APPEAL NO. 002486

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 11, 2000. The issue at the CCH was whether the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fourth quarter of eligibility.

The hearing officer found that the claimant had made a good faith search for employment during the qualifying period, and that her decrease in earnings was a direct result of her impairment.

The appellant (self-insured) appeals, arguing that the determination that the claimant made a good faith job search is against the great weight and preponderance of the evidence. It points out that the claimant failed to show that she is actively pursuing a real estate job, and that her other job involves working for her spouse. The self-insured also argues that because she voluntarily left her teaching job due to stress, not her injury, that her underemployment is not the direct result of her impairment but rather of other factors. The claimant responds that the fact determinations made by the hearing officer should not be set aside by the Appeals Panel, as they are supported by the record.

DECISION

Affirmed.

The claimant taught profoundly disabled students for the self-insured. She said that she had to lift students about 30 times a day. The claimant injured her back and neck on _____, while lifting the children. On this day, a substitute, who was not well- versed in the proper lifting procedure, had been assisting her. By the end of the day, the claimant was in severe pain. The qualifying period under review at the CCH ran from March 29 through June 28, 2000. Her impairment rating was 20%.

The claimant said she would not have been able to perform her teaching job during the qualifying period due to the lifting and the stress. The claimant maintained that lifting was part of "that job," when asked if her employer could have been able to make other provisions for her. The claimant, prior to the inception of the SIBs periods, trained herself and obtained her real estate license to work as an agent (but not a broker). She testified that during the qualifying period, she worked 40 to 45 hours a week in combination for two jobs: as a real estate agent and as a bookkeeper's assistant for what she described as a small remodeling business called "Making a Better Home." She could not recall the CPA/bookkeeper's name. Her primary position was data entry and faxing items to the CPA, and she said that her position was probably not really "necessary."

It was brought out on cross-examination (not on direct) that the owner of this business was her husband. She said that her husband used subcontractors but had no employees. She was paid $7.00 an hour for 20 to 25 hours of work by this business. She

had started doing this work in December 1999 and had "not really" assisted her husband in his business before. He had previously done her duties before December 1999. There were no benefits provided.

Her wages from both jobs amounted to $2,900.94 during the qualifying period, with $464.84 earned in real estate commission. The claimant said that she had earned $3,000.00 to $4,000.00 in commissions for the year 2000, and worked 20 hours a week, at least, in her real estate endeavors. The claimant said that several pending sales she made during the qualifying period did not close (and commission was not therefore payable) until after the end of that period. She had changed employment to work for a broker, in order to retain the commissions totally. She paid the broker a fee, but was more on her own in developing her business.

In addition, the claimant also sought employment from 21 prospective employers. The claimant located these positions through the want ads in the newspaper and she focused on home-based or geographically nearby positions. She said interviewed for employment by a bank regarding a loan officer position, in connection with selling real estate, but an offer had not materialized as yet. She said that she was certified to teach elementary school in the state of Texas. However, she had not sought teaching positions. The claimant said she taught for a year for the employer after the injury and was not required to do lifting, but there was too much stress involved with teaching. The claimant said she sought to avoid stress because it enhanced her back pain.

The claimant said that she had last seen her treating doctor in October 1999. However, she said that all that was being done for her at this point was refilling prescriptions for pain medication. She said that she had several injections for pain relief, and would likely be in the same condition indefinitely.

The claimant's restrictions were set forth in a September 8, 1999, letter from Dr. M, her treating doctor. He stated that driving to and from work would cause her condition to worsen and that her medication impaired her reaction time so that she was suitable only for a home-based activity. He said that she required the freedom to move around and change positions. Dr. M corroborated that stress increased her cervical pain by increasing muscle tightness. He stated that she could not long maintain a sitting or standing posture.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The issue at hand did not involve disability; the reasons that the claimant may have left the teaching profession in 1998 were not therefore directly relevant to the qualifying period. What the claimant was required to prove was that, during the qualifying period, her underemployment was a direct result of her impairment, even though other factors were present. The claimant testified, and was believed, that stressful jobs increased the pain she experienced from her back injury. The hearing officer's determination that her underemployment was a direct result of her impairment is sufficiently supported by the record. The claimant testified as to working in positions that allowed her to shift her position and set her own pace, in an aggregate of 40 hours or more per week. While the claimant could have been more forthcoming in her direct testimony that she was working for a family business, the amount paid exceeded minimum wage. No evidence was offered by the self-insured that the amount she was paid was artificially less than market rate for a similar part-time job.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) defines good faith as follows:

> 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;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;
>
> (3) has during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;
>
> (4) 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; or

(5) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

The hearing officer evidently applied Rule 130.102(d)(1) to the facts at hand. While different inferences may have been drawn regarding her bookkeeping assistance and her real estate work, we cannot agree that the inferences drawn by the hearing officer are without sufficient support in the record or that they are against the great weight and preponderance of the evidence, and affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kenneth A. Huchton
Appeals Judge