APPEAL NO. 991173

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 4, 1999. She (hearing officer) made the following findings of fact and conclusion of law:

FINDINGS OF FACT

2. During the filing period for the 15th quarter, which ran from October 22, 1998 through January 20, 1999, the Claimant [appellant] had an ability to work in a sedentary capacity full-time. He was unable to perform the tasks of his preinjury occupation, which is a heavy duty job.

3. Between October 22, 1998 and January 20, 1999, the Claimant did not make a good faith effort to find work in line with his ability to work.

4. Between October 22, 1998 and January 20, 1999, the Claimant's unemployment was a direct result of his impairment from his _____ injury.

CONCLUSION OF LAW

5. The Claimant is not entitled to supplemental income benefits [SIBS] for the 15th compensable quarter.

The Claimant appealed Finding of Fact No. 3 and Conclusion of Law No. 5, stated why he thought that the evidence established that during the filing period he in good faith sought employment commensurate with his ability to work, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for the 15th quarter. The respondent (carrier) replied, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

A Statement of Employment Status (TWCC-52) for the 15th quarter contains the information concerning 25 prospective employers and indicates that contacts were made on 23 days. The claimant testified about his attempt to obtain employment with each of the prospective employers and stated that during the filing period he also sought employment with additional employers he did not include in the TWCC-52. The claimant introduced copies of 15 business cards from places he said that he applied for work and copies of five applications that he said that he submitted during the filing period. The claimant stated that

he learned of the prospective employers from looking in newspapers, seeing signs posted at places of business, and lists from a service that worked for the carrier and that he looked in the newspaper almost every day. He testified that on applications he indicated that he was available to work Monday through Friday from 8:00 a.m. to 5:00 p.m., that the desired wage was $7.50 to $8.00 an hour, and that he had restrictions on what he could do. He said that many of the jobs he applied for were for working in shipping and receiving; that from experience working for the employer, he knew that some shipping and receiving jobs were to keep records of what was shipped and received; that such a job was within his restrictions; and that is the type of job in shipping and receiving that he was seeking to obtain. The claimant testified that he looked for jobs that he wanted to do and thought that he was capable of performing.

Ms. J testified that she has worked in vocational rehabilitation for about 20 years; that she instructed the claimant on completing applications; that on December 9, 1998, she sent the claimant eight job leads for sedentary light-duty work and provided times in which applications should be submitted; that the claimant applied for two of the eight jobs; that both applications were submitted after the suggested time; that she contacted the employers listed on the TWCC-52; that some of them were not advertising or hiring at the time the claimant indicated that he contacted them; that some of them did not have a record of the claimant contacting them or did not remember him contacting them; and that the person at a staffing agency said that the claimant said that he could not do any physical work, could not stand too long, and not to rush to find him anything.

Section 408.143 provides that one of the criterion for entitlement to SIBS after the first quarter is that "the employee has in good faith sought employment commensurate with the employee's ability to work." Whether such good faith was shown is usually a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. Consideration can be given to the manner in which a job search is made and timing, forethought, and diligence may be considered in determining whether a good faith job search was made. Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996. In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel rejected the contention that a certain number of job applications showed good faith and stated the following about good faith:

> In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.

And in Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel stated that the trier of fact, in determining whether the claimant in good faith sought employment commensurate with the ability to work, sometimes assesses whether undeniable contacts made with prospective employers constitute a true search to reenter employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS. In Texas Workers' Compensation Commission Appeal No. 950592, decided May 25, 1995, the Appeals Panel affirmed the determination of the hearing officer

that the claimant did not make a good faith effort to seek employment where he sought employment for jobs that he did not think he was capable of performing with his restrictions rather than seeking employment with jobs that were within his restrictions.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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). Finding of Fact No. 3 is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Even though Finding of Fact No. 3 does not include the words used in Section 408.143, it is sufficient to support Conclusion of Law No. 5.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge