

APPEAL NO. 991023

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 22, 1999. She (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 14th, 15th, and 16th quarters. The claimant appeals these determinations, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____, for which he was assigned an impairment rating of greater than 15%. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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, "filing 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 14th SIBS quarter began on December 6, 1997, and the 16th quarter ended on September 4, 1998. The filing periods for these quarters were the preceding 90 days.

The claimant underwent a functional capacity evaluation (FCE) on June 16, 1998. He was reported as demonstrating minimal effort, and placed in at least a medium occupational category. Sometime during the 15th quarter filing period, according to the claimant, he began qualifying as a race car driver and raced competitively on several weekends of the 16th quarter filing period. A videotape of activities associated with racing was shown to Dr. J, the treating doctor, who wrote on May 6, 1998, that these activities exceeded what he had authorized the claimant to do. From this he concluded that the claimant "has not been totally honest with me." The claimant contended that the activities did not involve the degree of effort that a casual observer may believe.

The claimant submitted a Statement of Employment Status (TWCC-52) for 14th quarter SIBS to which he attached, in addition to medical documentation, copies of 14 business cards and nine job applications, three of which were for employment with an employer included in the business cards. One application consisted of a cover page only. Also included was the business card of the local office of the Texas Rehabilitation Commission (TRC) and a letter of December 3, 1997, from the TRC saying that the claimant was a client and had cooperated with the TRC. The claimant described his job

search activities as "mostly walk-ins." Some, he said, were hiring. He received no job interviews. The business cards do not reflect when they were picked up.

The TWCC-52 for the 15th quarter lists 19 job contacts, two of which appear to be duplicates and one entry lists the claimant as the employer and reflects his filing as a candidate for a full-time justice of the peace position. The claimant again described these contacts as walk-ins. He said he filed applications with each employer listed, but received no interviews. He also said he visited the TRC during this filing period. Investigative contacts with nine of these employers failed to confirm that the claimant completed the applications and one employer was not found to exist at the address indicated. The claimant also testified that during this filing period he began training to qualify as a licensed race car driver.

The TWCC-52 for the 16th quarter again lists the justice of the peace elective position, a TRC contact, and another contact, together with the claimant's racing activities. According to the information provided by the claimant, he raced on five days of the filing period. He explained in his testimony that he had to first qualify and only if he qualified would he be eligible to race for a cash prize. He listed his total winnings as \$2,150.00, which, after entry fees of \$1,500.00, left him \$650.00 "in pocket." He said that he no longer looked for work after he began racing for prize money. (The first such event was apparently March 6, 1998.)

The hearing officer considered this evidence and concluded that, for each quarter at issue, the claimant did not establish that he made the required good faith job search or that his unemployment or underemployment was a direct result of his impairment. 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 occurred 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. The claimant appears to argue in his appeal that the number of job applications he submitted for the 14th and 15th quarters established his good faith. There was, however, contrary evidence from which the hearing officer could conclude that not all the employment contacts were made or that the claimant did not pursue employment with the object of finding work, but merely to satisfy on paper the requirement for SIBS in order to enable him to pursue race car driving. With regard to the 16th quarter, the claimant asserts that, once he began racing for prize money, this, in effect, became his job and satisfied the requirement for a good faith job search. The claimant testified that he had to prepare his race car during the week for the limited number of races he engaged in for prize money during the filing period for this quarter. It can also be assumed from his testimony that he did not, in every case, qualify to race for a prize. In any event, there was very little evidence about the time spent during the

week to qualify for weekend racing or how this time and these efforts related to his physical limitations arising out of his injury. Dr. J's comments, quoted above, together with the FCE, are some evidence from which the hearing officer could conclude that the hours the claimant could work were virtually full time. While actually finding and working part time up to one's physical abilities can be prima facie evidence of a good faith job search, see Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997, we cannot agree from the limited evidence that the time spent as a race car driver constituted anything more than a hobby. To the extent it was employment, the hearing officer could consider it to be employment self-limited by the desires of the claimant and not by his ability to work or his impairment. See Texas Workers' Compensation Commission Appeal No. 972352, decided December 31, 1997. Ultimately, as noted above, whether the claimant made the required good faith job search was a question of fact for the hearing officer to decide. In her role as fact finder, she was the sole judge of the weight and credibility of the evidence. Section 410.165(a). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support her determination that the claimant failed to make the required good faith job search in each of the filing periods in issue in this case. Having affirmed these findings, we also consider the evidence sufficient to support the determination that the claimant's unemployment and underemployment was not a direct result of his impairment.

For the foregoing reasons, we affirm the decision and order of the hearing officer that the claimant was not entitled to SIBS for the 14th, 15th, or 16th quarters.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge