

APPEAL NO. 030695  
FILED MAY 8, 2003

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 January 23, 2003. The hearing officer determined that the respondent (claimant herein) was entitled to supplemental income benefits (SIBs) for the first quarter. The appellant (carrier herein) files a request for review, arguing that the hearing officer erred in finding that the claimant's unemployment during the qualifying period for the first quarter was a direct result of her impairment from her compensable injury and that the claimant made a good faith effort to seek employment during the qualifying period. The carrier argues that the hearing officer's conclusion that the claimant was entitled to SIBs for the first quarter was, therefore, erroneous. The claimant responds that the hearing officer's findings were sufficiently supported by the evidence and that the hearing officer did not err in awarding SIBs for the first quarter.

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.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; that the claimant reached maximum medical improvement with an impairment rating (IR) of 15% or greater; that the claimant has not commuted any portion of her impairment income benefits (IIBs); that the first quarter was from July 4 through October 2, 2002; and that the qualifying period for the first quarter was from March 22 through June 20, 2002. The claimant testified that her injury took place when she fell to the ground at work and injured her neck, cervical spine, and lumbar spine, herniating three lumbar discs. The claimant testified that, as a result of her injury she remains under restrictions and is unable to perform the job on which she was injured as the work required considerable lifting. The claimant testified that during the qualifying period for the first quarter she sought employment from 35 different employers, seeking employment during each week of the qualifying period. The claimant also testified that during the qualifying period, she was enrolled in a vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC).

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs upon the expiration of the IIBs period if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBs is determined prospectively and depends on whether the employee meets the 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.

We have previously held that both the question of whether the claimant made a good faith job search and whether the claimant's unemployment was a direct result of his or her impairment are questions of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 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. 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 overwhelming weight 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).

On appeal, the carrier argues that the hearing officer erred in finding that the claimant's unemployment during the qualifying period for the first quarter was a direct result of her compensable injury. 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. The claimant testified that this was the case and there is certainly no countervailing evidence which could constitute the overwhelming evidence contrary to the hearing officer's finding of direct result.

As far as the carrier's arguments concerning good faith job search, the carrier argues that its rehabilitation nurse was unable to confirm all of the claimant's job searches and appears to argue that the claimant should have made more job searches to establish good faith. We find that both of these arguments go to the weight of the evidence. Weighing the evidence was the province of the hearing officer and we do not find any basis to overturn her finding of good faith job search as a matter of law, when her finding was supported by the testimony of the claimant who the hearing officer obviously deemed to be credible.

Much of the hearing and a good deal of the carrier's appeal revolves around the claimant's participation in a TRC-sponsored vocational rehabilitation program during the qualifying period. At the hearing, the claimant contended that her participation in the TRC program was a ground, independent of her job search, which established that she met the requirement that she make a good faith effort during the qualifying period to obtain employment commensurate with work, relying upon Rule 130.102(d)(2). On appeal, the carrier argues that the claimant failed to establish that she complied with Rule 130.102(d)(2) and further argues that her TRC participation in fact fell short of the requirements of Section 408.150 and of Rule 130.102(e)(4). Both of these appear to be arguments that the carrier did not make at the CCH and at least the argument concerning Section 408.150, which would appear to be in the nature of an affirmative defense, would have needed to be raised below to be preserved on appeal. As far as the argument concerning Rule 130.102(e)(4) is concerned, we note that this is a reference to but one factor for the hearing officer to consider in evaluating whether or not the claimant made a good faith job search. In any case we find that the hearing officer's finding concerning the claimant's participation with TRC was supported by both the claimant's testimony and the answers to the carrier's interrogatories of the claimant's TRC counselor concerning the claimant's participation with the TRC.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **FREMONT COMPENSATION COMPANY** and the name and address of its registered agent for service of process is

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

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Veronica Lopez  
Appeals Judge