

APPEAL NO. 011330  
FILED JULY 25, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 16, 2001. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fifth compensable quarter. The appellant (carrier) contends on appeal that this determination is not supported by the evidence or, alternatively, it is against the great weight and preponderance of the evidence. The claimant urges affirmance.

DECISION

Affirmed.

Section 408.142(a) provides the requirements for SIBs entitlement as follows:

An employee is entitled to [SIBs] if on the expiration of the impairment income benefit [IIBs] period computed under Section 408.121(a)(1) the employee:

- (1) has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
- (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
- (3) has not elected to commute a portion of the [IIBs] under Section 408.128; and
- (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), effective November 28, 1999, provides:

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:

- (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
- (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission [TRC] during the qualifying period;

- (3) has during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;
- (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; or
- (5) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

The carrier argues that the claimant did not satisfy the good faith criterion for entitlement to SIBs because he enrolled in a TRC-sponsored program "late" in the qualifying period and did not document a job search during each week of the qualifying period. The parties stipulated that the qualifying period for the fifth compensable quarter began on September 21, 2000, and ended on December 20, 2000. The evidence reflects that the claimant developed an Individualized Plan for Employment with the TRC on November 9, 2000, and also looked for work each week of the qualifying period, with the exception of the second and eighth weeks. In Texas Workers' Compensation Commission Appeal No. 001536, decided August 9, 2000, the Appeals Panel held that Rule 130.102(d) is written so that fulfillment of any one subdivision of subsection (d) may be viewed as meeting a good faith search for employment. In the present case, the claimant asserts that he is entitled to SIBs based upon his involvement with the TRC. Therefore, the applicable provision is Rule 130.102(d)(2), and whether or not the claimant documented a weekly job search is not an issue. Rule 130.102(e) provides, in pertinent part, that "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. [Emphasis supplied.]" A claimant need not satisfy Rule 130.102(e) if such claimant has satisfied one of the good faith elements in Rule 130.102(d). See Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000.

We next address the carrier's contention that because the claimant enrolled in a TRC-sponsored program "late" in the qualifying period, he is not entitled to SIBs. However, as stated in Appeal No. 001536, *supra*, attendance in a TRC-sponsored program as described in the rule is not required in every week of the qualifying period, but only "during" that period. The elements of a full-time vocational rehabilitation program are described in Rule 130.101(8) and consist primarily of adherence to a prescribed plan that sets goals, describes TRC services to be rendered, and details the injured worker's responsibilities. Whether the claimant attempted in good faith to obtain employment commensurate with his ability to work is generally a fact question for the hearing officer to resolve. Texas

Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. 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. 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 of the evidence as to be clearly wrong or manifestly 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). We are satisfied that the evidence sufficiently supports the hearing officer's determination of the good faith criterion for the fifth quarter.

The carrier also argues that the hearing officer erred in determining that the claimant's unemployment was a direct result of his impairment. We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. Nothing in our review of the record indicates that the hearing officer's determination that the claimant's unemployment was a direct result of his impairment is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Michael B. McShane  
Appeals Judge