APPEAL NO. 991265

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 in on May 20, 1999. The appellant (carrier) and the respondent (claimant) stipulated that the claimant sustained a compensable injury on _____; that he has a 25% impairment rating for that injury; that the third quarter for supplemental income benefits (SIBS) began on October 9, 1998, and ended on January 8, 1999; and that the fourth quarter for SIBS began on January 9, 1999, and ended on April 9, 1999. The hearing officer determined that during the filing period for the third quarter the claimant did not in good faith seek employment commensurate with his ability to work and that he is not entitled to SIBS for the third quarter. Those determinations have not been appealed and have become final under the provisions of Section 410.169.

The hearing officer made six underlying findings of fact that during the filing period for the fourth quarter for SIBS the claimant made 22 job contacts, that he does not read or write English and has always worked at manual labor, that his impairment is totally based on brain dysfunction, that the claimant has not been released to return to work due to possible seizures which limit his ability to drive and the types of work he should perform, that during the filing period he took advantage of offered employment counseling services, and that he met with a counselor from the Texas Rehabilitation Commission (TRC) during the filing period. The hearing officer also found that during the filing period for the fourth quarter for SIBS the claimant in good faith sought employment commensurate with his ability to work and that his unemployment was a direct result of his impairment from the compensable injury and concluded that the claimant is entitled to SIBS for the fourth quarter. The carrier appealed, urged that those eight findings of fact and one conclusion of law are against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBS for the fourth quarter. A response from the claimant has not been received.

DECISION

We affirm.

Only the evidence related to entitlement to SIBS for the fourth quarter will be summarized in this decision. A translator was used at the hearing. The claimant resides in (City), Texas. He had admitted into evidence a Statement of Employment Status (TWCC-52) for the fourth quarter with attachments. That exhibit states that during the filing period the claimant sought employment with 22 prospective employers on 16 days and contains applications for employment with eight prospective employers and documents completed for the TRC. The claimant testified that he went to each of the places listed in the exhibit; that he cannot read or write English; that, if an employer would take an application, people filled out the application for him and signed his name on it; that, if he did not complete an application, he had the person complete a form showing that he had been there asking

about work; that Mr. S, who worked for the carrier, helped him try to find work; that he met with Mr. S in his attorney's office and at a Dairy Queen; that he spoke with a woman at TRC three times; that they talked about him training to become a truck driver; that she told him that she would try to get a letter from his doctor stating what his restrictions are; that he does not know if she has received anything from his doctor; that he did not look in a newspaper to try to find a job; and that he was not offered a job. He said that he thought that during the filing period he had fewer seizures than he had in the past and that his doctor has not released him to return to work.

The claimant had admitted into evidence reports from Dr. D dated January 30, 1998. They indicate that Dr. D has a Ph. D and is a clinical neuropsychologist and that the claimant has a closed head injury, has mild to moderate brain dysfunction, has major depression secondary to a head injury, is to continue medical treatment with Dr. C and is a good candidate for cognitive retraining procedures.

The carrier had admitted into evidence contact notes of Mr. S. In a note dated November 6, 1998, Mr. S stated that he met with a State Mental Health/ Mental Retardation representative to see if the claimant qualified for their services based on his full scale IQ of 69; that he hoped that he could help the claimant get a job in a program picking up trash on highway right of ways; and that he met with the claimant, his wife, and the attorney representing the claimant. In a note dated November 24, 1998, Mr. S said that he met the claimant at Dr. C's office to see if a release to return to work could be obtained; that Dr. C said that he was a neurosurgeon, that it was not appropriate for him to say what type of work the claimant could do, and that it was up to Dr. D to recommend what type of work the claimant could do. Mr. S also reported that, while waiting to see Dr. C, he and the claimant were able to communicate in English. In a note dated November 30, 1998, Mr. S indicated that he attempted to talk with Dr. D, but was not able to do so. Mr. S reported that he met with the claimant and the claimant's wife on December 1, 1998. He also reported that he spoke with Dr. D on December 2, 1998, and that Dr. D looked at a report he had done in January 1998 and said that without more testing he could not give the claimant a release to return to work. Another note indicates that Mr. S met with the claimant and a representative from TRC on December 16, 1998. In a note dated January 6, 1999, Mr. S stated that he met with the claimant and the TRC counselor; that he provided the claimant with leads in City 2; that it is unknown when the claimant's doctor will release him; that the TRC person said that she did not think that the claimant could train to become a truck driver because of his seizures; and that he checked with six prospective employers given by the claimant, and they did not have job openings. The carrier also had admitted into evidence a report from (Mr. RR) dated May 12, 1999. In the report, Mr. RR stated that he attempted to contact 31 prospective employers and provided information concerning his attempts and what he learned from those employers. In summary, Mr. RR was not able to contact seven of the employers, six did not recall the claimant, six did not have an application from him, two had an application from him, seven recalled the claimant coming in, 10 said that they were not hiring, and three said that they were hiring. The total exceeds 31 because, for example, an employer might have said that the claimant came in and they were not hiring at the time he came in.

Whether good faith in seeking employment commensurate with the ability to work 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.

Texas Workers' Compensation Commission Appeal No. 971092, decided July 25, 1997, contains the following quotation from an unpublished decision:

> We note, however, that in evaluating whether the claimant made a good faith job search, the hearing officer must also consider the reality of the circumstances in which the claimant finds himself. It is entirely appropriate for a hearing officer to recognize and acknowledge that where, as here, the claimant is limited geographically to looking for work in rural areas, what constitutes a good faith job search may differ significantly from what constitutes a good faith job search in a more urban setting. To that end, the hearing officer can consider that in small towns, the fact that an employer is not advertising or has not posted a help wanted sign may be of far less significance than such a fact would have in a larger city. Similarly, the hearing officer can consider that it is customary in smaller towns where people know each other to simply make a "cold call" to see if a job is available or to let potential employers know that a person is looking for work in the event that a position becomes available in the future.

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). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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. An appeals level body is not a fact finder, and it 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). The appealed determinations of the hearing officer, including the six underlying findings of fact on which other findings of fact and the conclusion of law are based, are 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, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the appealed determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge