APPEAL NO. 990293

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 December 29, 1998. The issue at the CCH was whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for her 21st and 22nd quarters of eligibility.

The hearing officer found that the claimant's underemployment was not the direct result of her impairment. He further found that the claimant failed to make a good faith effort to search for employment during the filing period for either quarter that was commensurate with her ability to work.

The claimant has appealed, contending that she did not understand the questions she was asked during the CCH. She argues that as she is restricted to light duty, she cannot go out and do "any type of work." The respondent (carrier) responds that the decision is supported by the evidence.

DECISION

Affirmed.

The claimant was injured on _____, while lifting a box. Although not made clear, it was inferred that the claimant had not worked since then. After going to two doctors who did not help her but told her she could return to work, she started treatment by Dr. N. Claimant said that she received medication for treatment of her back pain. Dr. N's diagnosis was lumbosacral sprain, but claimant obviously was given a 15% impairment rating (IR) or more in order to be eligible to apply for SIBS.

The claimant, who was 42 at the time of the CCH, said she had little work experience and this was a factor in not being offered jobs. She said that she searched for employment through the newspaper and through the Texas Workforce Commission (TWC). She contended that a lot of times the jobs she called about were filled. The claimant said she put in about six applications during the six months constituting the filing periods, which ran from June 20 through December 17, 1998.

The claimant said she was released to light duty, with a 10-pound lifting restriction. The claimant could drive. She said she went three times a week to the TWC. She also contended that it was hard for her to get out and seek employment because sometimes her sister would lend her a car, sometimes not. There was no indication during the CCH that the claimant did not understand the questions she was asked on direct examination; during cross-examination, she asked the attorney to repeat questions several times. The claimant also said she sold Avon Products (cosmetics) and sold about $50.00 worth every two weeks at most. She said she spent four to five hours a week selling cosmetics. She

agreed that her Statement of Employment Status (TWCC-52) form sent to the carrier for the 21st quarter did not list job contacts. When asked if it was true that she contacted only four employers during the quarter, and asked to identify more employers, she identified at least four more, contending she could not remember after a long time. These were temporary services or laundries. The hearing officer questioned her more closely and the claimant kept responding with facts about her computer search at the TWC. The hearing officer took the time to explain his questions if the claimant did not appear to understand. She then asserted that she made contact with other employers. She then said that she turned her list over to the vocational counselor rather than the carrier. There were apparently a few more contacts (or at least recorded contacts) made during the filing period for the 22nd quarter.

There are two eligibility criteria that must be met to continue after the first quarter to qualify for SIBS, set out in Section 408.143(a). The injured employee must prove that he or she has earned less than 80% of the employee's average weekly wage as a direct result of the employee's impairment and has in good faith sought employment commensurate with the employee's ability to work. The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

We cannot agree that the hearing officer did not have enough support in the evidence for his conclusion that the claimant really did not make a good faith effort to find employment. Given that the 21st and 22nd quarters were in issue, he apparently determined, with justification, that a good faith search at this late stage would have been more intensive, methodical, and documented than it was. Furthermore, he could consider the nature of the injury and restrictions and conclude that claimant's unemployment did not directly result from any impairment. We cannot agree that the hearing officer's decision is against the great weight and preponderance of the evidence, and we affirm her decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Judy L. Stephens
Appeals Judge