APPEAL NO. 990880

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 25, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter and that respondent (carrier) was relieved of liability for SIBS for the fifth compensable quarter from November 26, 1998, through December 20, 1998, due to claimant's late filing of his Statement of Employment Status (TWCC-52) with the carrier. The late filing determinations have not been appealed and, therefore, have become final. Section 410.169.

Claimant appealed, contending that the hearing officer erred in stating claimant made 25 verifiable job contacts during the filing period, and contended that his "almost daily efforts to make job contacts" amounted to the diligence, timing, and forethought necessary for a good faith job search. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, citing the testimony of its vocational rehabilitation counselor, that many of claimant's job contacts were "not a true job search." Carrier urges affirmance.

DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to 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, "[f]iling 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, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable neck and low back injury on _____, that claimant has an impairment rating of 21%, that impairment income benefits were not commuted, and that the filing period for the fifth compensable quarter was from August 27 through November 25, 1998. Attached as part of his TWCC-52, claimant listed some 126 contact entries he had made during the filing period. On direct examination, claimant discussed each contact day by day. On cross-examination, claimant did not remember when he had had lung tumor surgery and that he had a certificate in financial management until carrier pointed out documentation of those facts. At one point,

carrier asked claimant "[d]id you ever apply to any of them [prospective employers] prior to this qualifying period" to which claimant replied "No, ma'am . . . not to my knowledge, no." Carrier then produced the TWCC-52 for the prior (fourth) compensable quarter which showed many (about 27) of the contacts to be the same. Claimant said that he had misunderstood the question. Similarly, other portions of claimant's testimony were contradicted by Mr. M, carrier's vocational rehabilitation counselor, regarding the number of contacts and who claimant had, in fact, contacted. Mr. M testified that, of claimant's 120 plus contacts, there were 57 different potential employers, of which he was able to contact 38. (At least two of the telephone numbers claimant had listed were private residences.) Mr. M testified about the employers he had contacted. In one case, Mr. M said that the employer had an opening and gave claimant an application to complete; claimant took the application and never returned. Claimant testified that he had submitted "like 26, 27 total" written applications to which the hearing officer said:

> Q. All right. So based on what you've told me, I'm going to take your word that you submitted 27 written applications during the filing period.
>
> A. Yes, sir.

Further, the testimony brought out that, when claimant made a personal contact, he had a "slip of paper" which said "[claimant] may return to part-time work with other restrictions on 7/10/98" which he would give to the prospective employer.

Claimant has not had any surgery regarding his compensable injury. Claimant's treating doctor, Dr. B, released claimant to light duty, working six hours per day maximum, with a 20-pound lifting/carrying restriction and bending, stooping, standing, reaching, etc. limited to "2/3 of the time." A functional capacity evaluation of November 20, 1998, lists claimant's recommended "work class" as light to medium. Dr. B states that claimant can work sedentary duty only. Most of claimant's job contacts were for clerk, cashier, sales, etc. positions.

Claimant appealed the following factual determinations:

FINDINGS OF FACT

3. Claimant made twenty-five (25) verifiable job contacts during the filing period for the fifth compensable quarter of [SIBS].

4. Claimant's claimed extensive job search including the twenty-five (25) verifiable job contacts during the filing period for the fifth compensable quarter of [SIBS] was done by Claimant to meet on paper the eligibility requirements for [SIBS] for the fifth compensable quarter and was not a true job search.

5. Claimant's job search during the filing period for the fifth compensable quarter of [SIBS] was self-restricted, selective, and lacked timing, forethought, and diligence.

* * *

7. Claimant has not in good faith attempted to obtain employment commensurate with Claimant's ability to work during the filing period for the fifth compensable quarter of [SIBS].

Claimant appeals the finding that he made only 25 verifiable job contacts during the filing period (Finding of Fact No. 3). Although claimant, on appeal, asserts that the hearing officer, in his Statement of the Evidence, states that "[Mr. M] was able to confirm twenty-five (25) prospective employers . . . " what the hearing officer actually said was:

> According to his investigative reports, [Mr. M] was able to confirm Claimant had applied at twenty-five (25) prospective employers during the filing period.

Based on Mr. M's testimony and reports, the hearing officer found claimant made 25 "verifiable job contacts" during the filing period.

Basically, the issue boils down to whether claimant's submission of 126 job contacts and his testimony about the manner in which he went about making whatever job contacts he did make, were credible. The hearing officer found they were not, specifically stating that claimant's job search "was self-restricted, selective, and lacked timing, forethought, and diligence." Claimant disputes that characterization, saying his "almost daily efforts" do show diligence, timing, and forethought. At issue is claimant's credibility and interpretation of the quality of the job search. The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994. Whether the required good faith job search exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have also cautioned that good faith is not established simply by some minimum number of job contacts, but 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. Further, we have held that good faith is largely a question of attitude, as reflected in one's conduct. Texas Workers' Compensation Commission Appeal No. 941292, decided November 9, 1994. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No.

950456, decided May 9, 1995. We find the hearing officer's decision to be supported by sufficient evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge