APPEAL NO. 950283

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on January 13, 1995, to determine whether the claimant was entitled to supplemental income benefits (SIBS) for the seventh compensable quarter beginning November 16, 1995. The carrier appeals from the determination in the claimant's favor by hearing officer (hearing officer), contending that the evidence does not support a determination that the claimant made a good faith effort to find employment or that the claimant's inability to work is the direct result of her impairment. The claimant responds that the hearing officer's decision should be affirmed.

DECISION

Affirmed.

The claimant was injured on (date of injury), while working for (employer); while the evidence was not well developed, it appears that the claimant suffered injury to her back and also was diagnosed with carpal tunnel syndrome. (Dr. C), apparently her treating doctor, wrote on April 22, 1994, that claimant could not return to her former job as an industrial dishwasher which he said would cause problems in her neck, back, and right hand, although he said she could perform light dishwashing "and do some of the individual care work that she has been performing at this time." He also stated she could perform repetitive activities with limited stooping and bending of her back and no lifting more than 20 pounds with her right hand on a repetitive basis.

In addition, (Dr. S), an orthopedic surgeon who saw the claimant on referral, stated his belief that claimant would be "significantly limited in her work capacity to a sedentary or at best light level of work capacity" and that she was restricted to a 25 pound lifting maximum, and a 10 to 15 pound frequent lifting limit. He also advised that she avoid repetitive bending, stooping or twisting, and said she should not perform repetitive keyboard or assembly line type jobs.

Facts showing claimant's eligibility to apply for SIBS were stipulated to by the parties, as well as the entitlement period (August 18 through November 15, 1994) for the seventh compensable quarter (November 16, 1994 through February 14, 1995).

On March 28, 1994, the claimant had been hired by Outreach Health Services as a home health care attendant for an elderly man. The claimant was terminated on September 6, 1994; she contended she had been sexually harassed by the client, that she had reported this to her supervisors, (Ms. C) and (Ms. F), and requested that she be reassigned, but that she was fired instead. Ms. C testified that claimant was fired because she was late on several occasions and the client, a diabetic, needed someone to cook his breakfast in the morning. Ms. C also said claimant had been absent on occasion when her car broke down. She said that to her knowledge claimant did not contend she could not do

the job--which involved bathing and dressing the client, as well as cooking, cleaning, and doing laundry--and that she heard of the allegations of sexual harassment after claimant was fired. Ms. F, claimant's supervisor, gave similar testimony as to claimant's lateness and absenteeism. The claimant contended that she was late only on one occasion, and that she had notified the client as instructed. In answer to a question as to whether the claimant could have worked more hours than she was actually working "during the relevant period of time we're discussing," Ms. C stated that claimant could have worked 40 hours a week for different clients; she said claimant had been asked on several occasions but that claimant could not take the job.

It was the claimant's testimony that she applied for numerous jobs during the balance of the entitlement period, which she detailed at the hearing. These included jobs at restaurants, hotels, and the health care company for which she previously worked. She stated that some places had no job openings and that she did not know if some of the positions were within her physical restrictions, but that two or three did not hire her because of her restrictions. She said one of the hotels was prepared to hire her as a dishwasher until they became aware of the restrictions. She also said that she applied more than once at some of the places.

(Ms. J), a vocational consultant hired by the carrier, testified that she was aware of claimant's physical restrictions, that she began working with the claimant on September 29th, and that claimant supplied her with information about the jobs for which she had applied. In evidence was a listing Ms. J had compiled of 21 employers claimant said she had contacted, along with verification Ms. J had received from each employer. Some had no record of claimant having applied, some had her application on file, and others refused to take the time to verify whether claimant had applied. While most had no openings, or the openings had been filled, Ms. J said that she found six employers who were hiring and she speculated that claimant was not following up enough. She said that while she inquired about the requirements of each job, she did not mention claimant's restrictions to any employer. Ms. J's notes reflect, however, that one employer asked her if claimant "was the one that had just gotten over [an] injury."

The hearing officer found that the claimant has in good faith attempted to obtain employment commensurate with her ability to work and that after her termination on September 6, 1994, claimant had been unable to return to work due to the impairment from her compensable injury. In its appeal the carrier contends claimant did not make a good faith effort, citing Ms. J's testimony, and that claimant testified she was not hired at several places because they had no openings. It also contends that her former employer had positions claimant could have accepted, but that she did not.

The hearing officer is the sole judge of the relevance and materiality of the evidence in a contested case hearing, as well as of its weight and credibility. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence and determines what facts have been established. Texas

Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The record below includes evidence, in the form of claimant's testimony and the information compiled by Ms. J, to indicate that the claimant made application for numerous positions in the remaining part of the entitlement period following termination from her previous employment. While the Appeals Panel has refused to hold that any particular number of jobs is indicative of a good faith effort, *see* Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995, we cannot say that evidence was lacking to support the hearing officer's determination that the claimant in this case demonstrated a good faith effort to find employment. As to whether carrier is correct in stating that the health care company actually offered her employment, which she would not accept, the testimony is not clear as to whether this occurred while she was still actively employed, rather than during the period in which she was seeking employment; we note that Ms. J's notes reflect that as of October 26, 1994, claimant's application was on file with that employer.

As to whether claimant's inability to work was a direct result of her impairment, there is medical evidence from two doctors detailing her physical restrictions. In addition, claimant testified that at least two and possibly three potential employers knew of her restrictions and that this played a role in the decision not to hire her. We also note some corroboration in Ms. J's notes, indicating that one employer knew of claimant's injury and that one hotel apparently "tried out" claimant, consistent with her testimony. In short, this issue is a factual determination for the hearing officer and we cannot say that his determination was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge