APPEAL NO. 002336

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 18, 2000. The issues at the CCH were the respondent's (claimant) impairment rating (IR) and whether she was entitled to supplemental income benefits (SIBs) for her first quarter of eligibility.

The hearing officer gave presumptive weight to the report of the designated doctor and found that the claimant's IR was 15%. She found that the claimant was entitled to SIBs. Although she observed in her discussion of the evidence that the claimant left the impression that she was going through the motions of a job search to qualify for SIBs, the hearing officer nevertheless found that she had conducted a good faith search for employment commensurate with her ability to work. There was no express issue brought forward about the extent of injury. The hearing officer observed that a neck injury had been claimed by the claimant.

The appellant (carrier) has appealed, and argues that further clarifcation should have been sought from the designated doctor concerning matters raised by the carrier's doctors and consultants. The carrier argues that there should have been no IR assigned to a cervical injury because the injury was initially reported as an upper extremity injury. The carrier argues that the claimant has not made a good faith search for employment. The carrier seeks remand or reversal of the decision. The claimant responds by arguing facts and law in support of the hearing officer's decision.

DECISION

Affirmed.

The qualifying period for the first quarter of SIBs ran from February 24 through May 24, 2000. The claimant had been employed by a staffing services company and sent to work for a telephone company around July 31, 1998. She was inventorying telephones and injured her low back around _____, which was a few days before the injury in issue during this CCH. She said she was put on light duty on the computers and, as the hearing officer commented, in only a week she was complaining of wrist and elbow pain. This was claimed as a separate _____, injury.

The claimant was initially sent to the company doctor, Dr. B, who referred her to Dr. P. Her problems were initially thought to be a strain. The claimant consulted a number of doctors and was treated for her neck and shoulder in addition to her upper extremities. A doctor for the carrier, Dr. C, assigned a zero percent IR (the claimant said that she thought his examination was for a second opinion only). This IR was disputed.

When the claimant was examined on July 27, 1999, by the designated doctor, Dr. H, he was initially under direction to rate only her hands; however, his narrative indicated that

he considered a bilateral cumulative trauma injury which expanded into the cervical and shoulder areas. The claimant said that Dr. H was aware that her lumbar injury was a separate injury. Dr. H found that the claimant had myofascial pain syndrome, thoracic outlet syndrome, bilateral carpal tunnel syndrome, and right pronator syndrome. (These diagnoses are supported and also made in the reports of the claimant's treating and referral doctors). Dr. H's IR consisted of 5% for limited range of motion (ROM) of the cervical spine, and 10% for ROM deficits in the upper extremities. Dr. H later clarified that he had not rated IR for her lumbar spine. Dr. H's report explained that he used cervical ROM to rate the myofascial pain and thoracic outlet syndromes, for which no specific condition IR was available in the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association.

The carrier hired an evaluator who is not a physician, Mr. A, to go over Dr. H's report. Mr. A questioned how a wrist injury could "cause" a cervical loss of ROM. He agreed, however, that the claimant's records indicate pain into the neck. Mr. A said that decreased cervical ROM was due to the claimant's body habitus. He disputed that it was appropriate for Dr. H to rate upper extremity ROM since the injury was peripheral nerve injury.

Some of Mr. A's observations were not supported by another non-physician reviewer for the carrier. This reviewer, on staff with Cascade Disability Management (CDM, a peer review company), agreed that cervical ROM was appropriately assessed, as was right upper extremity IR. However, the left upper extremity IR was questioned due to the reviewer's impression that this was not part of the compensable injury.

On May 12, 2000, Dr. W performed an IR examination for the carrier. He recorded the nature of the injury as right wrist, with "some" radiation to the right shoulder. Dr. W assessed a 4% IR only for this region. He wrote that the claimant complained of pain in both arms, shoulders, and her neck.

The claimant's treating doctor beginning on January 11, 2000, and through the qualifying period for the first quarter of SIBs, was Dr. L. Dr. L recommended the following restrictions: sedentary work, no more than six hours a day, no prolonged sitting or standing, no driving, and periods of time for stretching every two hours. She said that the driving restriction resulted from restricted ROM and her medication. A doctor for the carrier, Dr. W, agreed with these restrictions.

The claimant described her job search during the period of time in question. She said she made 31 telephone contacts that did not "pan out" and, in addition, there were 41 other contacts in which she mailed or dropped off resumes or applications. The telephone contacts had not been submitted with the Statement of Employment Status (TWCC-52) but were tendered at the CCH. She said that the receptionist or data entry jobs she was seeking were within her restrictions. The claimant had been receiving job leads from a vocational assistant provided by the carrier and found when she met with this person that

all of her restrictions had not been submitted to this person. Dr. L reviewed some of the job leads sent to the claimant by the vocational assistant. The claimant agreed she had only five interviews with the employers listed on her TWCC-52, three of which were set up by the vocational counselor. One interview she went to was for a job involving climbing up on top of and under houses. The claimant also stated that she seemed to have a good interview for a sales position but was not called back. The claimant maintained that she also had telephone interviews. She agreed that there were a number of interviews she did not attend that the carrier had set up. Her reason was that her doctor did not approve these as being within her restrictions.

Concerning the designated doctor's report, we must first state that there is no requirement for the Texas Workers' Compensation Commission (Commission) to seek "clarification" which is nothing more than seeking a response from the designated doctor about contrary evidence. We have reviewed the report of Dr. H and the contrary opinions and fail to see a need for Dr. H to "clarify" anything. Certainly, Mr. A, Dr. W, and the peer review company had varying levels of disagreement with Dr. H's approach. Ultimately, it is the hearing officer's responsibility to weigh the contrary medical evidence against the designated doctor's report. It is not incumbent upon the Commission to either foster an argument on paper between the designated doctor and the carrier's consultants, or appear to pressure the designated doctor into amending his report to account for dissenting opinions.

We would note that the reports of Mr. A and the peer review company are not themselves consistent; one of them agrees with some elements of Dr. H's report even as one disagreed. There was no medical evidence commenting on Dr. H's use of cervical ROM to rate two pain syndromes that he found were part of the claimant's _____, injury. We affirm the hearing officer's decision according presumptive weight to the designated doctor's report in accordance with Section 408.125(e).

Concerning the search for employment for the first quarter qualifying SIBs period, the hearing officer observed that it was to some extent her impression that the claimant was "going through the motions" in her job search and in so doing has put the claimant on some notice that the number of searches made is not necessarily the guiding factor. She also considered only the information on the TWCC-52 and not the supplemental phone contact information commented upon at greater length in her decision. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Appeal No. 94150, decided March 22, 1994. The various factors that may be considered are set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)). The hearing officer nevertheless concluded that during this first quarter the claimant had proven a good faith search by a preponderance of the evidence. 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); American Motorists Insurance Co.

v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). We find this decision sufficiently supported.

No reversible error being found on any points appealed, we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge