

APPEAL NO. 990404

Following a contested case hearing held on February 8, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by finding that the appellant (claimant) did not attempt in good faith to obtain employment commensurate with his ability to work and by concluding that claimant is not entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Claimant appeals that determination, urging that his evidence established his entitlement. The respondent (carrier) urges in its response that the evidence is sufficient to support the challenged determination.

DECISION

Affirmed.

The parties stipulated that on \_\_\_\_\_, claimant sustained a compensable injury; that he reached maximum medical improvement on February 6, 1996, with an impairment rating (IR) of 21%; that claimant has not commuted any portion of his impairment income benefits (IIBS); that the filing period for the eighth compensable quarter began on August 23 and ended on November 22, 1998; and that the eighth compensable quarter began on November 23, 1998, and ends on February 21, 1999.

The finding that during the filing period claimant was unemployed as a direct result of his impairment was not appealed and has become final. Section 410.169.

Claimant testified that on \_\_\_\_\_, while employed as a salesperson by (employer) in (city 1), Texas, a small town with a population of 6,000, he slipped on a spot of oil on a step and twisted but did not fall; that he was first treated conservatively by Dr. H; that he subsequently underwent spinal surgery twice in 1994 by Dr. R and once in 1995 by Dr. M; and that he continues to be treated by Dr. M. He stated that he was released by Dr. M in March 1997 to return to work part time with a restriction against lifting more than 25 pounds. He acknowledged not having medical documentation in 1997 of being limited to part-time work but introduced Dr. M's 1998 report which limits him to working four hours per day. He also said that he takes medication, that he has "nagging" pain in his legs which wears him out, and that on occasion his left leg gives way and he has fallen and hurt himself. Claimant further testified that during the filing period, he sought part-time, light work at three business locations including the employer, a liquor store, and a flooring and appliances store, and he introduced documentary evidence of these contacts. He further stated that he worked for the flooring and appliances store part time for two weeks performing telephone and sales activities for four hours per day, and that he also attempted to start a small engine repair business but learned he would need \$20,000.00 to capitalize the business and did not consider it feasible to borrow that much money given the fact that he was nearly 60 years old. Claimant also stated that his former employment with the employer involved not only the sales activities but the delivery of appliances purchased by customers, which involved heavy lifting. Stating that the carrier had paid him SIBS for the

first seven compensable quarters without dispute, claimant acknowledged that he did not list the earnings from his two weeks of work or his job search contacts on his Statement of Employment Status (TWCC-52). He wrote the following on his TWCC-52: "Not able to find part time job that matches my ability" and "I will open a small engine repair shop Nov. 15th. I will be self employed." Claimant acknowledged that he could perform telephone, sales and small engine repair work.

Dr. M wrote on September 10, 1998, that he did not believe claimant will ever be capable of performing even light duty for more than four hours per day and that claimant will need to rely on his Social Security benefits which he has already obtained.

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. 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 have also cautioned that good faith is not established simply by some minimum number of job contacts, but that a hearing officer may consider "the manner in which the job search is undertaken with respect to timing, forethought and diligence." Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves 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 a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it 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 decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Alan C. Ernst  
Appeals Judge