APPEAL NO. 001559

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 June 14, 2000. The issues at the CCH were extent of injury and entitlement to supplemental income benefits (SIBs) for the first and second quarters. The hearing officer determined that the appellant's (claimant herein) compensable injury does not extend to or include an injury in the form of bilateral carpal tunnel syndrome (CTS) and that the claimant is not entitled to SIBs for the first and second quarters. The claimant appeals, contending the evidence established that her injury included bilateral CTS. In her appeal, the claimant also argues that the hearing officer erred in finding that she was able to work during the qualifying periods for the first and second quarters of SIBs. The respondent (carrier herein) replies 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 parties stipulated that the claimant sustained a compensable injury on _____; that the claimant has not elected to commute any portion of his impairment income benefits; that the claimant has reached maximum medical improvement on October 26, 1998, with an impairment rating of 17%; that the first quarter was from October 16, 1999, through January 17, 2000; that the second quarter began on January 18, 2000, and ended on April 18, 2000; that the qualifying period for the first quarter was from July 7 through October 5, 1999; and that the qualifying period for the second quarter began on October 6, 1999, and ended on January 4, 2000. It was undisputed that the claimant did not seek employment during the qualifying periods for the first and second quarters. The claimant described her injury as taking place when she fell over some bread trays at work and landed on her face and right side. The claimant received various medical treatments for the injuries resulting from her fall. The claimant was not diagnosed with CTS until 1999. In a March 31, 2000, report Dr. S, the claimant's treating doctor, stated that the claimant was unable to do any time of work because of "exacerbation of her extensive neck, back, shoulder and arm pain with any type of prolonged muscular activity."

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case 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).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298,299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found that the claimant's injury did not include bilateral CTS. Claimant had the burden to prove her injury. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer's determination is against the great weight and preponderance of the evidence. Cain, *supra.*

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(4), "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 the claimant made a good faith job search and whether the claimant's unemployment was a direct result of his impairment are questions of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994.

[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.

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:

* * * *

(4) 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[.]

The hearing officer stated in her decision that the claimant had met the direct result requirement for both quarters and neither party has appealed this finding. The basis of the claimant's appeal is that the hearing officer erred in finding that she had the ability to work and therefore did not make a good faith effort to seek employment. Applying this standard, we find sufficient evidence to support the hearing officer's factual finding that the claimant had some ability to work. This finding, linked to the undisputed fact that the claimant did not seek employment during the qualifying period, is sufficient to support the finding of the hearing officer that the claimant did not seek employment in good faith commensurate with her ability to work. The finding that the claimant did not make a good faith job search during the qualifying period is sufficient to support the hearing officer's conclusions of law that the claimant is not entitled to SIBs for the first and second quarters.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge