APPEAL NO. 990633

Following a contested case hearing held on March 1, 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 concluding that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fourth compensable quarter, October 21, 1998, to January 19, 1999. The appeal filed by the appellant (carrier), which specifically asserts error concerning this conclusion and Finding of Fact No. 5 relating to claimant's good faith attempt to obtain employment, also appears to take issue with the finding that claimant's unemployment was a direct result of his impairment. The appeal argues numerous perceived weaknesses in claimant's evidence, focusing in particular on his felony conviction for assault. Claimant's response to the appeal addresses most of the points made by the carrier and urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

Not appealed are findings that claimant sustained a compensable injury to his low back on _____, and that during the filing period for the fourth compensable quarter (July 22 through October 20, 1998), he "had a sedentary ability to work . . . ." The parties stipulated that claimant reached maximum medical improvement on November 5, 1996, with a 21% impairment rating (IR); that he did not elect to commute any portion of his impairment income benefits (IIBS); and that he was unemployed during the filing period.

Claimant testified that following his compensable injury, he underwent a spinal fusion operation in November 1995 by Dr. M and that during the fourth quarter filing period, his work capacity was sedentary to light duty with a 20-pound lifting restriction. Dr. M's July 13, 1998, report states that claimant "is not fit for return to any work beyond light work, at best" and that "this would include a 20 pound lifting restriction." He also reported that he felt claimant will require a fusion procedure above his current three-level lumbar fusion. Claimant stated that in July 1998, Dr. M recommended additional surgery and that in September 1998, the carrier's second opinion doctor, Dr. W, agreed that he should have the surgery. Dr. W's September 23, 1998, report states that in November 1995, claimant underwent a fusion from L-3 to the sacrum with instrumentation; that in October 1996, the hardware was removed secondary to pain; that he has developed increasingly severe back pain; and it is felt that fusion from T11-12 to the old fusion level will help alleviate the current pain. Claimant indicated that Dr. M was out of the office and unavailable for practice for three months and that on January 6, 1999, he underwent the additional fusion surgery. Dr. M reported on January 14, 1999, that claimant underwent a lumbar and thoracolumbar decompression with instrumentation from T10 to L3 with fusion and the operative report of January 6, 1999, indicates that claimant's spine was fused from T-10 to S-1. Claimant stated that the Texas Rehabilitation Commission wants him to return once he is healed from surgery so he can commence retraining.

Claimant further testified that he took a course at (social agency) on how to complete job applications; that in July and again in October 1998, he re-registered with the Texas Workforce Commission (TWC); and that during the filing period, he was provided with several job leads from the TWC which he pursued. He also introduced TWC documents reflecting that he registered with the TWC on March 4, 1998; that in March and April 1998, he did job searches and visited the TWC office; that he renewed the registration on July 16, 1998, and visited the TWC office on July 21, 1998; and that he again renewed the registration on October 1, 1998, and received a job referral on October 1 and another on October 2, 1998.

Claimant further testified that during the filing period, Ms. J, owner of (JRMS), provided him with a booklet of job leads; that they conversed by telephone on how he should proceed with his job search including calling the employer first to verify that the position was still available; and that he made contact with some but not all of those prospective employers, explaining that he tried to limit his search to businesses within a 25 to 30-mile radius of his residence to conserve gasoline and that he sometimes would get discouraged after making a number of telephone calls only to be told the position was not available. Claimant also testified that he subscribed to the (city 1) daily newspaper; that he reviewed the classified ads for job openings each day although the Sunday editions contained the most ads; and that he would either go by or call prospective employers who were advertizing jobs he felt were within his physical capacity such as restaurant, hotel/motel clerk, cashier, and home sales type jobs. Claimant indicated that he had a year remaining on his probation following a deferred adjudication of guilt of a felony assault which occurred six years earlier. He conceded that he did not seek telemarketing jobs because he understood those jobs required the employee to sit for eight hours talking on the telephone and using a computer, and he explained that he has to be able to get up and move around at will to relieve his back symptoms. Claimant said the conviction was never brought up in his contacts with employers and that he was never told it kept him from being employed.

Ms. J testified that she resides in (city 2) and conversed with claimant by telephone; that she sent claimant a booklet with transferrable skills jobs in September 1998; that she referred claimant to the social agency for evaluation and learned that he was interested in becoming a draftsman; that claimant could not apply for security guard jobs because of his conviction; and that she had only mixed success in efforts to verify that claimant had either completed job applications or called the businesses he claimed to have contacted. She said she verified seven applications on file; that 15 were unverifiable for a variety of reasons; and that she agreed that some of the businesses had changed phone numbers. She also said that, in looking at copies of applications claimant had completed, "by and large I thought he completed them well" but that she did have some concerns which she voiced to him about various omissions such as his driver's license and Social Security numbers. Claimant indicated he made it a practice not to divulge those numbers for the security of his bank account and so on. Claimant introduced copies of 17 employment applications. Ms. J also said that some telemarketing companies do provide flexible hours and permit employees to sit and stand at will. She also testified to making several calls to

businesses, without mentioning claimant's name, to try to ascertain the relative effect of a felony conviction on getting a job, that there was some indication that hotels would not hire an ex-convict and that the adverse effects on employment generally diminished approximately seven years after the conviction.

Claimant's Statement of Employment Status (TWCC-52) reflects that he contacted 40 businesses; that the contacts were made during two days in July, seven days during August, six days during September, and six days during October 1998; and that on a number of days, more than one prospective employer was contacted. Claimant listed the names and addresses of the businesses, the dates of his contacts, and, in some instances, the name of the person contacted. The types of jobs included cashier, greeter, desk clerk, counter clerk and "any available." Asked why his employment search efforts were somewhat clustered, claimant indicated he really had no explanation. However, he also said that he had to drive his wife to and from her work on Padre Island and, as noted, that most jobs were advertized in the Sunday papers, that he tried to conserve gas, and that he looked for jobs within a 25 to 30-mile radius of his residence. Claimant introduced copies of 20 employment applications as well as copies of letters from his attorney to various businesses asking that they complete a questionnaire seeking information on claimant's contacts. He also introduced copies of some newspaper ads for jobs for which he applied.[1] The carrier also introduced a copy of the hearing officer's decision and order which held that claimant was not entitled to SIBS for the third compensable quarter and the Appeals Panel decision affirming that decision.

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.

The hearing officer is the sole judge of the 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

[1]The carrier acknowledged in closing argument to having burdened the record with some 200 pages of hard to read copies of newspaper job ads "just to indicate the volume" of jobs available.

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). The hearing officer could consider the number of employment search contacts claimant made, as well as the timing and nature of those contacts including preparation of applications, in addition to the evidence of contact with the TWC and cooperation with Ms. J and conclude that claimant did make a good faith attempt to obtain employment. As for the "direct result" criterion, the Appeals Panel has consistently stated that an injured employee need not establish that the impairment is the only cause of the unemployment or underemployment but only that it is a cause, and that the direct result requirement 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." 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Elaine M. Chaney
Appeals Judge