimant's self-imposed restrictions of his job searches with a majority of his job searches with the prospective employers to a full-time job with restrictions, and restricted his work hours to the daylight hours during the qualifying period for the 3rd quarter of [SIBs] were contrary and inconsistent with the probative evidence and probative medical evidence concerning Claimant's ability to work.
6. Claimant's probative evidence did not establish that Claimant had a job search plan during the qualifying period for the 3rd quarter of [SIBs].
7. Claimant's probative evidence did not establish that Claimant was actively pursuing a general equivalency diploma [GED] during the qualifying period for the 3rd quarter of SIBS.

In addition, the hearing officer found that the claimant was not registered with the TWC or was not enrolled in a full-time vocational program sponsored by the TRC. He further found that the claimant's job search was "self-restricted, selective, and lacked timing, forethought, and diligence."

The discussion lends some insight into assumptions made by the hearing officer in his evaluation of the evidence. He stated that the claimant had "sabotaged" his prospects for employment. He highlighted that the claimant had, between March 17 and April 14, stated that he had not graduated from high school or received a degree (there is no mention of the applications in which he indicated he was working for his GED). He read the report of Ms. H to indicate that there were "several" employers who had made phone calls to the claimant for interviews. From this, the hearing officer stated that he determined that the claimant "refused" follow-up interviews with "several" employers. Although the claimant testified that he attended GED preparation classes through February and March, the hearing officer stated that it was "speculative" if he did this and stated that the claimant spent the "bare minimal amount of time" in preparation. The hearing officer stated that the date that the claimant actually took the GED test "may have been before the qualifying period" for the third quarter of SIBs.

We will first observe that when a claimant, as here, is physically capable of performing full-time work, and has not been medically restricted to part-time work, a search for full-time employment cannot fairly be characterized as a "restricted" job search. Likewise, the indication of a preferred shift on some (not, as stated by the hearing officer, the "majority") job applications cannot be fairly characterized as a self-restricted search, especially when there are as many other applications indicating a willingness to work any time. Without further discussion, therefore, we find that Findings of Fact Nos. 4 and 5 are against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust, and they are reversed.

Concerning the GED certificate finding, we cannot imagine a more active pursuit of such a certificate than taking and passing the required examination. Both of these occurred within the qualifying period. It is clear that the hearing officer misunderstood the evidence or overlooked the evidence that the examination was taken shortly before the certificate was issued. Therefore, we reverse the fact finding in which the hearing officer found that the claimant was not actively pursuing his GED during the qualifying period, and render a finding that the evidence showed that the claimant was actively pursuing his GED during the qualifying period.

As we agree that the record supports that the claimant did not fall within any of the "equivalency" exceptions to the job search requirement as set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(d)(1)-(5) (Rule 130.102(d)(1)-(5)), which includes participation in a full-time TRC-sponsored program, his search must be evaluated under Rule 130.102(e), the rule in effect for the qualifying period which states:

- (e) 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. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(5) of this section, the reviewing authority shall consider the information from the injured employee, which may include, but is not limited to information regarding:
 - (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 [TRC]

- (5) cooperation with a vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;
- (6) education and work experience of the injured employee;
- (7) amount of time spent in attempting to find employment;
- (8) any job search plan by the injured employee;
- (9) potential barriers to successful employment searches;
- (10) registration with the [TWC]; or
- (11) any other relevant factor.

While these are factors to consider, they are not an exhaustive checklist. A good faith job search may be found to exist, for example, where some of these factors are not present. The hearing officer specifically mentions the job search plan and the TWC registration in his findings but it is hard to determine what other factors were considered. Because so many of the hearing officer's questions were directed at ascertaining whether the claimant had committed his job plan to "writing," we would note that Rule 130.102(e) does not require a job plan, let alone a written plan, but merely presents this as a factor that can be considered. The sophistication of a plan may fairly vary with the type of jobs sought. We are concerned that when the hearing officer states there was no "probative evidence" of a job plan, he is speaking in terms of whether or not there was a written plan. We would observe that the seeking of high school equivalency or advanced degrees are consistent with the existence of a "plan."

We are further concerned that the hearing officer based his determination of good faith in large part upon an erroneous belief that the evidence proved that the claimant refused follow-up interviews with "several" of the employers contacted. There is no support in the evidence for such an observation. At best, only one employer stated that messages had been left and were not returned.

With the great number of unsupportable findings that are against the great weight and preponderance of the evidence, as cited above, we are unable to separate the extent to which the decision was appropriately made based upon a weighing of the many factors listed in Rule 130.102(e) or influenced largely by erroneous perceptions of, for example, a "restricted" job search for full-time work or nonpursuit of the GED during the qualifying period. The errors are material, in our opinion, to the decision of the hearing officer. We therefore reverse and remand for further development and/or consideration of the evidence (Section 410.203(b)(3)), taking into consideration that we have reversed certain fact findings made in this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Robert W. Potts
Appeals Judge