

APPEAL NO. 990887

Following a contested case hearing (CCH) held on March 31, 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) had some ability to work during the filing period for the eighth compensable quarter; that his self-employment and seeking of three jobs did not constitute a good faith effort to find work commensurate with his ability to work; and by concluding that he is not entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Claimant has appealed these determinations on evidentiary sufficiency grounds and also asserts that he was not able to show all the evidence because the adjuster failed to respond to a subpoena. The file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, with an impairment rating (IR) of 25%; that he did not commute any portion of the impairment income benefits (IIBS); that the eighth quarter began on September 20 and ended on December 19, 1998; and that the filing period began on June 21 and ended on September 19, 1998. Not appealed are findings that during the filing period, claimant earned \$175.00, which is less than 80% of his preinjury wage; that claimant's underemployment during the filing period was a direct result of his impairment; that claimant sought three jobs on one day of the filing period; and that claimant operated his own general contracting business as a self-employed individual throughout the filing period.

Claimant testified that he was injured when he fell off a ladder while installing air conditioning piping and struck his head and that he has been diagnosed with posttraumatic oscillopsia and migraine headaches. His neurologist, Dr. H, reported on February 18, 1999, that claimant has a post-traumatic vertigo disorder characterized by oscillopsia; that oscillopsia is characterized by a "to and fro" motion of the environment, as well as lightheadedness and vertigo associated with changes in position of the body and head; that despite optimal outpatient ophthalmological treatment, the condition has not resolved; and that claimant continues to have symptoms and, for this reason, is not able to work. Claimant testified that he has received SIBS for all prior quarters; that during the filing period at issue he had some ability to work; and that he has been seeking employment, despite Dr. H's concerns, because he has a wife and two children to support. He made clear in argument that he was not taking the position that he had no ability to work at all during the pertinent filing period.

Claimant further testified that he is bothered by flashing lights including computer terminal screens; that he has balance problems and cannot even wash his hair in the shower; that he cannot sleep well; that he cannot fly; that his driving is very limited and Dr. H feels his driver's license should be surrendered; and that sometimes his headaches are

so bad he just wants to be alone. He stated that the Texas Rehabilitation Commission (TRC) helped him in arranging to take college courses in 1994 and 1995 with the goal of having a career as a project manager, given his background in construction, but that he had to give it up because he could not handle the escalator at school and the computer screens. He said he sees the lady at the TRC every quarter. Claimant indicated that, notwithstanding the efforts of the vocational case manager hired by the carrier to work with him, he could not get hired due to his physical problems. In the summer of 1997 he decided, with the encouragement of the carrier's adjuster, Ms. G, to start his own business as an independent contractor in home repairs and remodeling, subcontracting roofing and other parts of jobs he could not do because of his condition. Claimant said that he lacked the money to advertize his home repairs business in the newspaper; that he distributed his advertizement fliers to real estate agents in the area; that his wife goes through the newspapers to find other persons to send fliers to; that he distributed the fliers door-to-door and to nurses at the handicapped hospital; and that he got on lists to receive requests for bids from municipal and school district offices and responded to approximately 15 to 20 of them. He indicated he did not have any records of this bidding activity. Claimant stated that during the filing period, he earned \$175.00 for installing handicapped bars in two houses and that he obtained these jobs from references from the handicapped hospital. He acknowledged that although being self-employed gave him the flexibility to accommodate his varying symptoms, his self-employment efforts have not been very successful. He stated that the carrier had decided not to rehire a vocational case manager to work with him again, commenting that the carrier "finally decided to get rid of me."

Claimant further testified that, toward the end of the filing period, he began looking into the possibility of obtaining a small business loan to buy a furniture repair franchise; that Ms. G told him he needed to go out and look for work; and that, as reflected on his Statement of Employment Status (TWCC-52), on August 10, 1998, he applied for a building inspector job with the (City 1) and for two jobs (building inspector and plans examiner) with the (City 2) because those were the only things he could go out and do quickly. He said he did not have time for other job search efforts in addition to his ongoing efforts to get jobs for his home repair business.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.12(c)(2) (Rule 142.12(c)(2)) provides that an unrepresented claimant may request a subpoena by contacting the Texas Workers' Compensation Commission (Commission) in any manner, and may also request the Commission to arrange for service, at no cost to the Commission. Rule 142.12(e) provides that upon granting a request and issuing a subpoena, the hearing officer shall (1) return it to the requester for service according to Rule 178, Texas Rules of Civil Procedure; or (2) send it the appropriate sheriff or constable for service if an unrepresented claimant has requested the Commission to arrange for service, as provided by subsection (c)(2). Concerning claimant's complaint at the hearing about Ms. G's not complying with a subpoena to appear at the hearing, hearing officer exhibits reflect that on March 3, 1999, claimant submitted to a Commission hearing officer a request for a subpoena to secure the presence of Ms. G at the hearing to testify to "efforts made throughout the years to find suitable employment" and that a hearing officer, on March 4, 1999, signed an order "that a

commission for subpoena to require the presence of [Ms. G] at the [CCH] scheduled for March 31, 1999, at 1:00 PM be issued." Claimant's request for the subpoena did not request or otherwise indicate that claimant sought the assistance of the Commission with service of the subpoena on Ms. G nor was such assistance requested at the hearing. When asked about service of the subpoena order on Ms. G, claimant's assistant stated that the March 4, 1999, order was sent by her office to Ms. G. The hearing officer inquired into the reason for claimant's wanting Ms. G's testimony and claimant said that, over the course of the preceding SIBS quarters, Ms. G had numerous conversations with him and with the rehabilitation persons, and that he wanted her testimony to show all these activities prior to the quarter in issue to help explain the situation he was in during the filing period at issue, including trying to start his own business. The hearing officer then stated that he felt that claimant could cover these matters in his own testimony. Under these circumstances, we do not find reversible error.

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). 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.

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). We are satisfied that the appealed findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. 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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge