APPEAL NO. 001715

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 27, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the second quarter and that the respondent/cross-appellant (carrier) did not waive its right to contest entitlement to SIBs for the second quarter by failing to timely request a benefit review conference (BRC). The claimant appealed the adverse findings of fact as to direct result and good faith on the grounds of sufficiency of the evidence. The claimant also appealed the adverse determinations that he was not entitled to SIBs for the second quarter and that the carrier had not waived the right to contest entitlement by failing to timely request a BRC.

The carrier appealed the findings of fact as to receipt of the claimant's application for SIBs and when it disputed entitlement to SIBs on grounds of sufficiency of the evidence. The carrier also filed a response to the claimant's appeal, contending that the findings as to good faith and direct result were sufficiently supported by the evidence and should be affirmed. The appeals file does not contain a response from the claimant to the carrier's request for review. The findings that the claimant was unemployed during the relevant qualifying period, that during such relevant time period he had some ability to work, and that the carrier had not made a prior payment of SIBs to the claimant before March 22, 2000, were not appealed and have become final pursuant to operation of law. Section 410.169.

DECISION

Affirmed as reformed.

The claimant testified that he sustained an injury to his shoulder, knee, and back and was depressed as a result of his injury. The parties stipulated the claimant sustained a compensable injury on _____. The claimant testified that he looked for work throughout the entire second quarter SIBs qualifying period. In response to questioning about the type of work that he could do, the claimant stated that he had been released to full-duty work. The carrier's attorney then stated, "so you do have a release to return to full duty work?" and the claimant replied, "I got a release on my shoulder." The claimant testified that during the second quarter SIBs qualifying period he looked for work in the newspaper, made cold calls at businesses, and went to the unemployment office. No other questions were asked regarding the claimant's employment search or whether he was employed or underemployed as a direct result of his employment.

The claimant testified that he filed his Application for Supplemental Income Benefits (TWCC-52) for the second quarter of SIBs with the carrier in February 2000 and that he had a return receipt card as proof that the carrier received his TWCC-52 for the second quarter of SIBs on February 14, 2000. The claimant testified that he never received any

documentation from the carrier denying entitlement to SIBs for the second quarter or that the carrier was requesting a BRC. The claimant acknowledged that he did not receive any money for his first quarter of SIBs until after the CCH when he received a copy of the Decision and Order around March 22, 2000. No further testimony was taken.

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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides that a claimant with an ability to work "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 Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999, we held that the documentation requirement of Rule 130.102(e) was mandatory and that a hearing officer could not consider non-documented employment contacts in arriving at the good faith determination. The hearing officer found that the claimant only made searches during the 2nd, 3rd, 9th and 10th weeks of the 13-week qualifying period. At the CCH, the claimant gave no explanation as to why there were no documented searches for the remaining nine weeks of the qualifying period. In his appeal, the claimant attempts to rectify this omission but the Appeals Panel is generally constrained to consider only the record of the hearing with certain exceptions not applicable here. Section 410.203(a). Based upon the claimant's failure to make a job search each week of the qualifying period, the hearing officer found that the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work.

The hearing officer found that the claimant's unemployment was not a direct result of his impairment from the compensable injury. In his Statement of the Evidence, the hearing officer wrote that the claimant's testimony as a whole raised questions that were not adequately addressed by the medical records in evidence. The claimant offered a letter dated September 16, 1999, from Dr. P, a psychologist, who had been treating the claimant for depression. Dr. P wrote that the claimant's depression prevented him from being capable of holding a job. The claimant was not asked any questions about his depression and whether it was still causing any problems during the qualifying period in question. Because of the paucity of evidence, we cannot state as a matter of law that the hearing officer erred in finding no direct result given the claimant's answers to questions propounded to him during the hearing that he had received a full-duty release which only created a fact question for the hearing officer to resolve.

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 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 (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 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

In a case such as the one before us where both parties presented evidence on the disputed issue, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. 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 could 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).

Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

There remains the question of whether the carrier waived the right to contest the second quarter SIBs entitlement. The claimant asserted that Finding of Fact No. 6 should read the "carrier received the claimant's application for second quarter SIBs benefits on February 14, 2000" instead of "the claimant received. . . ." We agree that a typographical error was made and reform this finding to reflect that the carrier rather than the claimant received the document. The carrier argued that Finding of Fact No. 6 was against the great weight of the evidence, contending that it did not receive the application until February 15, 2000, because the carrier had file stamped the document as received on this date. However, the carrier failed to address the claimant's United States Postal Service return receipt card reflecting a postal stamp of February 14, 2000. Whether the application was received on February 14 or 15, 2000, was within the province of the hearing officer to resolve and we do not find error in this finding by the hearing officer.

The hearing officer found that the carrier first filed a Request for Benefit Review Conference (TWCC-45) on May 4, 2000, to dispute entitlement to the second quarter of SIBs and that the carrier did not send a determination of second quarter eligibility to the claimant within 10 days of receiving his application for SIBs. The carrier contended that it sent the TWCC-45 with a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) which had been received by Texas Workers' Compensation Commission (Commission) on February 25, 2000. The TWCC-21 contained a statement that the carrier was disputing entitlement to the second quarter of SIBs. However, it was unable to offer a Commission file-stamped copy of the TWCC-45 with a date of February

25, 2000. The only Commission file-stamped copy of the TWCC-45 contained a date of May 4, 2000.

The carrier contended that the affidavit of the carrier's adjuster stating that she sent the TWCC-45 with the TWCC-21 should establish a receipt date for the TWCC-45 as February 25, 2000, the same date file-stamped on the TWCC-21. The hearing officer apparently did not find the affidavit credible and specifically discussed the lack of any assertion by the adjuster in her affidavit that she had any personal knowledge that any document was in fact delivered to the Commission. We do not find error in the hearing officer's findings that the carrier did not file a TWCC-45 with the Commission until May 4, 2000; that the carrier did not send a determination of second quarter eligibility to the claimant within 10 days of receiving the application; or that the carrier filed a TWCC-21 disputing the claimant's SIBs eligibility for the second quarter on February 25, 2000.

The claimant asserted on appeal that the hearing officer erred in determining that the carrier, as a matter of law, had not waived the right to contest eligibility for the second quarter of SIBs. The carrier argued, in the alternative, that it was not required to file a TWCC-45 or TWCC-21 within 10 days of receiving the claimant's TWCC-52 as there was no prior payment of SIBs. The hearing officer found that the carrier's failure to fulfill the requirements of Rule 130.108(e) did not constitute a waiver of the right to dispute eligibility. We agree. In Texas Workers' Compensation Commission Appeal No. 001112, decided June 30, 2000, we wrote:

> Rule 130.108(d) provides that when a carrier has paid the prior quarter SIBs, it must dispute the following quarter SIBs by requesting a BRC within 10 days after receiving the TWCC-52. This subsection of the rule expressly states that a carrier which fails to timely request a BRC under these circumstances waives the right to contest entitlement to SIBs. Rule 130.108(e) provides that when a carrier has not paid SIBs for the immediately preceding quarter and disputes the immediately succeeding quarter, it must send this determination to the employee within 10 days of the date the application was filed with the carrier. There is no parallel provision in subsection (e) establishing carrier waiver for failing to dispute in 10 days.

In Appeal No. 001112, we noted that a distinction has been made between paid and unpaid prior quarters and declined to hold a formally promulgated rule of the Commission inconsistent with the 1989 Act. *See also* Texas Workers' Compensation Commission Appeal No. 991354, decided August 9, 1999; and Texas Workers' Compensation Commission Appeal No. 000581, decided May 1, 2000. We find that the hearing officer did not err in determining that the carrier did not waive its right to contest entitlement to SIBs for the second quarter by failing to timely request a BRC.

We affirm the hearing officer's decision and order as reformed.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge