APPEAL NO. 950445

A consolidated contested case hearing was convened by the hearing officer, (hearing officer), in (city), Texas, on December 1, 1994, and was continued to and completed on January 11, 1995. The two disputed issues were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for both the third and fourth compensable quarters and the hearing officer issued separate decisions and orders for the two quarters. In this case, the hearing officer determined that claimant was entitled to SIBS for the third compensable quarter and the appellant (carrier) has appealed. The carrier asserts that the decision is against the great weight of the evidence because claimant failed to prove both of the statutory criteria for continuing SIBS, namely, that his unemployment during the eligibility period was "a direct result of [his] impairment" and that he "in good faith sought employment commensurate with [his] ability to work." Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 408.142(a) (1989 Act). Claimant's response supports the sufficiency of the evidence to support the decision.

DECISION

Affirmed.

In the companion case concerning SIBS for the fourth quarter, Texas Workers' Compensation Commission Appeal No. 950298, decided April 10, 1995, the Appeals Panel affirmed the hearing officer's decision and order determining that the dispositive findings of fact and conclusions of law made by the hearing officer were not so against the great weight and preponderance of the evidence as to be manifestly unjust. Our opinion in the companion case contains a recitation of so much of the evidence adduced at the hearing as pertains to both the third and fourth quarter qualifying periods and to only the fourth quarter, as well as a discussion of the statutory and case law involved. Thus we will not repeat such here but only discuss the evidence specifically applicable to the filing period for the third compensable quarter which was stipulated to be from "12/10/93 through 3/29/94."

Claimant testified that in January 1994 he talked to (Dr. B) who advised him to change his occupation and to seek retraining through the Texas Rehabilitation Commission (TRC); that he could no longer do heavy work and had no managerial experience; and that in January or early February 1994 when he called the Texas Employment Commission (TEC) he was told that at that time they only had welding and construction jobs, which he said he could no longer do, and that they would contact him in the future when something came up. He said he also checked at the college's placement office but it had only one job listed which did not require extensive use of the hands. The job was with (a prospective employer) and he said he called them. As mentioned in Appeal No. 950298, *supra*, the TRC letter of March 11, 1994, stated that claimant was currently a TRC client who was cooperating and following through with his planned program, that his vocational goal is to be trained in the technical/vocational field, which should take about two years, and that he has completed the fall 1993 semester under TRC sponsorship and was currently attending the spring 1994 semester.

On Claimant's Statement of Employment Status (TWCC-52) signed on April 28, 1994, he listed four prospective employers to whom he had applied for work during the preceding 90 days. The form reflected that he was not offered a position with any of them, that one was not then hiring, that two were not then accepting applications but might in three months, and that the fourth was a full-time position. In his answer to carrier's Interrogatory No. 13 claimant was asked to describe the methods he used to seek employment during the filing period and he responded: "Between January 14 and April 8, 1994 I have sought employment by calling, going in person, people that referred me to places and newspapers." In his answer to carrier's Interrogatory No. 14 claimant listed six other prospective employers he contacted, as well as the TEC office, and indicated that five were not hiring though two of the five were accepting applications. His answer further stated that the sixth, (a storage company), was hiring and that he had an interview scheduled with (Mrs. C). Claimant testified that he went there and spoke with Mrs. C about a job answering telephones but never was called back and later learned someone else was hired. Incidentally, the carrier's investigative report reflected that the investigator who contacted the prospective employers listed by claimant looked for a "convenience store," not a storage company, at the address provided by claimant.

The hearing officer found that during the qualifying period claimant was a full-time student attending college under a vocational rehabilitation program devised by the TRC to retrain claimant for other occupations because of his impairment from his compensable injury, and that except for the time between semesters, claimant attended classes as a full-time student. The hearing officer further found that during the filing period claimant was limited from certain kinds of work involving heavy lifting, repetitive hand motions or using vibrating tools, and that the medical limitations resulted from the nerve damage from his bilateral carpal tunnel syndrome (CTS), which was his compensable injury. These findings do not appear to have been appealed.

The carrier asserts that the evidence did not establish that claimant was unemployed as a direct result of his impairment and grounds the assertion on the evidence of the number of employers claimant indicated were not hiring when he approached them and on the failure of the evidence to show that claimant was not hired because of his physical limitations. In this appeal, as in Appeal No. 950298, *supra*, the carrier cites our decision in Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, in support of its contention that claimant failed to meet his burden of proving that his unemployment during the qualifying period for the third quarter was a direct result of his impairment. Our discussion in Appeal No. 950298 distinguished the facts in Appeal No. 93630 and cited several other decisions and we regard our discussion of this issue in Appeal No. 950298 as dispositive in this case.

Similarly, with regard to the appealed issue on the "good faith effort" criterion, our discussion in the companion case is dispositive of that issue in this case. In addressing this point in its appeal the carrier states that "[f]or the entire third quarter claimant only

applied at three places that were not accepting applications and at one place of employment that was seeking a full time employee only." The evidence showed that while claimant listed four prospective employers contacted on his TWCC-52 for the third quarter, he listed six other prospective employers in his answer to carrier's Interrogatory No. 14. Further, contrary to the carrier's assertion, we find no indication in the record that the hearing officer "apparently considered the fourth quarter applications along with the third quarter claim for SIBS." As was noted, some of the evidence applied to both quarters. Finally, the Appeals Panel has indicated that "good faith" is not dependent upon a specific number of job applications made but that is, rather, a factor to be considered. *See, e.g.* Texas Workers' Compensation Commission Appeal No. 94119, decided March 14, 1994.

Whether claimant satisfied his burden to prove he met the continuing entitlement criteria for SIBS for the third compensable quarter was a question of fact for the hearing officer. It is the hearing officer who is the sole judge of the relevance, materiality, weight and credibility of the evidence (Section 410.165(a)) and it is the hearing officer who must resolve the 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). An appellate reviewing body 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 sufficiency of the evidence, we will reverse the decision only if it is so contrary to the overwhelming weight of the evidence as be clearly wrong or 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). The evidence is sufficient to support the determinations of the hearing officer.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge