

APPEAL NO. 980124

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 December 11, 1997. With regard to the issues at the CCH, he (hearing officer) determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the sixth and seventh quarters. The appellant (carrier) appeals, seeks a reversal of the decision and argues that during the filing periods for the sixth and seventh quarters of SIBS the claimant's underemployment was not a direct result of his impairment and he did not attempt in good faith to obtain employment commensurate with his ability to work. The claimant does not respond.

DECISION

We affirm.

The parties stipulated that the claimant sustained a compensable left knee injury on _____, that his impairment rating is 15% or more, that the filing period for the sixth quarter of SIBS was from April 24 to July 23, 1997, and that the filing period for the seventh quarter of SIBS was from July 24 to October 22, 1997. The disputed SIBS criteria are whether the employee, the claimant, during the filing period, had "not returned to work or has returned to work earning less than 80% of the employee's average weekly wage [AWW] as a direct result of the employee's impairment" and "attempted in good faith to obtain employment commensurate with the employee's ability to work." Sections 408.142(a)(2) and 408.142(a)(4); see *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(a) (Rule 130.104(a)).

The claimant testified at the CCH that he has worked for two years performing maintenance work at (a youth camp), earning \$157.50 per week. However, he had to stop working for four weeks beginning on March 13, 1997, when his treating doctor, (Dr. R), performed arthroscopic surgery on his knee. Dr. R returned to him to work with a 45-pound lifting restriction initially, then, on June 4, 1997, gave him a 75-pound lifting restriction. The claimant returned to working full time at the camp on April 14, 1997, worked there the remainder of the filing period for the sixth quarter of SIBS and all of the filing period for the seventh quarter of SIBS. He testified that the camp's job description demanded a 100-pound lifting ability but, in reality, he only lifted 60 pounds (employer) Employer's Wage Statement (TWCC-3) indicated his AWW is \$660.00.

The carrier maintains the claimant had an ability to perform the work required of a position paying more than the camp paid. It argues his underemployment was not a direct result of his impairment but rather was a direct result of limiting himself to a low-paying job. The carrier argues that since the claimant did not seek employment at all during the filing periods, he did not attempt to obtain employment commensurate with his ability to work. Its

argument focuses heavily on the claimant's testimony regarding his vocational experience and abilities. He testified that he had experience in the carpentry, computer, electrical, mechanical, and plumbing fields. He agreed that he had testified at an earlier CCH, regarding an earlier quarter of SIBS, that he could earn more than he was earning working at the camp. However, at the more-recent CCH, he testified that he was less sure about his job prospects because of recent layoffs in his area.

The hearing officer made findings of fact that the claimant's underemployment during the filing periods was a direct result of his impairment. Whether an employee's unemployment during a SIBS filing period was a direct result of impairment from the compensable injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. The determination may be based on circumstantial evidence. Texas Workers' Compensation Commission Appeal No. 960684, decided May 20, 1996. An employee is not required to show by evidence from each potential employer and by specific medical evidence that he was turned down for each position due to his restrictions. *Id.* The claimant testified at the CCH that he was underemployed during the filing period because of his physical limitations. The carrier argues that his lack of a job search was the reason for his underemployment.

The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We will reverse that determination if we find that it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The direct result determinations herein are not against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, therefore, we affirm the decision regarding direct result.

The hearing officer did not make findings of fact that the claimant attempted to obtain employment commensurate with his ability to work during the filing periods. Instead, he found that during the filing periods "the Claimant worked on [a] full time basis performing maintenance work." Although the fact an employee was employed during a SIBS filing period does not excuse him from the requirement to attempt to obtain employment commensurate with his ability to work, a hearing officer may consider an employee's work during the filing period in making a good faith determination. Texas Workers' Compensation Commission Appeal No. 951045, decided August 8, 1995. Given the record presented, we infer the hearing officer opined that the claimant was in good faith by way of being employed commensurate with his ability to work. 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 one's own mind and inner spirit and, therefore, may not be determined by one's protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. The good faith determinations herein are not against the great weight and preponderance of the evidence and, therefore, we affirm the decision regarding good faith.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge