APPEAL NO. 001746

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 July 13, 2000. The hearing officer determined that the respondent (claimant herein) is entitled to supplemental income benefits (SIBs) for the first, third, and fourth quarters and that the claimant is not entitled to SIBs for the second quarter. The appellant (carrier herein) files a request for review contending the hearing officer's findings that the claimant's unemployment and underemployment during the qualifying periods for the first, third, and fourth quarters were a direct result of the impairment from the compensable injury were not supported by the evidence. The carrier also raises a question as to whether the claimant made a good faith job search during these qualifying periods. The claimant responds that the evidence supports the decision of the hearing officer.

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 reached maximum medical improvement on November 17, 1997, with a 27% impairment rating (IR); that the claimant has not commuted any portion of his impairment income benefits; that the first quarter was from June 8, 1999, through September 6, 1999; that the second quarter was from September 7, 1999, through December 6, 1999; that the third quarter was from December 7, 1999, through March 6, 2000; and that the fourth quarter was from March 7, 2000, through June 5, 2000. The claimant testified that his injury took place when he was lifting some printers and injured his back. The claimant testified that after he returned to work in _____ he suffered a second compensable injury for which he eventually received an 11% IR.

The claimant testified that as a result of both injuries he was placed by his doctor under a 50-pound lifting restriction and was unable to perform his prior employment which he testified was heavy work. There was no matter evidence in the records concerning the effects of either the _____ or _____ injuries. The claimant testified that during the qualifying period for the first quarter, he sought employment during each week of the qualifying period. The claimant testified that during the qualifying period for the third compensable quarter, he was enrolled in an educational program in computer maintenance which was sponsored by the Texas Rehabilitation Commission (TRC). The claimant testified that at the end of the program and as a result of the training he received, he obtained employment upon completion of the TRC-sponsored training. The claimant testified that he held this job from November 11, 1999, until he was laid off on January 18, 2000, at which time he started his own computer maintenance business.

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, "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. 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).

The primary thrust of the carrier's appeal is that the hearing officer erred in finding that the claimant's unemployment and underemployment during the qualifying periods for the first, third, and fourth quarters were a direct result of his _____, injury. We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. The carrier argues that the fact

[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.

the claimant returned to work before his second injury in _____ means that this test is not met in the present case. We disagree. Even if both injuries in conjunction prevented the claimant from returning to his prior employment, he could meet this test, because we have repeatedly held that to meet the direct result requirement one only need prove that the unemployment or underemployment was a direct result of the compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 001786, decided September 13, 2000. Thus, the hearing officer could have concluded from the limited evidence before her that the claimant's unemployment and underemployment during the qualifying periods in question were a direct result of his _____, injury. There is certainly no countervailing evidence which could constitute the overwhelming evidence contrary to her findings of direct result.

As far as the carrier's arguments concerning good faith job search, all of them appear to be based upon the theory that the claimant's evidence was insufficient as a matter of law to establish facts he was asserting. In regard to the first quarter qualifying period, the carrier argues that the claimant should have looked for more jobs and not made so many searches by telephone. In regard to the third quarter, the carrier argues that the claimant should have presented more documentation that he was a full-time student. In regard to the fourth quarter, the carrier argues that the claimant should have provided more records concerning his self-employment. We find all of these arguments go to the weight of the evidence. Weighing the evidence was the province of the hearing officer and we do not find any basis to overturn her findings on good faith job search as a matter of law, when her findings were supported by the testimony of the claimant who the hearing officer obviously deemed to be credible.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

The hearing officer made findings of fact that during the qualifying periods, the claimant's unemployment and underemployment were "a direct result of his impairment." In the statement of the evidence in her Decision and Order, the hearing officer said that the claimant's unemployment and underemployment were "a direct result of his compensable injury." Nothing in the Decision and Order indicates the basis for those findings of fact and the statements in the statement of the evidence. The Appeals Panel judges were required to review the evidence; speculate as to the theory the hearing officer used to make her findings of fact, which are more in the nature of conclusions of law than findings of fact; and determine whether the evidence is sufficient to support the findings of fact related to

the direct result question. In Texas Workers' Compensation Commission Appeal No. 981878, decided September 18, 1998, the Appeals Panel stated:

> While the inability to return to a "preinjury occupation" may well be a significant factor in a given case in determining direct result, standing alone it does not prove direct result to the exclusion of any other evidence on the issue.

The claimant contends that he is entitled to supplemental income benefits because of a _____ injury. After sustaining that injury, he returned to work with restrictions and was again injured in _____. He testified that he was given a lifting restriction after the _____ injury. The evidence is not clear if the lifting restriction is based on one or both injuries. Deciding this appeal would not be as difficult if the hearing officer had made additional findings of fact and conclusions of law to resolve the disputed issues. *See* Hypothetical No. 6 on pages 6-53 and 6-54 and comments concerning findings of fact and conclusions law related to Hypothetical No. 6 on page 6-60 in 1 JOHN T. MONTFORD, *ET AL*., A GUIDE TO TEXAS WORKERS' COMP REFORM (1991). Also, as a general rule, an order should be based on a decision; a decision should be based on conclusions of law; conclusions of law should be based on findings of fact; and findings of fact should be based on evidence. Texas Workers' Compensation Commission Appeal No. 951061, decided August 14, 1995. After reviewing the limited evidence related to the question of direct result concerning the qualifying periods, I do not conclude that the hearing officer's determinations concerning the direct result question are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. However, I strongly suggest that hearing officers make appropriate findings of fact and conclusions of law to support their decisions not only to inform the parties to contested case hearings, but also to assist the appellate process should a request for review be filed.

_____
Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I respectfully dissent and would reverse and render that the claimant is not entitled to supplemental income benefits (SIBs) for the first, third, and fourth quarters of SIBs. Section 408.142(a) provides, in pertinent part, that an employee is entitled to SIBs if, on the expiration of the impairment income benefit (IIBs) period computed under Section 408.121(a)(1) the employee:

* * * *

(2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage [AWW] as a direct result of the employee's impairment.

The hearing officer found that the claimant was unemployed during the first, second, and part of the third quarters as a direct result of his impairment; that the claimant was underemployed during a part of the third quarter as a direct result of his impairment; and that the claimant was underemployed during the fourth quarter as a direct result of his impairment.

The claimant had the burden to prove, in this case, the disputed criterion that his diminished wages were below 80% of his preinjury AWW during the qualifying periods for the third and fourth quarters of SIBs as a direct result of his impairment. 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMPENSATION COMP REFORM § 4.28 at 4.119. Texas Workers' Compensation Commission Appeal No. 971524, decided September 18, 1997. There was no stipulation as to the claimant's AWW and the hearing officer made no finding of fact as to the claimant's AWW. I have extensively reviewed the record for evidence of AWW and there was no testimony or documentation suggesting what this figure could possibly be. Nonetheless, the hearing officer made the above determinations of underemployment for the third and fourth SIBs quarters without any underlying evidence to support such determinations.

The claimant testified that during the last month of the qualifying period for the fourth quarter of SIBs, he was self-employed but offered no evidence of income from such endeavor other than a business card and a statement from the claimant that he earned about $800.00 but put it back into the business jointly owned by him and his brother. In Texas Workers' Compensation Commission Appeal No. 961579, decided September 26, 1996, the Appeals Panel held that such testimony was insufficient to establish underemployment. The panel wrote that the claimant must also set forth the amount of wages earned in the qualifying period. In Texas Workers' Compensation Commission Appeal No. 981477, decided August 13, 1998, the Appeals Panel specifically wrote that tangible documentation was required (to which the author judge of the present case wrote a concurring opinion).

I find the evidence insufficient as a matter of law and that the hearing officer erred in making such findings of underemployment and would reverse and render the findings as to no direct result for the third and fourth quarters. There simply is no way to infer a finding that the claimant earned less than 80% of his AWW when there is no evidence of what the AWW is.

An additional reason for dissent is that the author judge cites Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995, and Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995, for the proposition that a "direct result" finding is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the

type of work being done at the time of the injury. We have certainly used this language in many Appeals Panel decisions since 1993 but in doing so we have required proof of what the injury was; what the lasting effects of that injury were; and what were the type of duties the employee performed at his preinjury employment. Simply to make this blanket statement with no proof or analysis is incorrect and the other Appeals Panel decisions temper the language "is sufficiently supported" with a more leveled analysis of the entire record.

For example, we have held that the direct result criteria may not be met when there is very little evidence in the record of the nature of the employee's injury or to establish that the employee continued to suffer from the results of that injury. *See* Texas Workers' Compensation Commission Appeal No. 950614, decided June 1, 1995. In Appeal No. 950614, we held that one must first analyze the nature of the impairment before reaching a conclusion about the cause of the unemployment. Additionally, the concurring author in the present case suggests that other factors must be addressed during the process of analyzing the evidence for a direct result. He offers Texas Workers' Compensation Commission Appeal No. 981878, decided September 18, 1998, for the proposition that the inability to return to the same job is only one factor and may well be significant, but standing alone it does not prove direct result to the exclusion of any other evidence on the issue. I agree and add that this language is just another way of stating that direct result cannot be established without an examination of the entire record. Under these requirements, the claimant's evidence in the present case fails.

In the present case, there is no documented medical evidence of what restrictions the claimant was under, if any, during the qualifying periods for the first, third, and fourth quarters of SIBs. The claimant offered no progress notes, test results, physical therapy notes, work release slips, functional capacity evaluations, or letters or notes from any doctor or health care provider to actually show the seriousness of the claimant's _____ injury and whether he had any kind of lasting effects from it. He claimed he was still under a doctor's care but offered no evidence thereof. We only know that he had "an upper back injury" in _____ from his testimony. The author judge, while conceding that the record was void of corroborating evidence, supports the hearing officer's direct result finding on the sole response from the claimant that he was under a 50-pound restriction for both his _____ injury and his _____ injury. The claimant was questioned during the hearing as to what his restrictions were after the _____ injury. He claimed a 50-pound lifting restriction trying to infer that it was the same for after the _____ injury as it was for the _____ injury but offered no documentation to corroborate the claimed restriction.

The author judge states that a claimant need only prove that the unemployment or underemployment be a direct result of the compensable injury. I agree, but, nonetheless, as stated previously, the SIBs statute clearly requires an analysis of whether unemployment or underemployment subsequent to the exhaustion of IIBs is causally connected to the impairment. I find the claimant fails in this analysis.

The claimant testified that he returned back to work at his same duties after the _____ upper back injury (the subject of this contested case hearing) and sustained another injury in _____ when he was "moving a mainframe computer on the tailgate of a truck." The claimant stated that "I was back doing warehouse work, strenuous work again." We have previously held that where a claimant suffers an intervening injury or condition, such injury or condition may break the chain linking current unemployment to the work-related impairment. Texas Workers' Compensation Commission Appeal No. 94907, decided August 16, 1994. We have also held that the subsequent injury must constitute the intervening cause to overcome evidence otherwise probative of direct result. Texas Workers' Compensation Commission Appeal No. 970424, decided April 23, 1997. Texas Workers' Compensation Commission Appeal No. 970150, decided February 25, 1997, stated that when evidence provides a link of the unemployment to the injury, the carrier has the burden of showing sole cause with respect to a subsequent injury. The carrier fulfilled this burden through the claimant's own testimony.

Because there were no medical records to support the claimant's testimony that he was under any restrictions when he returned to work after his _____ injury to support a finding that the claimant was experiencing lasting effects from the _____ impairment, coupled with the fact that when the claimant did return to work he returned to the same job performing the same preinjury duties before he sustained the _____ injury, I believe this panel is constrained to follow the precedent enunciated in Appeal No. 950614, *supra*, which required some minimal medical documentation to support the claimant's contention that his unemployment was a direct result of his impairment from the compensable injury.

I believe that under the facts of this case that, because the claimant returned to his pre-1997 job combined with the total lack of medical records, the determinations of the hearing officer that the claimant was unemployed and underemployed for the first, third, and fourth quarters of SIBs should be reversed as they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer found that the claimant made a good faith effort to seek employment commensurate with his ability to work during the first, third, and fourth quarters.

The parties stipulated that the first quarter was from June 8, 1999, through September 6, 1999. There was no stipulation or evidence taken as to the dates of the qualifying period for the first quarter of SIBs. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(4) (Rule 130.101(4)) provides that the qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. Therefore, the qualifying period for the first quarter would begin on February 23, 1999, and end on May 25, 1999. The claimant's Statement of Employment Status/ Application for Supplemental Income Benefits (TWCC-52) for the first quarter does not contain any documentation that he looked for work during the 10th and 11th weeks. We have previously held in Texas Workers' Compensation Commission Appeal No. 992321,

decided November 22, 1999, that the documentation requirements of Rule 130.102(e) were mandatory and that a hearing officer could not consider nondocumented employment contacts in arriving at the good faith determination. Because of this failure to document during two weeks of the qualifying period for the first quarter, the hearing officer's finding that the claimant made a good faith effort is contrary to the great weight and preponderance of the evidence.

The author judge would disagree that the documentation required must be in the form of tangible "writing" on a sheet of paper and argues that a "documentation" may be established solely by the testimony of the claimant. However, argument was rejected by the majority (which includes the concurring judge in the present case) in Texas Workers' Compensation Commission Appeal No. 001112, decided June 30, 2000.

Kathleen C. Decker
Appeals Judge