

APPEAL NO. 980134

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 1, 1997. With regard to the issues at the CCH, she (hearing officer) determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 11th and 12th quarters. The appellant (carrier) appeals, seeks a reversal of the decision and argues the claimant failed to show that during the filing periods for the 11th and 12th quarters of SIBS his unemployment was a direct result of his impairment and he attempted in good faith to obtain employment commensurate with his ability to work. The claimant responds and seeks an affirmance of the decision.

DECISION

We affirm.

The parties stipulated that the claimant sustained a compensable back injury on _____, that his impairment rating is 15% or more, that the filing period for the 11th quarter of SIBS was from December 7, 1996, to March 7, 1997, and that the filing period for the 12th quarter of SIBS was from March 8 to June 6, 1997. It is undisputed that the claimant was unemployed during both filing periods. The disputed SIBS criteria are whether the employee, the claimant, during the filing periods, had "not returned to work or has returned to work earning less than 80% of the employee's average weekly wage 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's treating doctor, (Dr. J), restricted him from lifting over 20 pounds and allowed him to work only in a light-duty capacity during the filing periods. The hearing officer, in the "Statement of the Evidence" portion of the decision, states that the claimant applied at 18 potential employers during the filing periods for the 11th and 12th quarters of SIBS, including eight written applications during the filing period for the 11th quarter of SIBS and six written applications during the filing period for the 12th quarter of SIBS. Almost all of the businesses he approached were automotive-related, including sales lots, restoration, repair and body shops, parts and tire stores, and painters. The claimant testified, and the hearing officer mentions, that he "completed six applications for employment during the twelfth quarter filing period, and each application is dated June 20, 1997." The carrier argues that those applications should not have been considered in determining whether the claimant attempted to obtain employment commensurate with his ability to work during the filing period for the 12th quarter of SIBS because they are dated two weeks after the filing period. If there were no further explanation, we would agree. However, the hearing officer goes on to explain that the claimant's June 20, 1997,

applications reflected his effort to send applications to the employers after he had made verbal inquiries with them. The claimant testified that the verbal inquiries preceding those applications occurred during the filing period for the 12th quarter of SIBS.

The carrier presented the testimony of its adjuster, (Mr. A), who testified that many of the potential employers the claimant claimed to have approached could not verify his application. The carrier also presented statements from the representatives of several of the potential employers. Some of the representatives could not verify the claimant's applications and several testified they did not have positions within the claimant's lifting restrictions. The claimant admitted he approached several of the potential employers on numerous occasions.

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 unemployed during the filing periods because of his physical limitations. The carrier argues that his limited job search and searching at employers without light-duty jobs were the reason for his unemployment.

The 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 hearing officer states in the decision that she found the claimant a credible witness. As the trier of fact, she 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 or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The direct result determinations are not against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, therefore, we affirm.

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. There is no specific number of job contacts which make an employee's efforts in good faith. Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996. The good faith determinations are not against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

The decision is supported by the evidence and, therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge