

APPEAL NO. 980123

Following a contested case hearing held, on December 12, 1997, 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 concluding that the respondent's (claimant) impairment rating (IR) is 36%, that claimant is entitled to supplemental income benefits (SIBS) for the second compensable quarter, that the appellant (carrier) is entitled to a reduction of claimant's SIBS for contribution from prior compensable injuries based on a fraction of 11/36th or 30.6%, and that the carrier is not entitled to contribution against claimant's impairment income benefits (IIBS). The carrier has appealed the SIBS conclusion (and certain underlying findings of fact) and the conclusion that it is not entitled to contribution against IIBS. The file does not contain a response from claimant.

DECISION

Affirmed.

The parties stipulated that claimant suffered an injury in the course and scope of his employment on _____; that he reached maximum medical improvement on May 26, 1995, with an IR of 36%; that the second compensable quarter started on September 20 and ended on December 19, 1997; that the filing period for the second compensable quarter started on June 21 and ended on September 19, 1997; that claimant did not commute his IIBS; that claimant did not earn 80% of his preinjury average weekly wage (AWW) during the filing period for the second compensable quarter; and that claimant suffered a prior compensable injury in 1989.

Not appealed are findings that claimant's IR included 11% for a prior lumbar surgery from a 1989 compensable injury; that claimant's IIBS were paid out prior to the date of the CCH, even adopting the 36% IR assigned by (Dr. W); that the prior back injury affects claimant's ability to return to his prior employment, with claimant limited to a medium-level lifting ability on a permanent basis; that claimant made multiple job contacts including follow-up contacts during the filing period for the second compensable quarter; that claimant submitted multiple job applications during the filing period for the second compensable quarter; and that the contribution from the prior compensable injury to claimant's current impairment is the fraction 11/36th or 30.6%.

Claimant testified that he was injured at work in 1989, underwent lumbar spine surgery, entered into a settlement agreement, and returned to work in the oilfields for another oilfield service company; that he worked as a floor hand for these companies, work he described as being very heavy; and that while at work on _____, he received injuries to his head, right shoulder, and right knee and leg but could not recall the details. According to the October 30, 1995, report of Dr. W, who evaluated claimant for the Texas Workers' Compensation Commission (Commission) and assigned a 36% IR, claimant was

hit in the right forehead by oilfield tongs, was thrown five to 10 feet away landing on the ground, lost consciousness for approximately 10 minutes, and suffered a deep laceration to the right forehead. Claimant said he subsequently underwent right knee surgery.

(Dr. B) reported on July 19, 1995, that he examined claimant at the request of the Commission; that claimant's "ongoing compensable injuries and parts of his body" included his right shoulder, right knee, cervical, thoracic, and lumbar spinal regions, and his "mental and behavior examination." Dr. B assigned an IR of 33% which included ratings for all these areas. Dr. W's October 30, 1995, report assigned a 36% IR which included ratings for the lumbar and cervical spinal regions, the brain, the preferred upper extremity, the non-preferred upper extremity, and the right lower extremity.

Claimant further testified that he was released by his doctor only for part-time, light-duty work and was told he cannot return to oilfield work; that he is 24 years of age and received a 12th-grade education in Mexico; that he lives in a small town; and that he obtained his previous jobs by driving to the businesses and asking if they were hiring, not through newspaper advertisements. Claimant conceded that he did not look for work in newspapers. On his Statement of Employment Status (TWCC-52) dated "9-23-97," claimant listed four entities at which he sought employment. One was a school where he applied for a job as a custodian and the other three were two stores and an auto dealership where he sought employment as a helper. Claimant also introduced copies of approximately 10 employment applications, all but one dated either July 22, 23, or 24, 1997, two business cards, a card from the Texas Rehabilitation Commission (TRC), and calendars for September and October 1997, the latter showing dates he made follow-up contacts at the various businesses where he completed applications and at three others businesses. The applications were for part-time employment.

(Dr. S), claimant's treating doctor, wrote on July 31, 1997, that claimant was successfully rehabilitated after the 1989 injury, that in 1994 he was hit in the head and suffered severe post-concussion syndrome and multiple bodily injuries; that he became suicidal, was hospitalized several times, and required the care of both a psychiatrist and a psychologist; that mentally he would not have been able to return to work until recently; that because of his injuries, he cannot return to the oilfield; and that he is gradually losing strength in his right hand and arm. Dr. S further stated that claimant needs job retraining and has contacted the TRC, which has made some recommendations; that a functional capacity evaluation demonstrates that claimant can perform medium-level work; and that she feels claimant can work five hours per day, five days per week with restrictions.

The carrier has appealed findings that claimant's inability to return to his prior employment is a direct result of the impairment from the compensable injury; that claimant's impairment from the compensable injury limits his ability to obtain employment generally; that claimant's inability to obtain employment during the filing period for the second compensable quarter was a direct result of the impairment from the compensable

injury; and that claimant made a good faith effort to obtain employment commensurate with his ability to work during the filing period for the second compensable quarter.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's AWW as a direct result of the impairment; (3) not elected to commute a portion of the IBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. As noted, findings that claimant made multiple job contacts and follow-up contacts during the filing period are not appealed. As for the direct result of impairment criterion, the evidence established that claimant sustained a serious injury which was assigned a 36% IR and that claimant cannot return to his previous heavy work in the oilfields but can only work at the medium physical demand level. There was no evidence of other causes of claimant's unemployment such as general adverse economic conditions, voluntary student status, voluntary choice of employment sought, or other apparent circumstances overshadowing the impairment. See Texas Workers' Compensation Commission Appeal No. 962653, decided February 13, 1997.

We are satisfied that the challenged findings are 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the challenged conclusion that the carrier is not entitled to contribution against claimant's IBS, that conclusion is supported by the unappealed finding that claimant's IBS were paid out prior to the hearing, even adopting the 36% IR assigned by Dr. W which was the stipulated IR.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge