APPEAL NO. 990372

Following a contested case hearing (CCH) held on January 20, 1999, with the record closing on January 25, 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's (claimant) _____, compensable low back injury is the producing cause of his current low back problems; that claimant is entitled to supplemental income benefits (SIBS) for the 15th and 16th compensable quarters; and that the October 14, 1998, Benefit Dispute Agreement of the parties is not binding on the appellant (carrier) because it was not approved by the Texas Workers' Compensation Commission. The carrier has appealed the determinations of the injury and SIBS issues for evidentiary insufficiency, contending that a September 1997 motor vehicle accident (MVA) is the sole cause of claimant's low back problems and that claimant's evidence failed to prove his entitlement to SIBS. Claimant filed a response urging the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

The hearing officer's determination of the issue concerning the Benefit Dispute Agreement has not been appealed and has thus become final by operation of law. Section 410.169.

The parties stipulated that on _____, claimant suffered a compensable low back injury; that he reached maximum medical improvement with an impairment rating (IR) of 16% and did not elect to commute a portion of his impairment income benefits (IIBS); that the filing period for the 15th compensable quarter was from February 2 through May 1, 1998; that the 15th compensable quarter was from May 2 through July 31, 1998; and that the 16th compensable quarter was from August 1 through October 30, 1998.

Claimant testified that on _____, while working for (employer 1), he injured his low back carrying rolls of carpet and boxes of tiles up a staircase; that his back injury was treated by Dr. JR; that in 1995, he underwent laminectomy surgery to his low back which resulted in a subsequent staph infection which, in turn, led to a second operation to treat the infection; and that he still has pain from his low back injury, has work restrictions, and can no longer perform his prior job as a carpet and tile layer because it involves carrying heavy rolls of carpet and boxes of tiles which he can no longer do. He stated that Dr. JR has requested authorization to perform fusion surgery on his low back and that such request is pending the outcome of this benefits dispute proceeding. Dr. JR's report of June 17, 1998, states that claimant had an infection after a spinal decompression and since that infection, his back pain has been increasing; that claimant has advanced spondylosis of L4-5 and L5-S1; and that he is recommending a fusion of these joints. Dr. JR further stated that claimant had been working as a machinist but was progressively developing more low back pain; that claimant has been working remodeling homes but his back pain precludes him from performing further activities; and that the pain is constant and worse with

activities. Dr. JR wrote on July 16, 1998, that claimant will require a spinal fusion, that he cannot work without taking breaks or rest, and that he should not lift more than 35 pounds.

Claimant further testified that he was involved in an MVA on September 30, 1997, when his car was hit by another and shoved up on a sidewalk; that his head was jerked and his neck popped; that he had neck and upper back pain from the MVA and was treated for six to eight weeks; that he received no injury to his low back in that MVA; and that Dr. JR told him his need for further spinal surgery is not a consequence of the MVA but rather of the staph infection. In evidence is Dr. JR's letter of November 6, 1998, stating that claimant's back problem and planned fusion surgery are not related to the September 1997 MVA but rather to an infection developed following claimant's spinal surgery which caused further damage to his already degenerating facet joints. The carrier introduced the first page of a March 6, 1998, report of Dr. S, who examined claimant for Dr JR which referred to claimant's MVA and injury to his neck "and to a lesser extent his low back and right knee." The carrier also introduced the August 26, 1998, report of Dr. N, who examined claimant to determine his functional capacity. Dr. N stated that the diagnosis was low back pain secondary to failed lumbar laminectomy and that claimant underwent a functional capacity evaluation which placed him at the higher end of the medium level work category. Also in evidence is a November 10, 1997, report of Dr. R stating that claimant was ambulatory after the MVA and was not treated at the scene, and that his diagnosis was cervical and thoracic spine sprain/strain and right knee sprain/strain. Claimant further testified that in September 1997, he commenced work as a milling machine operator for (employer 2) earning $8.00 per hour, that he quit the job on or about December 17, 1997, because he could no longer do that work due to his back pain, and that he enjoyed the job and would still be there were it not for his back. He explained that the job required him to stand and stoop over a machine throughout the entire shift. He also noted that he missed only one day of work for employer 2 after the MVA. The carrier contended that based on information its vocational employment specialist, Ms. W, obtained from contact with Mr. A with employer 2, claimant was able to perform his job there from September 11 to December 10, 1997, and quit after he was asked to participate in a random drug screen.

Claimant testified that during the 15th quarter filing period and for the first part of the 16th compensable quarter, he was self-employed doing remodeling jobs on houses whenever he could find such jobs and he reported earning $2,159.50 over 12 weeks on his Statement of Employment Status (TWCC-52) for the 15th quarter. He stated that he began this self-employment in early January 1998. According to the carrier's notations on the 15th quarter TWCC-52, the carrier denied SIBS for this quarter because claimant failed to make a good faith effort to find employment within his restrictions and because his employment/underemployment was not due to his work-related injury. The carrier's SIBS calculations on the TWCC-52 reflect that claimant's average weekly wage (AWW) is $440.12 and that he did not earn more than 80% of this amount during the filing period. Claimant stated that on June 8, 1998, he began working contract jobs he obtained from a friend in the drywall and remodeling business, Mr. V, and he reported earning $3,432.00 on his TWCC-52 for the 16th quarter. The TWCC-52 for this quarter reflects that the carrier denied SIBS because "[t]here was no wage verification of copies of pay stubs attached to

support wages." However, attached to the TWCC-52 was a handwritten statement, signed by Mr. V, stating that the writing was made to verify the weeks, wages, and salary for claimant. This document reflected the total hours worked and wages earned by claimant, at $7.50 per hour, for nine weeks commencing on June 5, 1998.

Claimant testified that he lived in (City A), a small town; that he posted fliers at various stores and on poles around the town advertizing his remodeling business; that he checked on these fliers every week; and that he had his own pickup truck and tools. He attached a sample to his TWCC-52 for the 15th quarter which identified his business as D & M Remodeling and which specified room additions, drywall, painting, and decks. Claimant also listed six business locations where he posted fliers and said there were other places as well. He also testified that the actual posted fliers stated both his telephone and pager numbers. He said he would also drive around town looking at houses that might need lawns mowed, roofs repaired, and other kinds of repairs and said the kinds of jobs he obtained included painting, trim repairs, roof repairs, drywall work and so forth. Claimant also said that when working on jobs for Mr. V, he worked within his medical restrictions and that he had two persons who could help him on any job where he need assistance with lifting. He indicated that the helpers were paid by Mr. V, that all of his earnings from self-employment and from Mr. V were cash payments based on an hourly rate, that he had no written records pertaining to the jobs he worked in the quarters involved other than for one job during the 15th quarter filing period for which he attached some documentation, and that the earnings listed on his TWCC-52 forms were the amounts he "took home." Claimant said he no longer gets jobs from Mr. V because Mr. V was contacted on numerous occasions by the carrier and said he did not need the hassle. Claimant's testimony indicated that from time to time he used a helper or two on one or more jobs he performed, specifically indicating roofing jobs, and paid them from his earnings. However, he did not identify any particular job on which he used a helper nor did he identify any of the weekly earnings listed on his TWCC-52 forms as earnings from which a helper was paid. He did indicate that there were no payments or deductions for mileage to the jobs and that the amounts listed on the TWCC-52 forms were his "gross wages" and the amounts he "took home."

Whether claimant's compensable injury of _____, is a producing cause of his low back problems, the amount of claimant's weekly earnings during the 15th and 16th quarter filing periods to be used to determine the monthly SIBS rate, and whether claimant is entitled to SIBS for the 15th and 16th compensable quarters presented the hearing officer with questions of fact to resolve. It is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence (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 tribunal, 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).

Concerning the injury issue, the carrier had the burden to prove that the MVA was the sole cause of claimant's low back problems, the position advocated by the carrier both at the benefit review conference (BRC) and at the hearing. The hearing officer could credit claimant's testimony and the opinion expressed by Dr. JR and conclude, as he did, that claimant's compensable low back injury, and the ensuing infection following the initial spinal surgery, are a producing cause of claimant's low back problems.

Concerning claimant's weekly earnings during the filing periods at issue, the carrier's position at the BRC and at the hearing was that claimant attached no wage verification or paycheck stubs to his TWCC-52 forms to support the wages he contended he earned. The carrier does not contend that the mathematical calculations determined by the hearing officer in Findings of Fact Nos. 16 and 17, derived from the information claimant provided in the TWCC-52 forms, are in error. Rather, the carrier's contention was and remains that the wages claimant reflected in his TWCC-52 forms were insufficiently documented and thus could not be verified. However, as noted above, claimant testified that he was paid in cash for his jobs during those periods, with the apparent exception of one job during the 15th quarter filing period, and he did attach a list of the weekly hours worked and wages paid by Mr. V during the 16th quarter period. That document was signed by Mr. V and was not refuted. The carrier also contends that claimant failed to report his "gross wages received," as called for on the TWCC-52 forms, at least with respect to the 15th quarter filing period because he indicated he deducted his payments to helpers on jobs where he used them. We do not find merit in this contention. In Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997, the majority decision, authored by Judge Kelley and concurred in by the author of this decision, the Appeals Panel determined that the decision in Texas Workers' Compensation Commission Appeal No. 950819, decided July 6, 1995, while correctly decided on its facts, was overbroad to the extent that it equated all gross receipts to gross wages and agreed with the hearing officer who was unwilling to attribute to the claimant as "wages" the amounts committed to normal operating and fixed expenses of the self-employed business. We observed that expenses required to operate a business must be expended to produce income. We view that principle as applicable to claimant's payments to helpers.

Concerning the SIBS issues, 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 pertinent filing periods, claimant did work, that he searched for jobs on his own through posting fliers and personal inquiries, that he obtained contract work from Mr. V, that he had light to medium duty physical job restrictions, and that he did work and did attempt in good faith to obtain employment commensurate with his limited ability to work. We are satisfied that the evidence sufficiently supports these findings and that they, in turn, adequately support the conclusion that claimant did attempt in good faith to obtain employment and actually worked commensurate with his ability to work during both filing periods.

The hearing officer found that claimant was underemployed earning less than 80% of his preinjury AWW during both filing periods as a direct result of his impairment from the compensable injury. The Appeals Panel has held that such a finding is sufficiently supported by evidence, deemed credible by the hearing officer, that a claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work being done at time of the injury. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. We have also consistently stated that a claimant need not establish that the impairment is the only cause of the unemployment or underemployment but rather need only establish that the impairment is a cause. Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Judy L. Stephens
Appeals Judge