APPEAL NO. 990265

Following a contested case hearing (CCH) held on January 11, 1999, 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 determining that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first through the fifth compensable quarters, that the respondent (self-insured) is excused from liability for SIBS for the second through the fourth compensable quarters; that the self-insured is excused from liability for SIBS for the fifth compensable quarter until September 16, 1998; and that claimant has not lost entitlement to SIBS pursuant to Section 408.146(c). The self-insured has appealed only the determinations that claimant is entitled to SIBS for the first quarter and part of the fifth compensable quarter and thus the remaining determinations have become final. Section 410.169. The self-insured contends that findings that during the filing periods for the first and fifth compensable quarters claimant made good faith attempts to obtain employment commensurate with his ability to work and that his unemployment or underemployment was not a direct result of his impairment are against the great weight of the evidence. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the self-insured accepted liability for the _____, injury; that claimant had an impairment rating (IR) of 15% or greater from the _____, injury and that he did not elect to commute any portion of his impairment income benefits (IIBS); and that the first compensable quarter began on August 5, 1997, and the fifth compensable quarter ended on November 2, 1998.

Claimant testified that he is 43 years of age; that at the time of the injury to his low back on _____, he was a painter at the self-insured's medical school; that he earned $12.34 per hour at this job working 40-hour weeks; that he underwent lumbar spine laminectomies by Dr. R in 1994 and 1995 and that Dr. R is considering fusion surgery but the self-insured has refused to authorize another MRI; that his low back pain has never resolved; that the self-insured refused to authorize physical therapy after his second operation; and that he sees Dr. R monthly and takes Vicodin for pain, SOMA for muscle relaxation, and an anti-inflammatory. A July 6, 1998, report from Dr. R states that claimant's operations were on August 23, 1994, and August 17, 1995; that claimant is still having back pain; and that he may be a candidate for a lumbar spine fusion and that an MRI is required.

Claimant further testified that while his job as a painter at the medical school involved heavy lifting, climbing, and strenuous activities which he can no longer do because of his low back condition, he can and has since worked as a painter on jobs with less strenuous activities. The carrier introduced the September 2, 1997, report of Dr. F which, in the portions relevant to SIBS, stated that claimant was capable of performing medium

employment. Claimant also indicated that when he was not working during the five filing periods, he drew unemployment compensation for his family's subsistence and for gas money to look for other jobs. He said he looked for work not only in (City 1) but also in (City 2) and (City 3); that he looked for jobs advertised in the (City 1) newspaper and contacted friends; and that when prospective employers would ask what he had been doing since December 13, 1996, he told them about his injury and the back operations and they said they would get back in touch with him but never did. He also said that some job applications asked about medications and he would list the drugs he took and would not hear further from the employers. He said he felt that employers did not want a person on a job site who was taking Vicodin and Soma. Claimant also stated that in September and October 1997, the Texas Rehabilitation Commission (TRC) assisted him in taking some courses but that he had to drop out due to lack of funds and that the TRC has recently tested him and told him he has to attend school full time to obtain that agency's assistance in retraining into the computer field.

Claimant's Statement of Employment Status (TWCC-52) for the first compensable quarter reflects that claimant earned $655.70 for the week ending May 14, 1997, $655.70 for the week ending May 21, 1997, $262.24 for the week ending May 23, 1997, and $679.20 for the week ending July 27, 1997. The form also reflects that he sought painting jobs weekly on Mondays with his painter's union local, that he went weekly to the Texas Workforce Commission (TWC), that he applied for schooling at the TRC, and that he made six other job contacts, one of them listed twice. He said he either called these prospective employers or went to the job sites, that he had previously worked for one of the employers, that he made follow up contacts with the prospective employers. He also indicated that he sought jobs other than painting jobs which he felt were within his physical capacity. Claimant said that Dr. R advised him that he cannot perform his prior job because he is "100% disabled" from doing his job at the medical school. There is a note in Dr. R's records to this effect. Claimant also stated that painting is all he has ever done and all he knows. He indicated that during the filing period, he did some painting jobs for people who knew of his back condition and would not require him to lift or climb and that he also made 11 or 12 job searches although he did not list all of them on the TWCC-52. He also acknowledged not listing the dates of his contacts on the TWCC-52, explaining that he was depressed over his situation including his financial problems and just did not write the dates down but that he did make the contacts.

Claimant's TWCC-52 for the fifth compensable quarter reflects that he earned $150.00 for the weeks ending August 13, August 20, August 27, September 3, September 10, and September 17, 1998. The form also reflects that he contacted the TWC and his painter's union local on August 13, 1998, and interlineated between the two entries, in different writing, are the words "every day."

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 average weekly wage 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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to [SIBS] for any quarter claimed." Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. 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.

We are satisfied that the appealed findings concerning claimant's having met the "good faith" and "direct result" criteria for SIBS for the first and fifth compensable quarters are not 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). While it is correct, as the self-insured points out, that claimant's TWCC-52 forms fail to state the specific dates of his job contacts and that claimant's search efforts, when not working, could have been either bunched up into just a few days of the filing periods or, obversely, strung out, the hearing officer could reasonably infer from claimant's testimony, together with the dates of the weeks he did work, that when claimant was not actually working, he was making consistent efforts to find work he could do. The hearing officer could also infer that while claimant may have concentrated his efforts in the painting occupation, because painting was his trade and the field in which he had contacts that could lead to work, he did not limit his efforts to only painting work. Claimant did provide evidence of frequent contacts with the TWC. As for the "direct result" criterion, the hearing officer could consider the evidence, including the comment in Dr. R's records, that claimant cannot return to his former employment. The Appeals Panel has consistently stated that a claimant need not establish that his impairment is the only cause of his unemployment or underemployment but need only establish that it is a cause. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996. Further, we have frequently noted that a finding that a claimant's 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." *See. e.g..* 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:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge