APPEAL NO. 001527

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 23, 2000. Three quarters of supplemental income benefits (SIBs) entitlement were in issue. The hearing officer held that the claimant was not entitled to SIBs for any of the quarters because he failed to make a good faith search for employment commensurate with his ability to work and because his underemployment was not the direct result of his impairment.

The claimant appeals and argues that his ability to work was limited by the contact lens he was given. He further argues that because he had some employment during some periods in issue, he met the good faith requirement. The claimant contends that he worked as many hours as physically able. The carrier responds that the decision is firmly based on the evidence and applicable statutes and that while it was clear that the claimant was capable of working full time, he voluntarily chose not to do so.

DECISION

We affirm.

The quarters in issue were the claimant's third, fourth, and fifth quarters of SIBs and the qualifying periods under review ran from June 23, 1999, through March 23, 2000.

The claimant lacerated his cornea on _____, when a piece of metal flew into his eye. He was employed as a carpenter's helper at the time. The claimant had surgery on his eye that day. He says that special contact lenses were prescribed and he was told he had to wear safety glasses and avoid jobs in construction. He said that he was also advised to avoid climbing or work in high places due to problems with depth perception. The claimant said he could drive but only on streets and not on the freeway.

The carrier's doctor released him back to work on November 24, 1997, with the sole restriction that he wear safety lenses. The claimant said he was not ready to go back to work at that time. The claimant said his problems with his eye involved blinking a lot. However, the claimant worked for a pizza kitchen full time for two months beginning in December 1997 and then at a tortilla factory for another four months after that. He indicated also that there were stitches in his eye that would pop loose. He had a second surgery to remove scar tissue in April 2000.

As the claimant explained, his eye was bothering him beginning in March 1999. Upon further questioning, it was disclosed that he was working again as a carpenter's helper at that time and a piece of wood dust flew into his eye. He was wearing sunglasses, but not safety glasses, at the time.

The claimant worked one part-time job during the third quarter qualifying period and sought no other employment. During the fourth quarter qualifying period, he contacted five prospective employers and received short-duration part-time jobs from three of them. Finally, during the fifth qualifying period, he had some more part-time painting work and contacted three other prospective employers. He did not seek employment with any restaurants. In January 2000, the claimant performed hotel work part time as well and applied to that employer for a full-time job, which he did not get. The claimant did not apply to any other hotels.

An optometrist wrote on November 17, 1997, that a rigid contact lens was medically necessary for the claimant because he could not tolerate glasses. The claimant's treating doctor, Dr. B, wrote that the claimant was unable to tolerate contact lenses. The letter also indicates that the claimant also wore glasses to correct his vision. Additional surgery was recommended in February. This was also the letter which set out in writing the prohibition against high work and climbing. There were no statements from Dr. B stating that the claimant was completely unable to work.

The rules in effect for the periods of time under review have changed somewhat the effect of prior Appeals Panel case law. Consequently, the fact that the claimant sought and obtained part-time employment does not present a prima facie case of good faith. 28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.120(d)(1)) makes a return to work equivalent to a good faith search if the work is a position "which is relatively equal to the injured employee's ability to work." We note that there is no evidence that the hours that the claimant could work were restricted in any way because of his eye. He was able to obtain and perform work that did not violate restrictions on climbing or high work. We cannot fault the hearing officer for evaluating the record in this case and arriving at the conclusion that the claimant did not qualify simply because of his employment as one who made a "good faith" search.

Likewise, the hearing officer could review the aspect of "underemployment" and conclude that although the claimant worked fewer hours and at less wages than when he was injured, this was not the direct result of his eye injury but due to a voluntary limitation. While the impairment from the eye injury was not required to be the sole cause of underemployment, the hearing officer could consider that the eye injury and blinking did not materially affect his ability to perform various types of work.

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).

In considering all of the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We, therefore, affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge