APPEAL NO. 002053

Following a contested case hearing (CCH) held on July 21, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the claimant is not entitled to supplemental income benefits (SIBs) for the fifth quarter, from May 10, 2000, through August 8, 2000. The appellant (claimant) appealed, asserting that the hearing officer's determination was against the great weight and preponderance of the evidence. The respondent (carrier) replied that the hearing officer's decision is correct and supported by the evidence and that the hearing officer's decision should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____, while employed by (employer). She reached maximum medical improvement and was assigned an impairment rating of 26%. The stipulations accepted by the hearing officer reflected that the claimant did not commute any of the impairment income benefits and that the qualifying period for the fifth quarter was from January 27, 2000, through April 26, 2000.

The claimant was returned to full duty after reaching MMI and returned to work for the employer on or before May 21, 1997. The claimant changed treating doctors to Dr. B, and was taken off work by Dr. B on June 5, 1998. At some time on or before January 21, 1998, the claimant returned to work at full duty. On January 22, 1998, the claimant was injured again when she was struck by another stack of falling lugs. The claimant has not returned to any type of employment since the injury of January 22, 1998.

The claimant conducted a job search during the qualifying period for the fifth quarter, but at the hearing she also asserted that she had no ability to work during the qualifying quarter. The theory under which the claimant wished to proceed was further muddied when, during her testimony, the claimant stated that she would look in the paper to try to find jobs which she could do, and that when she sent an application to a potential employer that she would try to pick a job that she could do because she didn't want the employer to contact her only to be turned down because she couldn't do the job she had applied for. The hearing officer found that the claimant had the ability to work during the qualifying period and that determination is supported by ample evidence in the record.

The hearing officer further found that the claimant had not made a good faith effort to seek employment commensurate with her ability to work during the qualifying period. There is evidence in the record that the claimant had been offered employment with the (the paper), a newspaper, and had declined the job. The claimant explained that she had done so because she asked how much lifting was involved and she had been told that she would be required to lift more than 20 pounds and that the job required constant activity. There is also evidence in the record that the claimant was scheduled to have an interview

with (the store), but had called to cancel the interview, telling the store manager that her doctor had advised her not to return to work. The claimant disputed the foregoing version of the conversation with the store's manager, stating that she had been to the hospital, that the emergency room doctors had advised her to rest for three days, that her doctor had advised her to follow the emergency room doctors' advice, and that she had called the store's manager in an attempt to reschedule the interview after the three day rest period. According to the claimant, the store's manager had hung up on her after she told the manager that she had been to the hospital and would not be able to attend the interview.

The claimant offered evidence of more than 60 applications which were mailed to various employers. The claimant testified that, although some of the newspaper advertisements for jobs specifically stated that potential applicants were to apply in person or were to call before sending an application, she did not. The claimant would identify jobs which she could or would apply for; make changes by hand to a photocopied, generic job application if necessary; then mail the application to the potential employer. It does not appear that the claimant made any follow up on her applications unless the potential employer initiated the contact.

Rule 130.102(b) provides that in order for an injured employee to be entitled to SIBs, there must be an impairment rating of 15% or more, the injured employee must not have commuted any portion of the impairment income benefits, and, during the qualifying period, the employee:

(1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and

(2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

The burden is firmly on the claimant to show that she had met each and every qualification for entitlement, in the instant case both that the unemployment was a direct result of the impairment and that she had made a good faith effort to seek employment commensurate with her ability to work.

The hearing officer found that the claimant's unemployment was not a direct result of her impairment from the compensable injury. The claimant's return to work for her old employer doing the same job she did before she was injured, and remaining at that job until a second accident on January 22, 1998, is evidence that her unemployment is not a direct result of her impairment from her compensable injury of _____. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor

v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. 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 hearing officer's determination that the claimant's unemployment was not a direct result of the impairment from the _____, injury is supported by the evidence presented and is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

The hearing officer also found that the claimant had not made a good faith effort to obtain employment commensurate with her ability to work. Rule 130.102(e) sets forth the criteria to be used by the trier of fact in evaluating the job search efforts of an injured employee who applies for SIBs. Only one of those criteria is the "number of jobs applied for throughout the qualifying period". The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994 (Unpublished). Whether the required good faith job search exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have also cautioned that good faith is not established simply by some minimum number of job contacts, but a hearing officer may consider "the manner in which the job search is undertaken with respect to timing, forethought and diligence." Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996. The hearing officer in this case did exactly that. Upon weighing the number of employers contacted, the manner in which the search was conducted, the claimant's stated position that she had no ability to work during the qualifying period, and the other evidence before him, the hearing officer found that the claimant had not acted in good faith in conducting her job search.

In a case such as the one before us where both parties presented evidence on the disputed issues, 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 it does not normally pass upon the credibility of witnesses or substitute its own judgement 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, 244 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 judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Finding that the hearing officer's determinations in this matter are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and finding no reversible error, we affirm the Decision and Order of the hearing officer.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge