APPEAL NO. 001165

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 March 28, 2000. The appellant (carrier) and the respondent (claimant) stipulated that the claimant's impairment rating (IR) is 23%; that he did not commute any portion of his impairment income benefits; that the filing period for the first quarter for supplemental income benefits (SIBs) began on December 10, 1998, and the qualifying period for the fourth quarter ended on November 25, 1999; that the SIBs rules effective April 17, 1992, apply to the first quarter; that the SIBs rules effective January 31, 1999, apply to the second, third, and fourth quarters; that the claimant's average weekly wage is $1,146.72; that during the filing period for the first quarter the claimant earned $2,790.17; that during the qualifying period for the second quarter he earned $3,209.67; that during the qualifying period for the third quarter the claimant earned $3,271.95; and that during the qualifying period for the fourth quarter he earned $1,939.25. The hearing officer determined that the claimant is entitled to SIBs for the first through fourth quarters; and that because there has not been four consecutive quarters of nonentitlement, the claimant has not permanently lost entitlement to SIBs. The carrier appealed; contended that the part-time, low paying job the claimant had during the filing and qualifying periods and his attending class under a Texas Rehabilitation Commission (TRC) program during the last part of the qualifying period for the fourth quarter did not meet requirements to in good faith seek 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 the claimant is not entitled to SIBs for the first through the fourth quarters and has lost entitlement to all SIBs. In the alternative, the carrier requested that the Appeals Panel reverse the decision of the hearing officer and remand to her for additional findings. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reform four findings of fact and affirm the decision and order of the hearing officer.

Operative reports of Dr. D indicate that on April 30, 1996, he performed a discectomy and fusion at C5-6 and that on April 21, 1998, he performed laminoforaminotomies on the right at C3-4, C4-5, and C5-6 and also one on the left at C5-6. In April 1998, the claimant had surgery to repair a right rotator cuff tear. On July 13, 1998, the claimant was out of the state, had severe pain, and was prescribed pain medication. A note dated September 11, 1998, states that the claimant was still having pain in his neck and right arm.

In September 1996 a functional capacity evaluation (FCE) was performed, apparently to determine if the claimant could return to his former job. The report of the FCE states that his physical capabilities for lifting and carrying were decreased and he did

not meet the requirements of the job, that his right hand grip and coordination scored below average, that he was able to use the right arm only 1 to 5% of an eight-hour day, and that he was able to lift only 20 pounds. In a letter dated February 10, 2000, Dr. D said that the claimant had a 23% IR; continued to have limited functional abilities; and that

> Therefore, his work restrictions are 4 to 6 hours a day, depending on symptomology. There may be days he can work a little bit longer and some days where he works less, depending on requirements such as lifting, taking things off the shelves, etc.

In a letter dated February 25, 2000, Dr. D wrote:

> Please be aware that [claimant] has a diagnosis of ongoing radicular symptoms with mechanical problems and limited ability to function. He has ongoing right shoulder mechanical problems. At this time, [claimant] has work restrictions of half days with no strenuous activity or constant bending, stooping, lifting, etc.

The claimant testified that he is 67 years old, that from 1980 until he was injured he repaired unique electronic equipment, that the job required heavy lifting, that he began working at (employer 2) in February 1997, that he worked about six hours a day four days a week, that he averaged working about 30 hours a week, that he is paid $5.50 an hour plus commission and bonuses, that the store manager understands when he cannot do certain work, that he sometimes had to lie down at work because of pain, and that he slowly did some remodeling of his house. He said that he contacted the TRC after he was advised to do so, that he selected to receive training in computers, that he started taking classes in September 1999, that he is still taking classes and working for employer 2, that some days he would attend class for four hours and work six hours, and that he has not looked for another job. A TRC report dated June 9, 1999, states that the claimant reported that his work at employer 2 varied from 20 to 40 hours a week depending on the level of business.

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, determines 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994.

In interpreting the SIBs rules effective April 17, 1992, the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 961469, decided September 11, 1996, stated generally that if a claimant contends that he is not able to work full time, the burden is on the claimant to prove the number of hours that he or she can work and that he or she worked that number of hours. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.102(d)(1)) effective January 31, 1999, provides:

> 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[.]

In her Decision and Order, the hearing officer wrote:

> Based on the evidence and testimony, I have concluded that the Claimant was not required to make a good faith attempt to find employment because he was working the full amount of hours that he was able to work commensurate with his ability and impairment from the compensable injury considering the Claimant's medical records and the credible record from [Dr. D] regarding the Claimant's condition. Furthermore, the Claimant also cooperated with the TRC and even attended classes during the 4th quarter.

She then made findings of fact stating that during the qualifying periods for the first through the fourth quarters "Claimant was not required to make a good faith attempt to find employment because he was working the full amount of hours he was able to work commensurate with his ability and impairment for the compensable injury." Rule 130.102 provides that an injured employee has made a good faith effort to obtain employment commensurate with his or her ability to work if he or she as returned to work in a position which is relatively equal to the injured employee's ability to work. Rule 130.102 states how an injured worker may meet the requirement of making a good faith effort to obtain employment commensurate with his or her ability to work, not that a claimant is not required to make a good faith effort to obtain employment commensurate with his or her ability to work. The language used by the Appeals Panel concerning the SIBs rules

effective April 17, 1992, and the language in the SIBs rules effective January 31, 1999, are not the same; however, the tests for meeting the "good faith requirement" are similar. We reform Findings of Fact Nos. 16, 18, 20, and 22 to state that during the qualifying periods the claimant made a good faith effort to obtain employment commensurate with his ability to work by returning to work in a position which is relatively equal to his ability to work.

The findings of fact as reformed, the conclusion of law that the claimant is entitled to SIBs for the first through the fourth quarters, and the finding of fact and the conclusion of law that the claimant has not permanently lost entitlement to SIBs are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly 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).

We affirm the findings of fact as reformed and the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge