APPEAL NO. 001421

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 May 30, 2000. The hearing officer determined that the respondent (claimant herein) is entitled to supplemental income benefits (SIBs) for the sixth quarter. The appellant (self-insured herein) files a request for review, arguing that the hearing officer erred in finding that the claimant made a good faith job search during the qualifying period for the sixth compensable quarter. The claimant responds that the evidence supports the finding of the hearing officer and that the self-insured's brief is replete with misstatements of fact for which he requests we sanction the self-insured.

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 parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement with an impairment rating of 15% or greater; that the claimant has not commuted any portion of his impairment income benefits; that the qualifying period for the sixth quarter ran from November 26, 1999, through February 24, 2000; and that the sixth quarter ran from March 9, 2000, through June 7, 2000. The claimant testified that he was injured while employed as an administrative law judge with the State Office of Administrative Hearings when on _____, the motor vehicle in which he was traveling for work was rear-ended by another motor vehicle. The claimant stated that as a result of this accident he suffered injuries to his head, cervical spine, thoracic spine, and both knees.

The claimant introduced medical records from both Dr. S, and Dr. O. Both physicians recommend that the claimant can do part-time, sedentary work as a teacher. Dr. S states as follows in a report dated February 3, 2000:

> Because of the patient's work-related injury, he remains capable of performing at only the sedentary-to-light-duty job category. He is able to perform at this level on a part time basis. The only job that he could do for which he is qualified and for which he could reasonably be expected to find employment is as a part time substitute teacher. He could work on an estimated frequency of 2 days per week because of his intermittent muscle pain flare-ups. My opinion is based on the history [the claimant] has told me, his previous performance in physical therapy, and result of a previous functional capacity evaluation.

The claimant testified that he searched for hundreds of jobs during the qualifying period conducting a job search both through the Internet and through checking newspaper ads. The claimant stated that he searched every week and put into evidence a calendar

showing the dates he searched and the amount of time he searched each day. It was the claimant's testimony that while he searched for hundreds of jobs he would make formal applications for those which were in his restrictions of intermittent part-time, light-to-sedentary work. The claimant testified that during the qualifying period he worked as a substitute teacher; and that during the filing period he sought employment as a part-time worker with the U.S. Census, and was tested for, and offered, the position, although he did not actually start working for the U.S. Census until after the filing period.

The claimant testified that he registered with the Texas Workforce Commission (TWC), although he received no job leads from them during the filing period. The claimant also testified that he had sought the assistance from the Texas Rehabilitation Commission (TRC). The claimant also stated that during an early quarter he had accepted employment which required he work set hours and that he was unable to perform this job when he had flare-up muscle spasms. The claimant testified that he holds a teaching certificate, is a licensed attorney on inactive status with the State Bar of Texas, and has had training in accounting. The claimant testified that his search included searching for law-related jobs.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. During the relevant qualifying period, the Claimant was underemployed.

3. The Claimant's underemployment was a direct result of the impairment from his compensable injury.

4. During the relevant qualifying period, the Claimant made a weekly search for employment appropriate to his training and experience and within his physical abilities.

5. The Claimant conducted his search according to a reasonable plan and in due regard to the existing barriers to his employment.

6. During the relevant qualifying period, the Claimant made a good-faith effort to secure employment commensurate with his abilities.

CONCLUSION OF LAW

3. The Claimant is entitled to [SIBs] for the 6th quarter.

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 the question of whether a claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission 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(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]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.

(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 [TRC];

(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 [TWC]; 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. 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 claimant requests we sanction the self-insured for making misstatements of fact in its brief. We have no authority to sanction either a party or an attorney for such action. We merely observe that as a general rule an appellate advocate who misstates the facts of a case is less likely to have credibility or success with an appellate tribunal in that case.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge