APPEAL NO. 000470

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 February 8, 2000. The issue at the CCH was whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 12th compensable quarter. The hearing officer determined that the claimant is entitled to SIBS for the 12th compensable quarter, and that her self-employment constituted a good faith search for employment. The appellant (carrier) appeals, requesting that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds, urging affirmance.

DECISION

Affirmed.

The hearing officer has comprehensively summarized the facts. The qualifying period for the 12th quarter of SIBS ran from August 9 through November 7, 1999. Briefly, the claimant, who has been released to work at the sedentary/light level with restrictions, operated an aviary business with her husband since 1997 that had earlier been operated as a hobby. She testified as to how the business premises was currently undergoing a physical expansion to over twice the current size, and the efforts taken to build up the business. The claimant put into evidence records that were given to her CPA to compile the self-employment schedule C for her income tax return for 1999. The claimant testified that the earnings for the 13th quarter filing period for SIBS were much greater than they had been for the 12th quarter. The claimant said that the store was open from noon to six p.m. from Tuesday through Sunday, but that she worked other hours not in the store, feeding and caring for her birds and buying inventory. She indicated that her husband generally worked from 25-35 hours. Claimant, in figuring her earnings, divided the net profits of the business in half. (However, as the hearing officer pointed out, attributing the total amount to her for the 12th quarter would still have resulted in earnings of less than 80% of the claimant's preinjury average weekly wage.) In evidence are yellow page listings, want adds, and other promotions for the aviary business.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) defines good faith as follows:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;

(3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; or

(4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

The new rules make clear that if an injured worker has returned to work, it need not be for the same wages, but in a position equal to the ability to work. The hearing officer has noted in her decision that claimant's self-employment fulfills this requirement. The requirement to look weekly for work applies if Rule 130.102(d)(1), (2), and (3) do not apply. *See* Rule 130.102(e).

The hearing officer may consider the facts of each case and particularly whether the claimant demonstrated that she made good faith efforts to secure business. Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995; *see also* Texas Workers' Compensation Commission Appeal No. 960188, decided March 13, 1996. Whether the claimant demonstrated good faith efforts to solicit business is a fact question for the hearing officer to determine. The claimant produced records that the hearing officer could believe satisfied the requirements of Rule 130.101(1)(D). The hearing officer could assess whether self-employment efforts were genuine or a sham. In this case, she stated that she regarded the testimony and evidence persuasive as showing claimant's effort to grow the business.

The hearing officer is the sole judge of the relevance, 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). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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.).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge