APPEAL NO. 002265

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 5, 2000. The issues before her were is the appellant (claimant) entitled to supplemental income benefits (SIBs) for the first quarter and is the claimant's compensable injury a producing cause of his diagnosed disc disorder at L3-4 and his pseudoarthrosis. The claimant and the respondent (carrier) stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on August 10, 1999, with a 15% impairment rating; and that the qualifying period for the first quarter for SIBs began on March 9, 2000, and ended on June 7, 2000. The hearing officer determined that the claimant's compensable injury is a producing cause of his pseudoarthrosis at L4-5 and L5-S1 but not a producing cause of his collapsed disc at L3-4.

The hearing officer also found that during the qualifying period for the first quarter for SIBs the claimant's unemployment was a direct result of his impairment from the compensable injury, that he had some ability to work, and that he did not make a good faith effort to seek employment commensurate with his ability to work and concluded that the claimant is not entitled to SIBs for the first quarter.

The claimant appealed the determinations that are adverse to him, contended that the evidence established that he had no ability to work during the qualifying period and that the collapsed disc at L3-4 is part of the compensable injury, and requested that the Appeals Panel reverse the decision of the hearing officer. The carrier responded, urged that the appealed determinations of the hearing officer are supported by sufficient evidence, and requested that the decision of the hearing officer be affirmed. The determinations that the claimant's compensable injury is a producing cause of his pseudoarthrosis at L4-5 and L5-S1 and that his unemployment during the qualifying period for the first quarter was a direct result of his impairment from the compensable injury have not been appealed and have become final under the provisions of Section 410.169.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. Only a brief summary of the evidence will be included in this decision. In October 1997, the claimant injured his low back moving a sign. In December 1998, the claimant had a laminectomy and anterior fusion at L4-5 and L5-S1. The claimant testified that he was better after the surgery; that later he had physical therapy and had pain during the physical therapy; and that the pain continued to get worse. In an office note dated March 22, 2000, Dr. D stated that the claimant complained of persistent low back pain with pain radiating into both lower extremities; that rotation and extension of the back aggravates the pain; that the claimant had undergone anterior interbody fusion at L4-5 and L5-S1; that the claimant probably has pseudoarthrosis which accounts for his persistent back and lower

extremity pain; that he recommended that the claimant have a lumbar laminectomy and fusion with pedicle screws; and that the reason for the surgery is for pseudoarthrosis at the L4-5 and L5-S1 levels. In a note dated May 12, 2000, Dr. D said that the claimant has a progressive collapse of the L3-4 disc and that if the L3-4 level is grossly unstable during surgery, then that level will be included in the fusion. In a letter dated July 26, 2000, Dr. D said that a Work Status Report (TWCC-73) dated May 12, 2000, which states that the claimant can go back to work with no lifting over 20 pounds was completed incorrectly; that other dictations as early as March 22, 2000, indicate that the claimant is unable to work whatsoever; that surgery for the claimant has been approved; and that for the period March through June 2000, the claimant was unable to work because of the symptoms he had experienced.

At the request of the carrier, Dr. C examined the claimant. In a letter dated April 14, 2000, Dr. C stated that a February 1998 MRI did not show a problem at L3-4; that an August 1999 MRI showed disc space narrowing at L3-4; and that, in his opinion, the disc collapse at L3-4 was not related to the compensable injury. Dr. B reviewed medical records at the request of the carrier and opined that the February 1998 normal MRI report concerning L3-4 essentially ruled out the possibility that the L3-4 condition was related to the compensable injury. In a report dated August 6, 1999, Mr. O, a physical therapist, reported that the claimant tested in the light to medium physical demand level, but could not return to his previous job description. The claimant testified that he could not work because of his pain; that he went to a café owned by friends; that he "worked with chips," but did not work there; that he was not paid, but was given a plate of food; that he has driven to Mexico three times since he was injured; that he drove for about one and one-half hours and then had to rest for 15 or 30 minutes; and that he has not had the surgery because his family lives in Mexico and he does not have anyone to take care of him where he lives.

We first address the determination that the claimant's compensable injury is not a producing cause of the collapsed disc at L3-4. The burden is on the claimant to prove by a preponderance of the evidence the extent of an injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. 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 may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, 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. 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). An appeals level body is not a fact finder, and it 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). The claimant did not introduce any

evidence directly relating the collapsed disc at L3-4 to his compensable injury. The carrier introduced reports from two doctors opining that the collapsed disc at L3-4 was not related to the compensable injury. The hearing officer's determination that the compensable injury is not a producing cause of the claimant's collapsed disc at L3-4 is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We next address the findings that during the qualifying period the claimant had some ability to work and did not in good faith seek employment commensurate with his ability to work and the conclusion that he is not entitled to SIBs for the first quarter. In his appeal, the claimant contended that he did not have any ability to work since he was "pending surgery." In Texas Workers' Compensation Commission Appeal No. 000553, decided May 1, 2000, the claimant claimed no ability to work because of pending spinal surgery. The Appeals Panel stated that decisions concerning pending surgery were rendered before the "new" SIBs rules and before good faith was defined in the rules and that under the "new" SIBs rules applicable to the case a claimant has made a good faith effort to obtain employment 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." As in Appeal No. 000553, the fact that the claimant was pending surgery was not sufficient to establish that the claimant was unable to perform any type of work in any capacity and is entitled to SIBs for the first quarter. We affirm the appealed determinations related to entitlement to SIBs for the first quarter.

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Gary L. Kilgore
Appeals Judge