

## APPEAL NO. 002622

Following a contested case hearing held on October 17, 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 appellant (claimant herein) was not entitled to supplemental income benefits (SIBs) for the seventh, eighth, and ninth quarters. The claimant appeals, arguing that the hearing officer erred in finding that he had an ability to work during the qualifying periods for the seventh, eighth, and ninth quarters. The respondent (carrier herein) argues that the evidence was sufficient to establish that the claimant had an ability to work during the qualifying periods in question.

### 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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)) provides as follows:

Eligibility Criteria. An injured employee who has an impairment rating of 15% or greater, and who has not commuted any impairment income benefits, 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.

The question before us on appeal is whether there is sufficient evidence to support the hearing officer's determination that the claimant failed to make a good faith effort to obtain employment commensurate with the employee's ability to work as this was the basis of the hearing officer's denial of SIBs. The claimant contends that the evidence established that he made a good faith effort by showing that he met the requirements of Rule 130.102(d)(4), which provides as follows:

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:

- (4) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

There was conflicting medical evidence as to whether the claimant had a total inability to work during the qualifying periods<sup>1</sup> for the seventh, eighth and ninth quarters.<sup>2</sup> Dr. S and Dr. M state that the claimant cannot work. Dr. B stated the claimant has restrictions but can do a number of things. Dr. B states as follows in his October 21, 1999, letter to the carrier:

In addition, there are no limitations in seeing, hearing, thinking, upper extremity function, sitting, standing or walking. He has unlimited use of hands for manual dexterity and frequent use of feet for foot pedals and there are no environmental restrictions such as heat, humidity and cold.

The question of whether or not the claimant had an ability to work during the qualifying periods under consideration is one of fact. Section 410.165(a) provides that the contested case 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 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find sufficient evidence to support the hearing officer's determination regarding the claimant's ability to work.

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<sup>1</sup>Pursuant to Rule 130.102(b), the quarterly entitlement to SIBs is determined prospectively and depends on whether the employee meets the eligibility criteria during the "qualifying period." Under Rule 130.101, "qualifying period" is defined as the 13-week period ending on the 14th day before the beginning of a compensable quarter.

<sup>2</sup>The parties stipulated that the qualifying period for the seventh quarter was from December 19, 1999, through March 18, 2000; that the qualifying period for the eighth quarter was from March 19, 2000, through June 17, 2000; and that the qualifying period for the ninth quarter was from June 18, 2000, through September 16, 2000.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Robert W. Potts  
Appeals Judge