APPEAL NO. 000983

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 4, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the sixth quarter. The appellant (carrier) files a request for review, arguing that the hearing officer erred in finding that the claimant made a good faith effort to find employment commensurate with his ability to work during the qualifying period and that the claimant's unemployment was a direct result of his impairment. The claimant responds that the decision of the hearing officer is supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarized the evidence in the case in his decision as follows:

> Claimant was working as a certified nurse assistant at the time of his injury in _____. Claimant testified that he was assisting in the transfer of a patient who weighed approximately 350 pounds when the patient panicked and grabbed his neck resulting in low back and neck pain. The Claimant subsequently had two neck surgeries in January 1996 and May 1997. On October 21, 1997, the Claimant was examined by [Dr. G] who assessed a 22% impairment rating and a maximum medical improvement date of July 6, 1997. The qualifying period for the sixth quarter began on September 27, 1999 and ended on December 26, 1999. During that qualifying period the Claimant made 46 job contacts. Claimant kept a journal of employment attempts listing the date of contact, the name of the employer, and the type of position. Claimant also provided medical reports which reflected that he was hospitalized for 5 days during the period.
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> Claimant testified that he would look in the Sunday paper for job possibilities and then would call the potential employer to verify that they were taking applications and that the job was within his restrictions. Claimant testified as to each of the job contacts and provided information concerning the duties that were required and any accommodations that the employer was willing to make. For example, Claimant testified that he had applied for positions as a dish washer, cashier, and sandwich maker. Each of these employer [sic] indicated that they would provide allow [sic] him to sit on a stool and to take periodic breaks. Claimant also applied for jobs as a medical dispatcher, bill collector, counter sales, furniture sales, customer representative, desk clerk, and leasing agent. Claimant stated that he would mail resumes to employers, if requested and also personally pick up applications, fill them out, and return them.

Claimant testified that on October 10, 1999 he started feeling more severe pain in his back along with numbness in his left arm and legs. He also stated that he was having unbearable muscle spasms. Claimant was seen by a doctor on October 11, 1999, and given Toradal for pain and sent home. Claimant stated that at that time his pain was a "10" and the medication did take the edge off the pain. On October 14, 1999, the Claimant was seen again and given additional pain medications. On October 15, 1999, the Claimant went to the emergency room at [medical center] and was subsequently hospitalized until October 19, 1999. Claimant stated that on October 18, 1999, he was beginning to feel much better. Prior to being discharged from the hospital [claimant] made several telephone calls looking for work. Claimant stated that as soon as he was discharged from the hospital he began looking for work again. In fact, there are two job contacts listed for October 18, 1999 on the Claimant's journal of employment attempts.

It appeared from the Claimant's testimony and his documentation for the qualifying period for the six[th] quarter that the Claimant did make a good faith effort to obtain employment. Claimant made 46 employment contacts during the qualifying period and sought a variety of jobs. Claimant documented those efforts and was able to testify to the details of his attempts to find employment. Claimant also testified concerning his job search plan which was to look in the Sunday paper, identify potential jobs and then call to make sure the jobs were within his work restrictions. Claimant's medical documentation was sufficient to establish that from October 11, 1999 through October [19], 1999 that the Claimant was unable to work and, therefore, was not required to search for jobs during that period of time.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b))[1], the quarterly entitlement to SIBs is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101, "qualifying period" is defined as the 13-week period ending on the 14th day before the beginning of a compensable quarter.

We have previously held that both the question of whether a claimant made a good faith job search and whether the claimant's unemployment is a direct result of the claimant's impairment are questions of fact. Texas Workers' Compensation Commission

[1]The "new" SIBs rules which went into effect on January 31, 1999, control in the present case. *See* Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999.

Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and 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).

Rule 130.102(d) provides as follows in relevant part:

> (d) 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:
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> * * * *
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> (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[.]

Rule 130.102(e) provides:

> (e) Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(4) of this section, the reviewing authority shall consider

the information from the injured employee, which may include, but is not limited to information regarding:

(1) number of jobs applied for throughout the qualifying period;

(2) type of jobs sought by the injured employee;

(3) applications or resumes which document the job search efforts;

(4) cooperation with the Texas Rehabilitation Commission;

(5) education and work experience of the injured employee;

(6) amount of time spent in attempting to find employment;

(7) any job search plan by the injured employee;

(8) potential barriers to successful employment searches;

(9) registration with the Texas Workforce Commission; or

(10) any other relevant factor.

Applying our standard of review, as well as the requirements of the 1989 Act and the rules cited above, we find no error in the hearing officer's determination that the claimant made a good faith effort to seek employment commensurate with his ability. We do find that this factual determination was sufficiently supported by the evidence. The carrier argues that the claimant did not establish a total inability to work while he was hospitalized. We find this argument singularly unpersuasive. We find no error in the hearing officer's believing that the claimant was unable to work while hospitalized.

The hearing officer also found that the claimant's job search during the remainder of the qualifying period constituted a good faith effort to seek employment commensurate with his ability to work. Once again, the carrier points to conflicts in the evidence and, once again, we will defer to the fact finder in resolving such conflicts. It was up to the hearing officer to weigh the evidence and the factors outlined in Rule 130.102(e) in making his factual determination concerning a good faith job search. We find sufficient evidence to support his findings and no error of law.

The carrier also contends that the claimant failed to establish that his unemployment was a direct result of his impairment. We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26,

1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. There is certainly such evidence in the record before us.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCUR IN THE RESULT:

I write separately only because I believe that the majority's lengthy opinion deals with generalities and dismisses carrier's appeal in one brief sentence as being "singularly unpersuasive" without discussion or giving a reason therefore. The issue is whether a claimant, who has some ability to work, and who has been hospitalized for a portion of the qualifying period, is required to "look for employment commensurate with his or her ability to work every week of the qualifying period" in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)). In other words, is he/she required to seek work from his/her hospital bed. If the hospitalization is due to the compensable injury or impairment, I believe the answer is fairly clearly, no. I believe the hospitalization itself is such an event to show that claimant was unable to perform work in any capacity and itself is a sufficient narrative which explains how the injury causes a total inability to work. I believe it would be completely ludicrous to have a claimant apply for a job from a hospital bed and tell the potential employer "I'm in the hospital with a compensable injury so I can't come for an interview or go to work." If the hospitalization is due to some totally unrelated event, then a problem arises regarding the "direct result" requirement. In the instant case, claimant's hospitalization appears to be due to the compensable injury, although not necessarily the rated impairment. I am willing to concur in the result of this case because the claimant was only hospitalized four or five days and apparently made some job contacts from his hospital bed. There is no finding when the "week" started and

I note that Rule 130.102(e) refers to "every week," not every seven days. Although it would have been preferable for the hearing officer to specifically address the requirements of Rule 130.102(e), he could, and apparently did, in essence, find that claimant's job search had complied with the requirements Rule 130.102(e). Nothing in carrier's brief would lead me to conclude otherwise.

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Thomas A. Knapp
Appeals Judge