

APPEAL NO. 990226

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 6, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 11th quarter and that the evidence is insufficient to establish the claimant's average weekly earnings during the filing period. In his appeal, the claimant argues that the hearing officer's determinations that he did not make a good faith effort to look for work commensurate with his ability to work; that he did not present sufficient evidence to establish that he was underemployed in the filing period; that he is not entitled to SIBS for the 11th quarter; and that he did not sustain his burden of proving his average weekly earnings in the filing period are against the great weight and preponderance of the evidence. The appeals file does not contain a response to the claimant's appeal from the respondent (carrier).

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable low back injury on _____; that he reached maximum medical improvement on July 22, 1994, with an impairment rating of 25%; that he did not commute his impairment income benefits; that the 11th quarter of SIBS ran from October 6, 1998, to January 4, 1999, with a corresponding filing period of July 7 to October 5, 1998; and that the claimant's preinjury average weekly wage is \$652.10. The claimant testified that he had two surgeries on his back as a result of his compensable injury, which occurred as he was doing carpentry work for a construction company. He testified that he wore a TENS unit for his back pain in the filing period and that using that unit, he had back pain at an average level of three on a scale of one to 10 during the filing period. He acknowledged that from October 1997 to May 1998, he worked for two different employers. He stated that he operated a forklift for several months, that he was paid \$8.50 per hour, and that he worked approximately 45 hours per week. For the balance of that period, he worked hanging sheetrock, where he was paid \$12.50 per hour and worked an average of 50 hours per week. He testified that he lost the job hanging sheetrock because the job ended.

On July 7, 1998, the claimant purchased a tractor, trailer and various other equipment in order to start his own business. He testified that he is trying to establish a bushhogging/tilling business. He explained that a bushhogger is a big lawn mower that goes behind the tractor which can knock down anything other than big trees that is on land. He stated that in his business, he does bushhogging, tills gardens, and levels yards either by using a tiller or by moving dirt around in the yard with a front-end loader. He testified that in the filing period, he did four jobs for three different people and that he received a total of \$425.00 for those four jobs. He submitted a handwritten document in support of that assertion, which simply listed the names of the three people for whom he worked in the

filing period and the amount he was paid for each job. On cross-examination, the claimant stated that he did not open a separate checking account for his business, that he had a ledger where he reflects money coming in but that he does not reflect expenses in the ledger, that he does not complete invoices to reflect the work he does, and that he did not obtain a tax identification number for his business.

With respect to his efforts to get his business started, the claimant testified that he ran an advertisement in the newspaper for one week of each month of the filing period, he went door to door handing out business cards and looking for jobs he could do with his tractor, and that he also put business cards in convenience stores and the bowling alley. He testified that he spent about 80% of his time trying to get his business going and that he applied for work with other employers in the balance of his time; however, he could not provide specifics about places he applied in his testimony and did not list any such applications on his Statement of Employment Status (TWCC-52).

The hearing officer found that the claimant did not make a good faith effort to look for work commensurate with his ability to work. We have previously recognized that self-employment may satisfy the SIBS good faith requirement. Texas Workers' Compensation Commission Appeal No. 960188, decided March 13, 1996. However, we have also recognized that in self-employment cases, the claimant must establish that he or she made efforts to solicit business or customers in the filing period in order to sustain his or her burden of proof. Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994; Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995; Texas Workers' Compensation Commission Appeal No. 950303, decided April 12, 1995. In this instance, the hearing officer apparently was not persuaded that the claimant's efforts to solicit business rose to the level of a good faith effort. In addition, the hearing officer was not persuaded that those efforts in conjunction with his alleged efforts to look for work with other employers, about which he could not provide any specifics during his testimony and which are not reflected on the TWCC-52, were sufficient to rise to the level of a good faith search for employment. Our review of the record does not reveal that the hearing officer's good faith determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for reversing that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Next, we consider the hearing officer's determinations that the claimant did not sustain his burden of proving that he was underemployed in the filing period and that he likewise did not present sufficient evidence to establish his average weekly earnings in the filing period. Those findings are interrelated and are dependent upon the hearing officer's determination that the claimant "did not offer sufficient supporting documentation to establish" either his underemployment or his average weekly earnings in the filing period. As noted above there is a dearth of evidence, other than the claimant's testimony, concerning his business and more specifically the jobs he performed in the filing period and the money he was paid for those jobs. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). He was not satisfied that the claimant's evidence was sufficient to satisfy his burden of proving underemployment during

the filing period. Our review of the record does not demonstrate that the challenged determinations are so contrary to the great weight and preponderance of the evidence as to compel reversal on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge