APPEAL NO. 950199

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing was held in (city), Texas, on January 10, 1995, with (hearing officer) presiding to consider the single issue of whether respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first compensable quarter, August 25, 1994, to November 23, 1994. The hearing officer held the record open until January 13, 1995, to permit the parties to submit medical evidence detailing claimant's work restrictions or limitations during the filing period. As a result, a report from claimant's treating doctor, (Dr. M), dated January 12, 1995, was included in the record as Hearing Officer's Exhibit 3. The hearing officer determined that claimant satisfied his burden of proving that he made a good faith effort to obtain employment commensurate with his ability to work and, therefore, that he is eligible for SIBS in the first compensable quarter. In its appeal, appellant (carrier) argues that the hearing officer's determination that claimant made a good faith effort to obtain employment is against the great weight of the evidence. Carrier also alleges error in the admission of evidence, specifically Claimant's Exhibit 3 a list of some of the employers whom claimant contacted regarding employment opportunities during the qualifying period. No response to carrier's appeal was received from the claimant.

DECISION

We affirm.

It is undisputed that claimant sustained a compensable injury to both wrists on (date), and that he reached maximum medical improvement for his compensable injury on (date of injury), with an impairment rating of 15%. The parties stipulated that claimant did not commute any portion of his impairment income benefits and that he did not return to work during the filing period earning 80% of his preinjury wage. Finally, the parties stipulated that the first compensable quarter is August 25, 1994, to November 23, 1994, and the filing period is May 27, 1994, to August 24, 1994.

Claimant testified that as a result of his compensable injury he is precluded from engaging in activities that require repetitive movement of his fingers, hands or arms. He testified that he has particular difficulty in manipulating his fingers to do detail work and thus, he cannot perform the work of a jeweler, which is the job he held for the 10 years preceding his compensable injury. In addition, claimant stated that he also cannot work as a carpet installer/cleaner, which is the job he had for the 10-year period before he became a jeweler. Nevertheless, claimant testified that, although it hurt his arms to perform the work, beginning in late August (just after the close of the filing period) and continuing through the date of the hearing, he was worked as a subcontractor cleaning carpets because he was able to get some work doing so and he needed the money. Claimant testified that his treating doctor, Dr. M, has told him that the limitations on repetitive use of his fingers, hands and arms will be permanent. In a report dated January 12, 1995, Dr. M provides:

[Claimant] will have some weakness in his upper extremity and probably not [sic] be able to perform repetitive lifting and twisting activities as well as repetitive activities with his arms above his head. He should be able to perform occasional activities with his arms in these positions without any undue side effects.

Claimant also testified that extended driving, such as the drive to the hearing, causes pain in his arms.

With respect to his job search efforts during the filing period, claimant testified that he went to the employment office at (the base) and was advised to contact potential employers listed on Claimant's Exhibit 3, as well as, a list of government contractors, which was not admitted in evidence. Claimant testified that he contacted approximately seven employers listed on Exhibit 3 during the filing period and that he contacted many of those employers on several occasions during the period. Claimant testified that when he contacted those employers, he was frequently told that the employer did not have positions available. If there was a position for which he believed he was qualified and that was within his restrictions, he applied. Claimant stated that he followed the same procedure in contacting some 16 potential employers listed on the base contractor list.

Claimant testified that he also called the job line for the City of (city) approximately two times per week during the filing period, that he continues to do so and that he completes applications as positions within his physical limitations for which he is qualified are listed. Similarly, he testified that he is listed with the Department of Labor and the (state) Employment Commission and that he went to each agency at least five times each month during the filing period to check on job listings and continues to do so. In addition, he stated that he applied to every jewelry store in the mall near his home to sell jewelry because of his 10 years of experience as a jeweler. Finally, he stated that he applied for custodial positions at (state) State University (the university) and at Days Inn and a sales position at Service Merchandise, the employers identified on his Statement of Employment Status (TWCC-52).

Claimant also testified that he worked with the Division of Vocational Rehabilitation of the State of (state) Department of Education during the filing period. Specifically, he testified that the Division of Vocational Rehabilitation paid his tuition for evening classes in the first and second summer sessions (June to August 1994) at a community college. Claimant completed 10 credit hours in the two summer sessions, having completed his GED through the Department of Vocational Rehabilitation in November 1992, some two months after his compensable injury. Claimant stated that taking classes for approximately four hours each evening permitted him to look for work during the day and that going to school would not have kept him from accepting employment had he been offered a position, because he would have worked around his class schedule.

Section 408.142 sets forth the eligibility criteria for SIBS. At issue in this case is the requirement that the injured employee "has attempted in good faith to obtain employment commensurate with the employee's ability to work." *See also* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.103 (Rule 130.103). In its request for review, carrier argues that the hearing officer's determination that claimant is eligible for SIBS is erroneous, because her determination that he made a good faith effort to obtain employment commensurate with his ability to work is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

The question of whether the claimant has made the required good faith effort to seek employment commensurate with his ability to work is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. As such, it is for the hearing officer to resolve conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. Civ. App.-Houston [14th Dist.] 1984, no writ). In its appeal, carrier emphasizes that claimant testified that he contacted employers with whom he was interested in working and that many of the employers contacted did not have positions available. The carrier seems to suggest that the hearing officer is precluded from considering claimant's cold calls in evaluating whether claimant made a good faith effort to obtain employment. Carrier cites no authority for the proposition that cold calls cannot be considered and we are unaware of any such authority. Similarly, we cannot agree that because the claimant selected some of the employers to whom he made cold contact based upon whether he had some interest in working for that employer or not is somehow fatal to his effort to prove a good faith effort to obtain employment. We know of nothing that would suggest that the statutory requirement to look for work eliminates an injured employee from having some choice in the employers with whom he will seek employment. Claimant testified that by contacting the employers on the two lists he became aware of and applied for approximately six jobs. In addition, he stated that he applied for sales positions at jewelry stores and for the three positions identified on his TWCC-52. Claimant also testified that he was registered with the Department of Labor and the (state) Employment Commission and checked job listings there about five times each month and that he also called several job lines regularly. Finally, claimant stated that he cooperated with the (state) Department of Vocational Rehabilitation and, therefore, was attending evening college courses in the filing period. The hearing officer was free to consider and weigh the evidence and arguments and to decide what weight she would assign to the evidence. Campos, *supra*. She determined that claimant had demonstrated that he had made a good faith effort to seek employment in accordance with his statutory obligation to do so. Our review of the record does not indicate that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, there is no basis for

disturbing her decision on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Finally, carrier alleges that the hearing officer erred in admitting Claimant's Exhibit 3, which is a list of employment information centers that claimant obtained from the base employment center. Carrier argues that the hearing officer erred in admitting this document because it was not exchanged prior to the hearing. However, the only objection that carrier raised to the document at the hearing was a relevance objection, which the hearing officer quite properly overruled. Because carrier did not raise the objection of failure to exchange at the hearing, the objection has been waived and we are precluded from considering it on appeal. Texas Workers' Compensation Commission Appeal No. 93514, decided August 5, 1993. However, we note that claimant testified extensively as to the contacts he made with the employers listed on the exhibit, in large part on cross-examination. Accordingly, any error in the admission of the exhibit was harmless in that it was merely cumulative of claimant's testimony. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Finding sufficient evidence to support the hearing officer's determinations and no error in the record, we affirm the decision and order.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge