APPEAL NO. 012085
FILED OCTOBER 17, 2001

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 August 3, 2001. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 12 quarters in issue.

The claimant has appealed and argues that he did not have the ability to work. The hearing officer further held that the claimant permanently lost entitlement to SIBs. The respondent (self-insured), responds asserting that the evidence supports the hearing officer's decision.

DECISION

We affirm the hearing officer's decision.

The hearing officer did not err in finding that the claimant did not make a good faith search for employment commensurate with his ability to work for the qualifying periods in issue, some of which occurred before the change in the SIBs rules. The claimant injured his wrists and cervical area on _____, and had several surgeries on his wrists. The claimant had worked for the self-insured for over thirty years as a welder. The claimant had a 30% impairment rating (IR); the self-insured had not accepted the decision of the Texas Workers' Compensation Commission (Commission) Appeals Panel and taken the claimant to court, which upheld the 30% IR sometime in 1999. The claimant offered this as the explanation for twelve quarters being in issue. The filing/qualifying periods for the quarters ran from January 1, 1998, through December 13, 2000.

The claimant said that he had not worked for the employer since after his second surgery in April 1995. For two years, he was on an 80% of wage off work program, and then went to full retirement. He said he did so because of inability to perform his job due to his injury. He was 67 years old at the time of the CCH. The claimant said he had not looked for work in part because he did not know that he had to look. He said he could stand, walk, use the telephone, and sit erect, but did not drive.

In July 1996, the doctor who assessed the claimant's IR noted that he would not be able to procure a job in the open job market as well as being precluded from working as a welder. His treating doctor wrote in May 2000 that he was permanently and totally disabled from "performing his job description." He further noted that the claimant had loss of sensation and could not grip or reach overhead and that he dropped objects. In February 2001, the treating doctor wrote that the claimant had total loss of sensation and could not perform "any" job description. On December 6, 2000, a doctor who had been asked by the Commission to perform a functional capacity evaluation (FCE) responded, after examining the claimant, that he was not qualified to perform an FCE but that it was his opinion that the claimant could not perform employment involving the use of his

dominant right hand. He wrote a couple of weeks later that the claimant could perform a job that did not involve repetitive pushing, pulling, lifting over 10 pounds, or fine manipulation work.

Effective in early 1999, the rules of the Commission were changed to be more precise about the type of medical evidence that would be required to prove a total inability to work. Prior to November 28, 1999, this rule was numbered 28 TEXAS ADMIN. CODE §130.102(d)(3); thereafter, it became Rule 130.102(d)(4). The rule provides that an injured employee has made a good faith effort to obtain employment commensurate with the ability to work if he/she:

> 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[.]

Prior to this, the hearing officer was able to review all the evidence to determine whether a preponderance of the evidence showed an inability to work such that no search would be equivalent to a good faith search.

The hearing officer indicated that he reviewed the evidence against the standards and rules that were applicable at the time for each filing or qualifying period. The hearing officer is the sole judge of the relevance, the 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). It is unfortunate that when numerous quarters are combined into a single proceeding, medical evidence that is produced may not be as detailed on a quarter by quarter basis as it might otherwise be. Furthermore, the fact that the claimant was retired was a factor that could be considered in evaluating whether he intended to return to work. The Appeals Panel has before noted that the purpose of SIBs is to provide support for a return to employment. *See* Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995. While different inferences could certainly be drawn from the evidence here, especially for the earlier quarters of SIBs, the decision is not so against the great weight and preponderance of the evidence that a reversal of the hearing officer's decision is compelled. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951)

For these reasons, we affirm the hearing officer's decision.

The true corporate name of the insurance carrier is **A CERTIFIED SELF-INSURED** and the name and address of its registered agent for service of process is

**(NAME
AND ADDRESS
IN BOLD PRINT).**

Susan M. Kelley
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Gary L. Kilgore
Appeals Judge