APPEAL NO. 990349

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 28, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the sixth quarter. In his appeal, the claimant argues that the hearing officer's determinations that he did not provide sufficient evidence to show that he was self-employed as a firearms dealer and gunsmith; that he did not make a good faith effort to look for work commensurate with his ability to work in the filing period; that his unemployment was not a direct result of his impairment from the compensable injury; and that he is not entitled to SIBS for the sixth quarter are against the great weight and preponderance of the evidence. In its response, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable low back injury on _____; that he has an impairment rating of at least 15%; that he did not commute his impairment income benefits; and that the sixth quarter of SIBS ran from September 15 to December 14, 1998, with a corresponding filing period of June 15 to September 14, 1998. The claimant testified that he has had three surgeries on his back as a result of his compensable injury. He stated that he has constant pain, lifting restrictions of 25 to 30 pounds, that he cannot sit or stand for more than 30 minutes at a time, and that he "will never be the same" because of his injury.

The claimant testified that he did not look for work in the filing period because he had opened (, a gun smithing business, in City 1, where he has resided for about five years. He testified that Mr. J is his partner in the business. The claimant stated that he has completed a basic course in gun repair but has not yet completed the advanced course; that he has a state resale tax license and a firearms license issued by the Bureau of Alcohol, Tobacco, and Firearms; that he advertises his business in the yellow pages, in a local telephone book, and in the newspaper; that he also has a web site; and that he hands out business cards and flyers at sporting events in an effort to solicit business. When asked on cross-examination why he had not included receipts for his advertising expenses, the claimant stated that he believes that his expenses are private information and that, as such, he should not be required to produce that information. He also stated that he believed documents relating to his purchase of supplies, equipment, and inventory were also private information that he need not produce. In addition, he maintained that his business records are privileged under federal law; however, he did not produce any statutory support for this assertion. He stated that he had earnings in each week of the filing period, as reflected on his Statement of Employment Status (TWCC-52). The claimant likewise maintained that documentation of his earnings was private, personal information that he would not produce and which he claimed was privileged under federal law.

Initially, we consider the hearing officer's determinations that the claimant did not sustain his burden of proving that he was self-employed in the filing period and that his underemployment was a direct result of his impairment. Those findings are interrelated and are dependent upon the hearing officer's observation that in failing to produce documentary evidence of his gross earnings, his business expenses, his net income, or his business licenses, the claimant did not sustain his burden of proving that he was underemployed in the filing period. As noted above there is a dearth of evidence, other than the claimant's testimony, concerning his business, the licenses he was required to have for his business, the jobs he performed in the filing period, the money he was paid for those jobs, and his expenses. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). She was not satisfied that the claimant's evidence was sufficient to satisfy his burden of proving that he was self-employed in the filing period and that his self-employment venture resulted in his being underemployed. Our review of the record does not demonstrate that those determinations are so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse them on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer also 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, as noted above, the hearing officer found, and we affirmed, that the claimant did not produce sufficient evidence to establish to the hearing officer's satisfaction that he was engaged in a self-employment venture, and, therefore, was underemployed. The claimant acknowledge that he did not make any efforts to look for work with other employers. Thus, the evidence sufficiently supports the hearing officer's good faith finding. Our review of the record does not reveal that that determination is so contrary to the great weight of the evidence as to compel reversal on appeal. Pool, *supra*; Cain, *supra.*

In his appeal, the claimant makes the bald assertion of *ex parte* communication between the hearing officer and the carrier after the hearing. Specifically, the claimant states that he received a letter from the carrier indicating that it knew the outcome of the hearing before the hearing officer's decision was issued. He did not include a copy of that letter with his appeal for our review. In its response, the carrier vehemently denies that any *ex parte* communication with the hearing officer occurred. We will not presume that there was contact between the hearing officer and the carrier after the hearing about this case absent some evidence thereof. No such evidence was presented here and, accordingly, we find no merit in the claimant's assertion of impropriety.

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