APPEAL NO. 002267

Following a contested case hearing held on August 17, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 11th and 12th quarters. The appellant (self-insured) appealed, asserting that the hearing officer's decision was contrary to the great weight of the evidence, that the claimant's underemployment was not a direct result of his impairment, and that the claimant had not looked for employment during each week of the qualifying period for either quarter and had not, therefore, made a good faith effort to seek employment commensurate with his ability to work. There is no response in the file from the claimant.

DECISION

The decision and order of the hearing officer is affirmed.

The claimant sustained a compensable injury in the form of an occupational disease while employed as a grant administrator for (employer). The claimant's injury results in the involuntary contraction of the claimant's fingers. As a result of the injury, the claimant has undergone multiple surgeries to the left hand, including a ray amputation of the left ring finger. During the qualifying periods for the 11th and 12th quarters of SIBs, the claimant was self-employed as a partner in a consultant firm and was engaged in writing and managing grant proposals for local governments. The parties stipulated that the claimant did not commute any portion of the impairment income benefits payable as a result of his impairment from the compensable injury. Although the parties did not stipulate to the date of maximum medical improvement or the claimant's impairment rating (IR) from the compensable injury, the hearing officer noted in the statement of the evidence that the claimant has an IR of 15% or more. It was undisputed that the claimant earned less than 80% of his average weekly wage during the applicable qualifying periods. At issue was whether the claimant's underemployment was a direct result of his impairment and whether the claimant had made a good faith effort to obtain employment commensurate with his ability to work.

The self-insured asserts that the claimant's underemployment was not due to the impairment, but rather due to economic factors and the result of a lack of acceptance of grant proposals. In finding that the claimant's underemployment was a direct result of his impairment, the hearing officer noted in her statement of the evidence that:

> [I]t is clear from the release [to return to sedentary employment] that was given to the Claimant that he still has lingering effects of the injury and is not capable of producing at the level he produced prior to his injury.

The hearing officer then went on to state specific factors which led her to conclude that the claimant's loss of productivity was a result of his injury and the impairment. The hearing officer's determination that the claimant's underemployment was a direct result of the evidence has support in the evidence.

Self-employment has been recognized as a valid way to show an attempt in good faith to obtain employment. *See* Texas Workers' Compensation Commission Appeal No. Appeal No. 961291, decided August 15, 1996, which affirmed SIBs for a maker of belt buckles; in that case the hearing officer had observed that it was primarily the effect of the claimant's injury as opposed to the market demand which limited that claimant's "opportunities for employment." Appeal No. 961291 cited favorably Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995, which affirmed SIBs for a real estate salesman who worked full-time acquiring listings and making sales. On the other hand, Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994, and Texas Workers' Compensation Commission Appeal No. 950303, decided April 12, 1995, both affirmed determinations that a claimant's self-employment did not constitute a good faith attempt to obtain employment. Appeal No. 94918, *supra*, involved a welder who did not show that he solicited business through advertising, with the Appeals Panel commenting that it would have been helpful to have more medical evidence as to that claimant's physical limitations. Appeal No. 950303, *supra*, involved a claimant with a videotaping service; that appeal commented that while a claimant does not necessarily have to seek employment from an employer, he "must" demonstrate a good faith attempt to "actively engage in an income earning business."

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). 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). In this case, the hearing officer reviewed the evidence, including the testimony of the claimant and documentary evidence of grant proposals and the results of such proposals. After examining the evidence, the hearing officer concluded that the claimant was engaged in valid, income-producing self-employment which was commensurate with his ability to work. 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).

The self-insured further argues that the claimant did not look for work during each week of the qualifying periods. The self-insured's argument on this point relies on the requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) that an injured worker who has not returned to work and is able to return to work in any capacity look for employment commensurate with his or her ability to work

every week of a qualifying period and document his or her job search efforts. However, the hearing officer found that the claimant was employed at a job commensurate with his ability to work during the qualifying periods for each of the quarters in dispute. Rule 130.102(d)(1) provides as follows:

> (d) Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work; . . .

The hearing officer found that the claimant returned to work in a position which is relatively equal to his ability to work. That finding is supported by the evidence. Since the claimant had returned to work, the requirement under Rule 130.102(e) that he engage in a weekly job search was not triggered. As stated by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 001947, decided September 25, 2000, an injured worker who has returned to work at a position which is relatively equal to his ability to work has, as a matter of law, made a good faith effort to obtain employment commensurate with his ability to work.

The determinations of the hearing officer that the claimant's underemployment was a direct result of his impairment and that the claimant made a good faith effort to seek employment commensurate with his ability to work are supported by the evidence. We therefore affirm the hearing officer's determination that the claimant is entitled to SIBs for the 11th and 12th quarters.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge