

APPEAL NO. 011901
FILED SEPTEMBER 20, 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 July 18, 2001. She determined that the appellant (claimant) failed to make a good faith search for employment commensurate with her ability to work during the qualifying periods for the fourth and fifth quarters of supplemental income benefits (SIBs).

The claimant appeals various portions of the decision that she believes represent misconceptions of the facts by the hearing officer. She argues that she was restricted to a part-time job, and, as she had part-time employment during the fifth quarter, she should be entitled to SIBs. The claimant also argues that she made a good faith search for employment. The respondent (self-insured) responded that the decision should be affirmed.

DECISION

We affirm the hearing officer's decision.

The hearing officer did not err in finding that the claimant was not entitled to SIBs for her fourth and fifth quarters of eligibility. The claimant had sustained a back injury while working as a teacher for the self-insured. The qualifying periods for the quarters in issue ran from July 2 through October 1, 2000, and from October 2 through December 31, 2000. The claimant had functional capacity evaluations in September and October, which assessed that she could work in either a sedentary or light-duty capacity. The restrictions given have to do largely with lifting or assuming certain postures, with no indication given that the claimant was limited to part-time work. In an undated letter, her treating doctor recommended no more than three to four hours of work per day; however, in a letter dated February 2, 2001, this same doctor set out various activities and postural restrictions and said that the claimant could work at the sedentary level, but made no restrictions as to hours per day of work.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) defines "good faith" 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:

- (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 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.

Rule 130.102(e) requires a search for employment in every week (not every day, as stated in the hearing officer's discussion) of the qualifying period if the provisions of subsection (d)(1)-(4) do not apply. The hearing officer may evaluate the job search that is conducted in accordance with the various criteria listed in that rule.

In this case, the hearing officer believed that the claimant was not restricted in her hours per day, as opposed to a duty level of sedentary. There was conflicting evidence on this. The claimant's job, during the qualifying period for the fifth quarter, as a consultant to a school on special education programs amounted to three hours a day. The hearing officer believed that the claimant was not employed in a position relatively equal to her ability to work. See Texas Workers' Compensation Commission Appeal No. 001820, decided September 15, 2000.

Finally, although the claimant presented evidence (through amended Application for [SIBs] (TWCC-52) applications that added considerably to the searches originally claimed) of searches for employment throughout the qualifying periods, this was undertaken primarily through a few limited sites on the internet or contact with her previous employer. 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 of 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.).

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. Valentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here, and affirm the decision and order.

The true corporate name of the insurance carrier is (**EMPLOYER**) and the name and address of its registered agent for service of process is

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge