

APPEAL NO. 980427

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 January 14 and January 26, 1998. With regard to the issues at the CCH, the hearing officer determined that, during the filing period for the 12th quarter of supplemental income benefits (SIBS) (filing period), the respondent/cross-appellant's (claimant) unemployment was a direct result of his impairment and he did not attempt in good faith to obtain employment commensurate with his ability to work, that the appellant/cross-respondent (carrier) waived the right to contest the claimant's entitlement to SIBS for the 12th quarter and that the claimant is entitled to SIBS for the 12th quarter. The carrier appeals the waiver and entitlement to SIBS determinations, seeks a reversal of the decision and argues it did not waive its right to contest the claimant's entitlement to SIBS for the 12th quarter. The claimant appeals the good faith determination, seeks its reversal and argues he attempted to obtain employment commensurate with his ability to work during the filing period for the 12th quarter of SIBS. Each party responds to the other party's request for appeal. Neither party appeals the direct result determination and, therefore, it became final by operation of law. Section 410.169; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(f) (Rule 142.16(f)).

DECISION

We affirm.

The parties stipulated that the claimant sustained a compensable back and knee injury on _____, that his impairment rating (IR) is 15% or more and that the filing period was from April 25 to July 24, 1997. The disputed SIBS criterion is whether the employee, the claimant, during the filing period, "attempted in good faith to obtain employment commensurate with the employee's ability to work." Section 408.142(a)(4); see *also* Rule 130.105(a)(2). The claimant testified at the CCH that he sought employment with 19 different employers during the filing period. The hearing officer, in the "Statement of the Evidence" portion of the decision, states that the claimant approached employers that either did not have positions available or did not have positions within his physical limitations.

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. 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. 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, 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 or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The determination that the claimant did not attempt to obtain employment commensurate with his ability to work during the filing period for the 12th quarter of SIBS is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, therefore, we affirm that determination.

In evidence is the Texas Workers' Compensation Commission's (Commission) September 17, 1997, decision and order regarding claimant's entitlement to SIBS for the 11th quarter and its September 25, 1997, cover letter, showing the carrier's Austin representative's receipt of the decision and order on September 26, 1997. It is undisputed that the carrier received the claimant's Statement of Employment Status (TWCC-52) for the 12th quarter of SIBS on July 25, 1997, and did not request a benefit review conference (BRC) within 10 days of its receipt of the TWCC-52. The carrier argues that it did not waive its right to contest the claimant's entitlement to SIBS for the 12th quarter because the 12th quarter of SIBS was not a case of continuing entitlement. It maintains that it was a case of reinstated or delayed entitlement and, therefore, the waiver provisions of Section 408.147(b) and Rule 130.108(c) do not apply.

The claimant responds that the hearing officer correctly interpreted the 1989 Act and Commission rules waiver provisions to determine the carrier waived its right to contest his entitlement when it failed to request a BRC within 10 days of its receipt of his TWCC-52. He also contends that the Commission, by passing Rule 130.108(c) "improperly alters the language and intent of the [1989 Act]." We reject the latter argument. Our jurisdiction is limited to those issues determined by the hearing officer at a CCH, contained in a decision and order and appealed by the parties subject to the decision and order. Section 410.203(a); Rule 143.2(a). Therefore, we lack jurisdiction to consider the validity of a rule adopted by the Commission. "Moreover, courts will presume that facts exist which justify the rules' promulgation." Bullock v. Hewlett-Packard Company, 628 S.W.2d 754, 756 (Tex. 1982), citing Texas Liquor Control Board v. Attic Club, Inc., 457 S.W.2d 41 (Tex. 1970); see Texas Workers' Compensation Commission Appeal No. 92119, decided May 4, 1992.

An employee's TWCC-52 "must be filed quarterly on a form and in a manner provided by the [commission]." Section 408.143(b). A carrier's failure to request a BRC within 10 days of its receipt of a TWCC-52 results in waiver of its opportunity to contest the employee's entitlement to SIBS for that quarter. Section 408.147(b); Rule 130.108(b). In Texas Workers' Compensation Commission Appeal No. 960801, decided June 11, 1996, the employee did not receive an IR of 15% or more until after judicial review of an Appeals Panel decision regarding his IR. He submitted his TWCC-52 prior to receiving an IR of 15% or more and the carrier therein did not request a BRC within 10 days of its receipt of the TWCC-52. We affirmed the hearing officer's decision determining that the carrier therein did not waive its right to contest the employee's entitlement to SIBS and stated:

After comparing the requirements of Rule 130.104 to those of Rule 130.105, it becomes apparent that where the determination has been made that a claimant is entitled to SIBS in a prior quarter, the burden is on the carrier to request a BRC in a subsequent quarter, if it elects to contest the claimant's continuing entitlement to those benefits. However, if the claimant has been determined not to be entitled to SIBS in the prior quarter and the carrier determines that the claimant is not entitled to reinstated or delayed SIBS, then the claimant is required to request a BRC to contest that determination. Because the claimant was not determined to be entitled to SIBS in the first quarter in this case, the hearing officer correctly determined that the carrier was not under an obligation to contest continuing entitlement and was, therefore, not subject to the waiver provisions of Rule 130.108(c). Accordingly, the hearing officer did not err in determining that the carrier did not waive its right to contest claimant's entitlement to SIBS by failing to timely request a BRC.

In Texas Workers' Compensation Commission Appeal No. 970612, decided May 21, 1997, and Texas Workers' Compensation Commission Appeal No. 971201, decided August 11, 1997, the Commission made its initial determination that the employees were not entitled to SIBS for the first quarter, the employees sought SIBS for the second quarter and the carriers did not request BRCs within 10 days of their receipt of the TWCC-52s. We held in those cases that the carriers did not waive their right to contest the employees' entitlement to SIBS for the second quarter because they were cases of reinstated entitlement and Rule 130.108(c) did not apply, citing the language from Appeal No. 960801, *supra*, quoted above. In Texas Workers' Compensation Commission Appeal No. 980143, decided March 11, 1998, the carrier paid the employee impairment income benefits beyond the time prescribed by the 1989 Act, the employee sought SIBS for the first through the fifth quarters and the employee argued the carrier waived its right to contest his entitlement to SIBS for those quarters because it did not request a BRC within 10 days of its receipt of his TWCC-52s. We held therein that the carrier did not waive its right to contest his entitlement to those quarters of SIBS because the employee had never received SIBS and, therefore, it was a case of delayed entitlement.

The hearing officer quotes the above-referenced portion of Appeal No. 980801, *supra*, and finds that when the carrier received the TWCC-52 for the 12th quarter of SIBS on July 25, 1997, the claim was in a continuing entitlement status. Although there had not been a determination regarding the claimant's entitlement to SIBS for the 11th quarter, the carrier did not show that he had lost entitlement. To have been in a reinstated entitlement status, the claimant would have to have been seeking to "regain" entitlement to SIBS. Rule 130.105(a). Therefore, the hearing officer did not err in rejecting the carrier's argument that on July 25, 1997, the claim was in a reinstated or delayed entitlement status. See Appeal No. 980601, *supra*. Likewise, he did not err in determining that the claim was in a continued entitlement status and Section 408.147(b) and Rule 130.108(c) applied to affect a waiver on the part of the carrier.

The determination that the claimant did not attempt to obtain employment commensurate with his ability to work during the filing period is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, therefore, we affirm that determination. The hearing officer did not err in applying Section 408.147(b) and Rule 130.108(c) to the undisputed facts and determining that the carrier waived its right to contest the claimant's entitlement to SIBS for the 12th quarter. Therefore, we affirm the decision that the claimant is entitled to SIBS for the 12th quarter.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge