APPEAL NO. 980222
FILED MARCH 20, 1998

Following a contested case hearing (CCH) held on January 15, 1998, 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 appelllant (claimant) is not entitled to supplemental income benefits (SIBS) for the first, second, third, and fourth compensable quarters, those quarters commencing on January 24, 1997, and ending on January 22, 1998. Claimant has appealed these conclusions and certain underlying findings of fact. The respondent's (self-insured) response urges the sufficiency of the evidence to support the challenged findings.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury to her hip and low back, that she reached maximum medical improvement on March 14, 1996, that she has a 15% impairment rating (IR), and that she has not commuted any portion of her impairment income benefits.

Claimant testified that that she is employed by the self-insured as a cook in a school cafeteria, that she injured her back when she put down a stack of plates and then straightened up, that she had spinal surgery after about eight months of treatment, and that her doctor, (Dr. R), released her on January 6, 1997, to return to work with restrictions against lifting more than 10 to 15 pounds. Claimant further stated that she thereafter did return to work and was given the the light-duty tasks of wrapping eating utensils in napkins and washing and sorting the beans. She acknowledged that she could perform these tasks either sitting or standing. Claimant further testified that since returning to work she has only worked from one to two hours per day, depending on how she feels each day, that she arrives for work at 6:00 a.m. and leaves work at 7:00 a.m. or 7:30 a.m. depending on how she is feeling, and that, when she gets home after work, she rests, sits, and walks and that her doctor has encouraged her to walk. She also said that Dr. R has not said anything to her about limiting her hours of work.

Dr. R wrote on December 3, 1996, that claimant "may return to light duties now," and on December 16, 1996, that claimant could perform light duty with restrictions against lifting or carrying or more than 15 pounds, against repetitive bending or squatting, and against standing or sitting for long periods, and that she could serve food, prepare utensils, accept meal tickets, and wipe off tables. Dr. R wrote on January 14, 1997, that claimant is now ready to return to light duties and that, in his opinion, she does not require any more medication. On February 1, 1997, Dr. R reported that claimant "may start working Feb 3 - 97"; on August 11, 1997, Dr. R wrote that claimant had a laminectomy and fusion at L5-S1 on May 29, 1995, and that she was released for light-duty work on May 13, 1996, with

permanent restrictions from carrying or lifting more than 15 pounds and from repetitive bending or squatting. Dr. R wrote on September 22, 1997, that claimant may perform work "with her given limitations" and on October 30, 1997, that claimant's light-duty status is related solely to her work-related injury.

Claimant challenges findings that, during the filing periods for the four compensable quarters, she worked for the self-insured for no more than two hours each workday because she chose not to work any longer each day; that she had the ability to work longer each day at the duties she was given; that her underemployment was not a direct result of her impairment; and that she did not attempt in good faith to obtain employment commensurate with her ability to work, urging that, when she returned to work after her compensable injury, she was only able to work up to two hours per day. Claimant states in her appeal that working up to two hours was all that she had the abiltity to do because of her condition.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employees: (1) has an IR of at least 15%; (2) has not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment; (3) has not elected to commute a portion of the IIBS; and (4) has made a good faith effort to obtain employment commensurate with his or her ability to work. Claimant had the burden to prove by a preponderance of the evidence that during the filing periods for the first four compensable quarters she made a good faith attempt to obtain employment commensurate with her ability to work and that her underemployment was a direct result of her impairment from her compensable injury. Though there were no stipulated facts in this case, it was not disputed that claimant had an IR of 15% or more and that she had not commuted any portion of her IIBS. Claimant had the burden to prove by a preponderance of the evidence that during the filing periods for the first four compensable quarters she made a good faith attempt to obtain employment commensurate with her abiltiy to work and that her underemployment was a direct result of her impairment from her compensable injury.

The Appeals Panel has 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. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and as the trier of fact is to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, we will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to

be clearly wrong or manifestly unjust and we do not find them so in this case. 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).

The hearing officer could consider the absence of medical evidence that claimant could not work for more than one to two hours per day at her light-duty tasks. He could infer from the evidence that claimant was simply limiting herself to these hours but had the physical capacity to work the normal duty hours.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge