APPEAL NO. 001450

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 May 31, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the qualifying period for the fourth quarter for supplemental income benefits (SIBs) began on May 17, 1999, and ended on August 15, 1999; that the qualifying period for the fifth quarter began on August 16, 1999, and ended on November 14, 1999; and that the qualifying period for the sixth quarter began on November 15, 1999, and ended on February 13, 2000. The hearing officer found that the during the qualifying periods the claimant had some ability to work, that he was not enrolled in and did not satisfactorily participate in a full-time rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC) or a private provider, that he did not make a good faith effort to obtain employment commensurate with his ability to work, and that his unemployment and underemployment were not a direct result of his impairment from the compensable injury and concluded that the claimant is not entitled to SIBs for the fourth, fifth, and sixth quarters. The claimant appealed, stated information favorable to his position, contended that the hearing officer did not properly apply the law, urged that the determinations of the hearing officer are contrary to the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBs for the fourth, fifth, and sixth quarters. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a thorough, three-page statement of the evidence. The claimant began treatment for a lower and mid back injury in 1987. On _____, he injured his neck, left shoulder, and left upper extremity. A designated doctor certified that he reached maximum medical improvement on November 16, 1997, with an 18% impairment rating (IR). At the time of the CCH, the issue of the claimant's IR was pending in district court. The claimant sustained a lumbar injury on _____. The claimant is seeking SIBs for the November 1995 injury.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102), Eligibility for [SIBs]; Amount, effective January 31, 1999, applies to each quarter in this case. Neither party referred directly to that rule. It provides in part:

> (c) Direct Result. An injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings.

(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:

(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 [TRC] 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.

(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 [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 Texas Workforce Commission [TWC]; or

(10) any other relevant factor.

The burden is on the claimant to prove by a preponderance of the evidence that he is entitled to SIBs. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. 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. 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 Appeals Panel will reverse factual determinations of the hearing officer only if they are 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).

We first address the determinations that during the qualifying periods the claimant's unemployment and underemployment were not a direct result of his impairment from the compensable injury. A TWC Appeal Tribunal Decision dated May 28, 1999, states that on June 23, 1996, the claimant began working as a communications equipment installer, a job that included installing heavy power cables, cable racks, and computer equipment; that he injured his back on _____; that he filed for workers' compensation benefits and received them until March 1999; that claimant was asked about prior injuries and did not list a 1987 back strain or November 1995 shoulder injury on his application; that the claimant had and passed a physical examination prior to being hired; that the claimant was terminated for falsification of his employment application; and that because of his misconduct, the claimant is not entitled to unemployment benefits. The claimant testified that he worked 80 hours a week while working for that employer, that his average weekly wage was over $1,000.00, that the reason he no longer worked for that employer is because he injured his low back, and that he collected temporary income benefits for that low back injury until he reached statutory maximum medical improvement. In Texas Workers' Compensation Commission Appeal No. 950490, decided May 15, 1995, the Appeals Panel held that a hearing officer may consider that a claimant had returned to work and sustained another compensable injury in determining whether a claimant's

unemployment was a direct result of the impairment from the compensable injury. The evidence is sufficient to support the hearing officer's determinations that during the qualifying periods for the fourth, fifth, and sixth quarters the claimant's unemployment and underemployment were not the direct result of his impairment from the compensable injury sustained in November 1995. We affirm those determinations. Those affirmed determinations are sufficient to support the conclusions of law that the claimant is not entitled to SIBs for the fourth, fifth, and sixth quarters.

We next address the finding of fact that the claimant was not enrolled in and did not satisfactorily participate in a full-time vocational program sponsored by the TRC or a private provider during the qualifying periods. The provision concerning a private provider does not appear in the version of Rule 130.102 effective January 31, 1999, but does appear in the version effective November 29, 1999. The hearing officer gave the claimant an additional opportunity to qualify for SIBs by considering a full-time vocational rehabilitation program sponsored by a private provider and did not commit reversible error in so doing. An unofficial transcript from a junior college dated January 11, 2000, and submitted by the claimant indicates that during an 11-week period beginning May 26, 1999, the claimant took and passed four semester hours; that in the fall of 1999 semester, he took and passed seven semester hours; and that in the spring of 2000 semester, he registered for three courses. The transcript does not indicate whether he passed those courses. The claimant testified that the TRC said that he had to maintain a 2.0 grade point average, but did not say how many hours he had to take. A note in TRC records dated September 20, 1999, says that the claimant has a letter from his doctor limiting him to nine hours. The claimant testified that he took three courses in the spring of 2000, that the courses were four hours each, and that he passed all three courses. The qualifying period for the sixth quarter began on November 15, 1999, and ended on February 13, 2000. For at least part of the qualifying period for the sixth quarter, the claimant was not enrolled in and did not satisfactorily participate in a full-time vocational rehabilitation program. Depending on the number of hours taken and whether his participation was satisfactory, the claimant may have been enrolled in and satisfactorily participated in a full-time vocational rehabilitation program for part of the qualifying period for the sixth quarter. The evidence is sufficient to support determinations that during the qualifying periods the claimant was not enrolled in and did not satisfactorily participate in a full-time vocational rehabilitation program sponsored by the TRC.

We next consider the finding of fact that during the qualifying periods the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. While that finding of fact is written in terms of the good faith requirement in Sections 408. 142 and 408.143 and the general good faith requirement in Rule 130.102, it does not indicate that she did not properly apply the more specific requirements in Rule 130.102. The hearing officer mentioned that the claimant was underemployed during the qualifying period for the sixth quarter. The claimant testified that he obtained a job using the Internet, that it took about three minutes to complete checking a site, that he was paid $0.25 to check a site, and that he was paid $703.00 during the qualifying period for the sixth quarter. The record does not indicate that the claimant could work only part-time. While

it would have been preferable for the hearing officer to have made findings of fact concerning the requirements in Rule 130.102(d)(2) that apply to a claimant who has returned to work in a position which is relatively equal to his ability to work, the evidence is sufficient to support an implied determination that during the qualifying period for the sixth quarter the claimant did not return to work in a position which is relatively equal to his ability to work. Rule 130.102(d)(4) and (e) apply to a claimant who has not returned to work and is able to return to work in any capacity. The hearing officer did not make findings of fact concerning the criteria in those subsections of Rule 130.102. The Applications for SIBs submitted by the claimant and the testimony of the claimant indicate that the claimant did not look for employment during each week of each qualifying period and did not document a job search during each week of each qualifying period as required. The evidence is sufficient to support the determinations that during the qualifying periods for the fourth, fifth, and sixth quarters the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. We affirm those determinations. Those affirmed determinations are sufficient to support the conclusions of law that the claimant is not entitled to SIBs for the fourth, fifth, and sixth quarters.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge