APPEAL NO. 950064
FILED FEBRUARY 24, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 13, 1994, a contested case hearing (CCH) was held. The sole issue was: "Is the Claimant entitled to supplemental income benefits [SIBS] during the sixth compensable quarter?" The hearing officer determined that the claimant was entitled to SIBS from the quarter in question. Appellant, carrier, contends that certain determinations are against the great weight of credible evidence and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant, did not file a response.

DECISION

The decision and order of the hearing officer are affirmed.

The claimant sustained a compensable low back injury on March (variously reported as (date of injury), (day after date of injury), (two days after date of injury) and (three days after date of injury), with the (two days after date of injury) probably being a consensus date), 1991. Claimant did not have surgery and eventually (Dr. O) was appointed as a Texas Workers' Compensation Commission (Commission)-selected doctor and certified a 15% impairment rating (IR) which has not been disputed. Claimant did not commute any portion of his impairment income benefits (IIBS) and now seeks SIBS for the sixth compensable quarter beginning September 1, 1994. Claimant has not worked during the filing period immediately preceding the sixth compensable quarter, being the months of June, July and August 1994.

Claimant contends that he has made a "good faith" effort to obtain employment during the filing period and offered a Statement of Employment Status (TWCC-52) dated August 24, 1994, with attached information showing approximately 10 applications or evidence of employment search efforts during the filing period with many, if not all, applications being for employment in (state). In addition, claimant testified that he was registered with the "(state) Employment Commission" (LEC also referenced as the (state) Department of Labor or (state) State Employment Service). Claimant concedes that he was offered a job by (employer) as a "stocker and/or truck driver" but refused that job because he believed that he was not physically capable of doing the work. Claimant testified that he believed it would involve stocking and delivering refrigerators, other large appliance or large boxes containing smaller items. Claimant testified that he has a high school education, and is pursuing some further retraining and college courses.

Claimant's treating doctor is (Dr. J) who, in a progress report dated June 7, 1994, stated:

> [Tests] showed valid and consistent findings with 35 lbs. maximum lifting capacity. This means that [claimant] should on an occasional basis lift up to 25 lbs. at "medium duty work." In addition to this he should not drive heavy equipment such as heavy trucks or heavy earth moving equipment which causes significant vibration an [sic] bouncing. He should not load or unload trucks or conveyer belts which require trunk torsion. He should only on an infrequent basis do stooping, bending and climbing.

At various times claimant indicated that he was going back into welding; that he was pursuing vocational retraining, apparently under the auspices of LEC in a "computer rehabilitation training program" at (state) State University (University); and was taking some preparatory educational courses at (University) prior to entering the computer rehabilitation program (CRT). Apparently, claimant was accepted in the (University) preparatory program on June 30, 1994, and actually entered the 10-week program in September 1994. Claimant testified that he had to drop out of the program two weeks or so before Thanksgiving, just two weeks shy of completion because of back and leg pain and "complications" from his injury. Apparently, during a portion of the time claimant was going to school, the State of (state) was paying him $1,200.00 a month in aid. Carrier argues that since claimant had been accepted in the (University) program, he had no intention of obtaining employment during the filing period of summer of 1994. Claimant, at times, asserted that he was only "required to submit three applications per quarter by TWCC rules and guidelines . . ." (apparently based on what a Commission employee had told him and because the TWCC-52 only had three lines) and that he had exceeded that requirement. The hearing officer explained that he was unaware of any specific number of applications a claimant must make to meet the "good faith" requirement.

Carrier's position, both at the CCH and on appeal, is summed up in carrier's closing statement at the CCH that claimant just went "through the motions [of seeking employment] without making any type of good faith effort to actually find a job." Carrier presented testimony from (Ms. J), a vocational rehabilitation consultant hired by carrier to assist claimant in his job search efforts. While Ms. J verified some of claimant's job search efforts and with at least one potential employer believed claimant could perform the job for which he was applying, she testified claimant was not consistent in his follow-up search efforts. Ms. J, in response to a question by the hearing officer requesting her opinion on whether claimant had made a good faith effort to seek employment, testified that she believed claimant ". . . has made a passive attempt at looking for employment. . . ." Ms. J subsequently defined passive as being the opposite of "aggressive."

The hearing officer considered the conflicting evidence, as indicated in his statement of evidence, and concluded: "[a] review of the entire record indicates that the Claimant's job search efforts were not `perfect'; however, they were made in good faith and are sufficient to entitle him to supplemental income benefits during the compensable quarter."

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has: (1) an IR of at least 15%; . . . (3) has not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101 *et seq*. (Rule 130.101 *et seq*.).

Carrier's appeal contends that claimant never had any intention of working, so long as he could receive SIBS, citing testimony and evidence that claimant had applied for jobs that were beyond his physical limitations, claimant's admission into the (University) program on June 30, 1994, and the fact that claimant had refused a position as a stocker/truck driver. Carrier cites Texas Workers' Compensation Commission Appeal No. 94119, decided March 14, 1994, for the proposition that "an employee who is a full-time student in cooperation with the TRC [Texas Rehabilitation Commission] still has a requirement to make some good faith effort to seek employment commensurate with his ability." We affirm that principle but find Appeal No. 94119 inapplicable to the case at hand because in the instant case, claimant was not attending school during the filing period. Further, in Appeal No. 94119, the Appeals Panel reversed a hearing officer's determination that "other than working as a laboratory assistant . . . the claimant had not made efforts to find other employment . . ." by noting claimant, in that case, was attending classes 14 hours a week and was working 19 hours a week as a laboratory assistant. The Appeals Panel held that the fact that claimant was in the TRC program was due solely to his impairment and claimant was not required to seek additional 40-hour week employment beyond going to class and working as a laboratory assistant. We note that the director of the (University) computer rehabilitation program (CRT) has confirmed their "policy of not allowing students to work while attending the [CRT] Program."

A very recent Appeals Panel decision, Texas Workers' Compensation Commission Appeal No. 950023, decided February 16, 1995, a SIBS case involving a full-time student under the auspices of the (state 2) Rehabilitation Services which was paying for the students' college, also involved a student who had not worked during the filing period. We pointed out that it is a question of fact for the hearing officer to determine whether a claimant has made a good faith effort pursuant to Section 408.142(a)(4) to obtain employment commensurate with the employee's ability to work. And we have many times stated that it is the hearing officer who is the sole judge of the relevance and materiality of the weight and credibility to be given the evidence. Section 410.165(a). There is certainly conflicting evidence which might cause a different fact finder to have reached a different result, but that alone is not a sufficient basis upon which to overturn the fact finder's decision. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer recognized that the claimant's job search efforts were less than "perfect" but nonetheless determined that claimant had made sufficient good faith efforts to obtain employment to entitle him to SIBS. The hearing officer was able to observe the claimant and his demeanor and we will not normally pass on the credibility of the witness and substitute our 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). *See also* Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993, for a discussion of the concept of good faith.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I reluctantly concur as I cannot find that the hearing officer's decision is wrong as a matter of law. Although I would likely have arrived at different findings given the evidence at the hearing, this I recognize as not being a sound basis for setting aside a finding. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). While I find the evidence in support of the award here very weak, the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Recognizing the concept of "good faith" is not exactly precise, it seems to me that it is stretched in this case. *See* Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993, for a definition and discussion of "good faith." In the case under review, the claimant has not worked since _____ because of a non-surgical back injury, there is a release to work with only some lifting restrictions, the claimant's own testimony indicates that his back problems are intermittent, that he has turned down a job offer because in his opinion he might not be able to meet all the job requirements, he applied for employment where no positions were indicated as being available, and his attempt to find any employment were, according to a vocational rehabilitation consultant, merely passive. It seems to me the statutory and regulatory job search requirements contemplate a little more than this. Texas Workers' Compensation Commission Appeal

No. 93636, decided September 3, 1993; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994.

Stark O. Sanders, Jr.
Chief Appeals Judge