APPEAL NO. 990100

Following a contested case hearing held on December 4, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, the disputed issues by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the seventh compensable quarter. The appellant (carrier) appeals, asserting the insufficiency of the evidence to support the substantive findings. The file does not contain a response from claimant.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, that his employer on that date was the (employer A), that claimant's impairment rating (IR) is 15% or more, that claimant did not commute any impairment income benefits (IIBS), that the dates for the seventh compensable quarter are from July 13 through October 11, 1998, and that claimant's average weekly wage (AWW) is $618.80. The hearing officer represented without objection that the filing period ran from April 13 to July 13, 1998.

Claimant testified that at the time of his injury, he had worked for the employer as an aircraft assembler since 1989, that before that employment he worked for another employer as a machinist, and that doctors have told him he cannot return to that type of employment because it requires the capacity to lift more weight than he is permitted to lift.

According to the February 19, 1996, report of Dr. G, the designated doctor who assigned claimant a 22% IR, claimant injured his lumbar spine in a lifting accident at work and was determined to have L4-5 disc bulging and an L5-S1 posterior disc protrusion with thecal sac effacement. He underwent a 360 degree spinal fusion operation with hardware and decompressive laminectomies on March 23, 1995.

In evidence are Patient Status Reports from claimant's treating doctor, Dr. A, dated April 10 and June 12, 1998, which release claimant for light duty and restrict him from lifting more than 30 pounds and from prolonged standing and more than minimal stooping, bending and climbing. An April 10, 1998, record, apparently that of Dr. A, states that claimant has pain in the lumbosacral area and gets numbness in his left leg and foot and that these symptoms have gradually recurred since his last surgery in 1996 when he had a neural decompression and removal of the hardware. The report further states that claimant is gradually getting worse, is on light duty, and takes three to four pills daily. Dr. A recommended an MRI to rule out stenosis and in evidence is an April 23, 1998, letter reflecting denial of authorization for the MRI.

Also in evidence is the April 1, 1998, report of a functional capacity evaluation (FCE) which states that claimant was "very cooperative," that no self-limiting tendencies or pain

exaggeration were noted, and that based on the FCE, claimant is classified for sedentary to medium workload with maximum lifting of no more than 20 pounds.

Claimant acknowledged that he was determined not to have qualified for SIBS for the first, second, and sixth compensable quarters. Texas Workers' Compensation Commission Appeal No. 980417, decided April 13, 1998 (Unpublished), reflects that the Appeals Panel affirmed the hearing officer's determinations that claimant was not entitled to SIBS for the first and second quarters because he earned more than 80% of his AWW during the respective filing periods but that he was entitled to SIBS for the third and fourth quarters.

Claimant testified that he was determined not to be entitled to SIBS for the sixth compensable quarter because he did not work and restricted his job search to machinist jobs for which he was, ostensibly, not physically qualified. He stated that he then began a search for light-duty work, including looking in the newspapers and asking around; that he found and began a light-duty job on April 1, 1998, with (employer B); that this job involved tasks such as typing, answering the telephone, and filing; that he worked approximately 25 hours per week, which was all the time the employer could use him; and that he was paid $5.15 per hour. He acknowledged that this job had the potential to develop into a full-time job at some future date. In evidence is a letter from the trucking company owner dated July 5, 1998, indicating that claimant was still employed at that time. Claimant further stated that sometime in approximately mid-July 1998, he stopped working for the trucking company, after having been given some office space there in July, in lieu of wages, in order to start up his own business producing videotapes of weddings, quinceaneros, and other important events. Claimant indicated that during the seventh quarter filing period he not only worked for the trucking company but also consulted with the Texas Rehabilitation Commission (TRC) about a career change since he could not return to machinist work; that the TRC assisted him in his effort, including arranging for him to participate in a U.S. Small Business Administration program and a new business mentorship program by retired executives; and that he spent time doing "cold selling," trying to obtain video production contracts. He also said he had done some "subcontracted" video jobs for others for which he had not yet been compensated. In evidence is the July 23, 1998, assumed name certificate for claimant's new business.

With respect to the carrier's surveillance videotape, taken on August 27, 28, and 29, 1998, showing claimant engaged in various activities such as running errands, shopping, lifting bags of waste, lifting and carrying a table, and changing a tire, claimant said that while the videotape showed him in periods of "extreme activity," these periods were followed by periods of "extreme inactivity" when he had to go home, take pain pills, and rest. He noted he could not do the latter while working.

As noted, the parties agreed that claimant's AWW was $618. 80. Claimant testified that he earned $1,224.12 from the trucking company during the seventh quarter filing period and produced some paycheck documents to support that testimony.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS 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 IIBS; 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.

The hearing officer found that during the applicable filing period, claimant made a good faith attempt to obtain employment commensurate with his ability to work and that his inability to earn 80% of his AWW is a direct result of his impairment from the compensable injury.

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, resolves the conflicts and inconsistencies in the evidence and determines what facts have been proven. 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 body, the Appeals Panel 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's brief discussion of the evidence characterized it as "more than sufficient" to support his determination. The carrier contends that claimant failed to provide adequate documentation of his earnings from his new business and of the business expenses incurred to derive such earnings. This point seems premature in that claimant indicated he was just starting the business and had only done a few subcontract jobs for which he had yet to be paid. We are satisfied that the hearing officer could view claimant's working 25 hours a week while also consulting with the TRC about starting his own business, participating in SBA and mentorship programs to help him start the business, and making efforts to market the business as constituting sufficient evidence to meet the "good faith attempt" criterion. As for the "direct result" criterion, the evidence established that claimant could not return to his former work as a machinist and assembler because of his impairment from his compensable injury. The Appeals Panel has consistently held that a claimant need not establish that his or her impairment is the only cause of the unemployment or underemployment to satisfy the "direct result" criterion but rather that it is a cause. Texas Workers' Compensation Commission Appeal No. 960905, decided June

25, 1996. Further, a finding that the unemployment or underemployment is a direct result of the impairment is "sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury." Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge