APPEAL NO. 002133

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 August 15, 2000. With respect to the single issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter. In his appeal, the claimant argues that the hearing officer's determinations that he had some ability to work during the qualifying period, that he did not make a good faith effort to look for work commensurate with his ability to work, that his "not returning to work during the fourth quarter [qualifying period] was not a direct result of his impairment," and that he is not entitled to SIBs for the fourth quarter are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (self-insured) urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that he was assigned an impairment rating of 15% or greater; that the fourth quarter of SIBs ran from May 19 to August 17, 2000; that the qualifying period for the fourth quarter was comprised of the period from February 5 to May 5, 2000; that the claimant did not work and did not look for work in the qualifying period; and that the claimant earned no wages during the qualifying period. The claimant testified that he was injured on _____, while trimming trees. He stated that he was on the ground picking up the branches that had been trimmed and a branch fell and hit him on his head, injuring his neck and low back. The claimant had cervical fusion surgery on June 13, 1997, and lumbar fusion surgery in April 1999, as a result of his compensable injury.

The claimant's treating doctor is Dr. G. In progress notes of February 9, 2000, Dr. G recommended a lumbar CT scan based upon her assessment that the claimant might have a nonunion of the lumbar fusion performed in April 1999. In a "To Whom it May Concern" letter dated April 19, 2000, Dr. G stated:

> In April 1999, the patient underwent a lumbosacral fusion with instrumentation. The patient has failed to completely consolidate this fusion and currently has a nonunion. He will require additional surgical intervention. As such, the patient has been off work since the operation on April 30, 1999. He is currently off work pending additional surgical intervention for his nonunion. He is unable to return to previous employment as a result of his current condition.

On March 23, 2000, Dr. L examined the claimant at the request of the self-insured. In his report of the same date, Dr. L agreed that the claimant had a lumbar fusion nonunion and stated that the claimant may require further low back surgery. However, Dr. L

concluded that the claimant is "capable of doing sedentary or light duty work at the present time. I do not see any benefit for this man staying at home indefinitely." Dr. L referred the claimant for a functional capacity evaluation (FCE), which was performed on March 6, 2000. The FCE report states that the claimant "is currently functioning at a 'sedentary-light' physical demand level defined as lifting 15 pounds infrequently and 10 pounds or less frequently."

In a May 24, 2000, "To Whom it May Concern" letter, Dr. G noted that Dr. L had opined that the claimant could return to light-duty work; however, she responded that "[i]n light of his current condition, the patient will be unable to work in any capacity while awaiting his surgery. The patient does have significant pain and discomfort and is unable to return to work at this time." In a June 14, 2000, letter, Dr. G reaffirmed that the claimant had a nonunion of his lumbar fusion and that he was awaiting surgery. Dr. G again opined that the claimant was unable to work. Specifically, Dr. G stated, in relevant part:

> At this time, the patient is unable to perform activities at work that require prolonged sitting or standing. He also is unable to bend or squat. At this point, the patient requires intermittent rest for his discomfort. As such, he is unable to return to his previous employment at this time. The patient requires surgical intervention as soon as possible. Because of his nonunion, the patient is having continued discomfort in the lumbar spine with movement. Even mild movement with activities of daily living cause increased pain and discomfort. Currently, the patient uses a cane to ambulate. I recommend the patient remain off work until surgery is completed and he recovers.

Finally, in a June 28, 2000, report, Dr. G stated that the claimant is "currently functioning with a significant amount of pain secondary to his lumbosacral nonunion," that "[e]ven activities of daily living such as walking and sitting cause significant symptoms," and that he "requires additional surgical intervention in the form of a bone graft for this nonunion." Dr. G concluded that "[b]ecause of his current physical condition, the patient is unable to return to gainful employment. The goal of the surgery will be to maintain a solid fusion in his lumbosacral spine so that he may return to work."

The claimant's entitlement to SIBs in the fourth quarter is to be determined in accordance with the "new" SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. The claimant contends that he is entitled to SIBs under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)), which provides that an injured employee has made a good faith effort to look for work commensurate with the employee's ability to work if the employee "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 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 trier of

fact decides the weight to assign to the evidence before him and resolves conflicts and inconsistencies in the evidence. 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. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work in the relevant qualifying period. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant had satisfied the requirements of Rule 130.102(d)(4) that he provide a narrative specifically explaining how the injury causes a total inability to work and that no other records show an ability to work. The hearing officer's determinations in that regard are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse those determinations on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Given our affirmance of the determination that the claimant had some ability to work, we likewise affirm the hearing officer's determinations that the claimant did not make a good faith effort to look for work in the qualifying period for the fourth quarter and that he is not entitled to fourth quarter SIBs in light of the fact that the claimant stipulated that he did not look for any work in the qualifying period.

Finally, we consider the hearing officer's determination that the claimant's "not returning to work during the fourth quarter [sic] was not a direct result of his impairment." Under Rule 130.102(c) the claimant satisfies the direct result criterion "if the impairment from the compensable injury is a cause of the reduced earnings." In this instance, it is apparent that the claimant sustained a serious injury with lasting effects, not the least of which is the nonunion of his lumbar fusion which both Dr. G and Dr. L agree will probably necessitate additional surgery. Thus, it strains credibility to suggest that the impairment from the claimant's compensable injury is not a cause of his unemployment. The hearing officer's determination to the contrary in this case is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, we reverse Finding of Fact No. 4 and render a new determination that the claimant's unemployment during the fourth quarter qualifying period was a direct result of his impairment from the compensable injury. Our action in this regard does not effect the determination that the claimant is not entitled to SIBs for the fourth quarter in light of our affirmance of the hearing officer's good faith determination.

Finding of Fact No. 4 is reversed and a new determination rendered that the claimant's unemployment is a direct result of her impairment. The balance of the hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Susan M. Kelley
Appeals Judge