APPEAL NO. 002500

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 October 3, 2000. With respect to the sole issue before her, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 12th quarter from June 23, 2000, through September 21, 2000. The claimant appealed the adverse determination that he did not make a good faith effort to obtain employment commensurate with his ability to work, specifically contending that he did look in good faith for work every week of the qualifying period and that the determination by the hearing officer that he did not make a good faith effort to obtain employment commensurate with his ability to work was against the great weight and preponderance of the evidence. The respondent (carrier) filed a response urging that the evidence was sufficient to support the determination of the hearing officer and should be affirmed. The finding that the claimant's unemployment was a direct result of his impairment was not appealed and is final by operation of law. Section 410.169.

DECISION

Affirmed.

The claimant testified that he sustained an injury to his neck, elbows and wrists on _____, when he was jolted when a crane that he was operating gave way. He testified that his job required him to perform welding and carpentry duties as well as operating heavy equipment and machinery. He stated that, at the time of the CCH, he was a sophomore in college and could not return to his preinjury employment, but that a functional capacity evaluation indicated he had a sedentary to light capacity to work. The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on October 3, 1996, with a 17% impairment rating (IR); that he had not commuted any portion of the impairment income benefits (IIBs); and that during the qualifying period for the 12th quarter the claimant earned no wages.

The hearing officer found that the qualifying period began on March 11, 2000, and ended on June 9, 2000, as agreed to by the parties at the CCH. The claimant testified that during the qualifying period he continued to suffer from neck pain which radiated to his arms and that he had numbness in his hands and fingers. He claimed that during the qualifying period he made two job contacts per week starting on Mondays depending on how he felt, looked in the newspaper for possible leads, and went to the Texas Workforce Commission (TWC) for sales positions on the agency's computer because he had difficulty in lifting heavy items and could possibly earn the same wages that he had earned in the past. He admitted that he did not look for any other types of jobs because they would not pay as much as he had previously earned. The claimant stated that he had contacted the Texas Rehabilitation Commission (TRC) and was a client but that he did not attend school during the qualifying period because of the pain in his neck. At the time of the CCH, the claimant was attending the fall semester at the local college under the auspices of the TRC. The claimant admitted that none of the positions that he applied for were hiring. He

made his contacts by making telephone calls and sending out resumes. The claimant admitted that he assisted his wife in her business by working about eight hours a week but did not receive any wages. The time periods for this activity were not established.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an IR of 15% or greater, and who has not commuted any IIBs, is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(e) provides in part that, except as provided in subsections (d)(1), (2), (3) and (4) of Rule 130.102, 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. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. Whether good faith exists is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

Rule 130.102(d)(5) provides that a good faith effort to obtain employment commensurate with the employee's ability to work has been made if the employee has provided sufficient documentation as described in subsection (e) of Rule 130.102 to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that the reviewing authority shall consider the information from the employee which may include, but is not limited to, information regarding the number of jobs applied for; the types of jobs applied for; applications or resumes used by the employee; whether the employee had cooperated with the TRC or other private provider of a vocational rehabilitation program; the education and work experience of the employee; the amount of time spent in the job search; the job plan of the employee; barriers to a successful job search; registration with the TWC; or any other relevant factor.

On his Application for [SIBs] (TWCC-52) for the 12th quarter, the claimant listed 24 job contacts, with the first contact being made sometime in March 2000. The date was illegible. The second contact was made on March 16, 2000. The carrier contended that the claimant went more than a week between job searches, specifically that no search was made May 11 through May 22, 2000.

The hearing officer found that during the qualifying period for the 12th quarter the claimant had some ability to work; had cooperated with the TRC but was not enrolled in a full-time program sponsored by the TRC; had made approximately 24 job contacts which resulted in no interviews or job offers; that the job search was conducted on 24 days of the 13-week qualifying period; that the claimant did not conduct and document a job search every week of the qualifying period, specifically May 11 through May 22, 2000; that the

claimant did not conduct a well-structured job search plan; and that his efforts to find work lacked the objective manifestations of "good faith" with respect to timing, forethought and diligence in his efforts to obtain employment.

Except as otherwise provided in Rule 130.102(d)(1) through (4) there are no exceptions to the requirement that an injured employee must, in order to satisfy the good faith criterion, search for work every week commensurate with his or her ability to work. Texas Workers' Compensation Commission Appeal No. 001328, decided July 24, 2000. The qualifying period began on March 11, 2000. The 9th week of the qualifying period ended on May 12, 2000. The claimant's TWCC-52 reflects that he made a job search during the 9th week on May 11, 2000. However, he did not make a job search again until May 22, 2000, and thus did not make a job search during the 10th week of the qualifying period. 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 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 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

From our review of the evidence there is sufficient evidence to support the finding made by the hearing officer and that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. The hearing officer concluded that the claimant is not entitled to SIBs for the 12th quarter. We conclude that the hearing officer's determinations are supported by sufficient evidence and that they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge