APPEAL NO. 022824
FILED DECEMBER 17, 2002

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 7, 2002. The hearing officer determined that the appellant/cross-respondent (claimant) was not entitled to supplemental income benefits (SIBs) for the 8th, 9th, and 10th quarters.

The claimant appeals, contending that he had no ability to work in any capacity during a portion of the 8th quarter qualifying period and that after he had been released to sedentary work he made a good faith effort to obtain employment commensurate with his ability to work. The claimant also took issue with some of the hearing officer's discussion, which gave the rationale for the hearing officer's decision. The respondent/cross-appellant (carrier) appealed the hearing officer's determinations regarding the appointment of a designated doctor pursuant to Section 408.151, contending that the doctor was improperly appointed. The carrier responded to the claimant's appeal, urging affirmance. The file does not contain a response to the carrier's appeal by the claimant.

DECISION

Affirmed.

Section 408.142(a) and TEX. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue in this case is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) by meeting the requirements of Rules 130.102(d)(4) and 130.102(e). The hearing officer's determination on the direct result requirement has not been appealed.

It is undisputed that the claimant sustained multiple serious injuries in a compensable motor vehicle accident on _____. The parties stipulated that the qualifying period for the 8th quarter was from October 31, 2001, through January 29, 2002. The claimant asserts that he was "disabled" until he was released to sedentary work on January 22, 2002.[1] Rule 130.102(d)(4) indicates how the good faith effort to obtain employment may be proved when there is a total inability to work in any capacity. The hearing officer made unappealed findings that neither of two doctor's reports had a narrative which specifically explained how the claimant's injury caused a total inability to work and there were records from another doctor which showed that the claimant was

[1] We note that throughout the CCH the claimant talked in terms of "disability" and being "disabled." Disability is an economic concept defined in Section 401.011(16) as the inability to obtain and retain employment at the preinjury wage. The SIBs requirement in Rule 130.102(d)(4) is the inability "to perform any type of work in any capacity" regardless of the wage.

able to return to work. The claimant failed to prove entitlement to SIBs pursuant to Rule 130.102(d)(4).

The claimant alleges that he began looking for work around January 10, 2002, and that his efforts constituted a good faith effort to obtain employment, even while contending that he was totally unable to work. Rule 130.102(e) provides that, except as provided in subsection (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 effort. Rule 130.102(e) goes on to list some of the factors that the hearing officer may consider in determining whether the documented job search efforts were performed in good faith. Although the claimant documented some 41 job contacts during the 9th quarter qualifying period and 35 job contacts during the 10th quarter qualifying period, the hearing officer commented that he was not persuaded that the job search efforts met the required standard of good faith but rather "appeared to be little more than going through the motions of a job search." The hearing officer explained why he reached that conclusion which is the basis of the claimant's appeal. We also note that one of the doctors noted the claimant's "profound lack of motivation." 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 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). The hearing officer's determination on the quality of the job searches for the qualifying periods is supported by the evidence.

Although the status of Dr E was disputed at the CCH, the hearing officer determined that Dr. E was a designated doctor appointed pursuant to Section 408.151 (and Rule 130.110) "to determine if the Claimant's medical condition from his compensable injury had improved sufficiently to allow him to return to work." As the hearing officer noted, Dr. E's report was received by the Texas Workers' Compensation Commission (Commission) well after the ending date of the 10th quarter qualifying period and therefore could not be accorded presumptive weight for the question at issue. (*See* Rule 130.110(a)). The hearing officer also found Dr. E's report "too vague" to reach the conclusion that the claimant was unable to return to work. Nonetheless the carrier has appealed the hearing officer's determination, contending that the Commission erred in appointing Dr. E and asserting that "the claimant's total inability to work in the four quarters prior to the appointment of the designated doctor is a condition precedent to the appointment of that designated doctor."

Rule 130.110(a) provides in part that that "section applies only to disputes regarding whether an injured employee whose medical condition prevented the injured employee from returning to work in the prior year has improved sufficiently to allow the injured employee to return to work on or after the second anniversary of the injured

employee's initial entitlement to [SIBs]." In that the carrier has prevailed in this case it is not an aggrieved party. In Texas Workers' Compensation Commission Appeal No. 991106, decided July 7, 1999 (Unpublished), we pointed out that judicial review can only be sought by a party that is "aggrieved" by a final decision of the Appeals Panel. Section 410.251. We would also note that Texas Workers' Compensation Commission Appeal No. 011564, decided August 21, 2001, and Texas Workers' Compensation Commission Appeal No. 002327, decided November 20, 2000, discuss Section 408.151 and Rule 130.110 and the prerequisites for giving a designated doctor's report presumptive weight on the issue of ability to return to work in a SIBs case. Even were we to agree with the carrier's contention it would not change the result of this case.

After review of the record before us and the complained-of determination, we have concluded that there is sufficient legal and factual support for the hearing officer's decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **HARTFORD CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Margaret L. Turner
Appeals Judge