APPEAL NO. 001634

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 June 15, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 14th quarter.

The claimant appealed, arguing that the hearing officer's decision is against the great weight and preponderance of the evidence. The claimant also complains of the admission into evidence of a supplemental report of a doctor that determined a light-duty ability to work. The respondent (carrier) responded that the factual determinations of the hearing officer on the issues before him are supported by the record.

DECISION

We affirm.

The hearing officer has done an accurate job of summarizing the pertinent facts and we will incorporate that summary by reference here. Only the briefest summary of evidence will be cited. The claimant was injured on _____, and had five back surgeries. He contended a complete inability to work for the period from December 2, 1999, through March 2, 2000, and sought no employment.

There was conflicting evidence as to whether the claimant was actually employed, with his wife, by an insurance company. The regional manager for the insurance company, Mr. W, denied he would have told someone that the claimant was employed by his company but did agree he "was asked" to represent that the claimant was the company's employee for purposes of an automobile purchase. He did not say who had asked him to do that. On the other hand, a written report of the private investigator hired by the carrier recited a conversation with Mr. W in which he asserted that the claimant and his wife were "a team" for the company and that the claimant did all the paperwork and computer work. Likewise, a credit report obtained by the investigator on the claimant characterized him as an insurance agent for Mr. W's insurance company.

The claimant's comment about a videotape showing him active and in no apparent disability was that he found it "funny." His explanation was that none of the businesses or restaurants he visited were very far from home nor were the trips very long. He maintained that he was "wiped out" afterwards due to pain. The claimant's wife described his limitations on a vacation they took to Hawaii, which involved an eight-hour airplane trip.

The claimant objected to admission of a June 6, 2000, supplemental report of Dr. B, based upon a videotape also in evidence. However, the claimant did not object to the videotape. The videotape was filmed in December 1999 and January 2000 but not supplied to Dr. B until May 25, 2000. The carrier's attorney said that he requested the videotape promptly as of the date of the benefit review conference but that it had to be

copied. The hearing officer expressed his disbelief that the videotape would take five months to copy. The carrier's attorney said that the investigative company told him that the videotape was not sent to the carrier until April 25, 2000. The hearing officer found no timely exchange since the report of Dr. B was not sent to the claimant until June 7, 2000. However, the hearing officer admitted it due to good cause because it could have taken a month to copy the videotape and send it to Dr. B for review.

Medical evidence on the ability to work is conflicting. Dr. B agreed in his original report that the claimant had some ability, though he characterized it as "cottage" industry level. He revised his opinion to light duty after viewing the videotape. Against this are statements of his doctors that refer generally to a state of permanent "disability."

First of all, we do not agree that the hearing officer's determination that there was good cause for late exchange of the supplemental report of Dr. B was an abuse of discretion. The exchange requirement extends to information "known to the party or documents that are in the party's possession, custody, or control at the time disclosure is required." While there is no clear explanation from the carrier as to why it took a month to furnish the videotape to Dr. B, it was not in fact furnished until then and the report of Dr. B was written promptly and exchanged immediately thereafter.

However, we note that the admission of the report does not constitute reversible error. More to the point, the burden is on the claimant to prove, through medical evidence, that he had the complete inability to work in order to have his nonexistent job search found to comply with the requirements of the SIBs statutes.

The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) in effect for the qualifying period under review governed the hearing officer's analysis of whether the claimant made a good faith search for employment commensurate with his ability to work:

> (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 Texas Rehabilitation Commission 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.

The hearing officer could interpret the medical evidence that is in the record as lacking a narrative as to how the impairment prevented any work, and could believe that there were other records that showed an ability to work. He could believe that the impairment was no longer a factor in the claimant's unemployment.

The hearing officer is the sole judge of the relevance, the 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). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this was the case here and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge