

APPEAL NO. 991629

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 9, 1999, a contested case hearing (CCH) was held. In response to the issues at the CCH, the hearing officer determined that: (1) respondent (claimant) is entitled to supplemental income benefits (SIBS) for the second compensable quarter and that (2) appellant (carrier) is relieved of liability for second quarter SIBS from March 22, 1999, through April 4, 1999, because claimant was late in filing her Statement of Employment Status (TWCC-52). Carrier appeals these determinations on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant is entitled to SIBS for the second compensable quarter. Carrier contends that: (1) claimant was able to work full time during the filing period; (2) claimant did not make adequate efforts to generate business for her needlework business and earned very little money; and (3) claimant could have worked in addition to running her needlework business, but chose not to and self-limited her job search.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than 80% of the 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. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The fact that a claimant is self-employed is not automatically dispositive of the issue of good faith job search for purposes of SIBS entitlement. A search for employment with third persons is not absolutely required, however, the fact of self-employment does not automatically obviate any need to search for work. In assessing the issue of good faith, the hearing officer may consider whether an injured worker who is self-employed has made efforts to solicit business and obtain customers. See *generally* Texas Workers' Compensation Commission Appeal No. 960188, decided March 13, 1996.

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 is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been 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 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant's IR was 15%; and (3) the filing period began on December 21, 1998. The second compensable quarter ran from March 22, 1999, to June 20, 1999. Claimant said she was living in a town of approximately 24,000 people in (State B) during the filing period for the second compensable quarter.

Claimant's medical records indicate that she sustained her _____ compensable back injury when she fell against a table while working as delivery room nurse. In a February 8, 1999, medical note, Dr. P noted under "impression," "failed back surgery syndrome," that claimant is fairly stable, and that "she is somewhat less functional than she was a year ago." In an April 5, 1999, letter to Ms. H stated that claimant's work status data indicates that she is able to work at the sedentary level for four hours per day. Ms. H recommended that claimant start out at two hours per day and work up to eight hours per day. Ms. H stated that claimant's restrictions included no bending and limited walking, squatting, and kneeling. Previous FCE reports stated that claimant could perform full-time sedentary work. A February 1998 FCE report states that claimant underwent an anterior discectomy with fusion and cages on May 28, 1997, that she has been treated with epidural injections and anti-inflammatories, and that she exhibited no inappropriate illness behavior or symptom exaggeration.

Claimant testified that she continues to have moderate to severe back pain from her injury; that she has intermittent spasms in her low back, legs, and hips; and that, for these reasons, she does not think she could be a reliable employee in the public sector. She said that, during the filing period, she sought work with a medical center and spoke to human resources personnel about any jobs that would fall within her work restrictions. Claimant said she applied for work as a sleep lab aide and initially thought she would be able to do the work. She said she spoke to her doctor and determined that she would not be able to do the work because she could no longer physically perform the required skill of cardio-pulmonary resuscitation. Claimant testified that she met with State B's "Job Services" agency and inquired about jobs within her restrictions. Claimant said she also began working to establish a needlework and sewing business during the filing period. She said she obtained a state tax filing certificate, established a state account tax identification number, and obtained a city permit to operate a home business. Claimant said she set up accounting for inventory and supplies and began promoting her business. Claimant said she makes pillows, wall hangings, christening dresses, and specialty clothing for children involving smocking, embroidery, and beadwork. Claimant testified that she set up a display at the public library and stayed with the display over a two-day period in an effort to promote her business. Claimant said she made flyers about her business, posted them around the town, and gave them to fabric stores and custom clothing or bridal shops. She also spoke at a meeting about her home-based business, created a press release, and sent a related videotape to the local television station. Claimant said that she arranged to teach embroidery for the state 4H Extension office, but that the classes were not taught during the filing period. Claimant testified that she will be also teaching in the future at the

local community college, but it was not clear whether claimant obtained the verbal contract for this work during the filing period. Claimant said that she looked into an internet web page and newspaper advertising, but that she did not have the money to engage in these advertising efforts.

Claimant testified that she made \$35.00 during the first week of the filing period, \$65.00 during the sixth week, \$89.00 during the seventh week, \$15.00 during the eleventh week, \$100.00 during the twelfth week, and \$195.00 during the last week of the filing period. Claimant testified that, at the time of the CCH, her business was “picking up” and that she was going to succeed.

In this case, our review of the record does not indicate that the hearing officer's good faith and SIBS determinations regarding the second compensable quarter are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra. Therefore, there is no basis for disturbing his decision on appeal. The hearing officer heard claimant's testimony about her job search efforts as well as her efforts to drum up business for her new needlework business. The hearing officer noted claimant's efforts to promote her business, including posting flyers, arranging and attending a display at the library, contacting custom dress shops, and designing a brochure for her business. The fact that the evidence could have allowed different inferences under the state of the evidence does not provide a sufficient basis for reversing the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992. The hearing officer's direct result determination is also sufficiently supported by evidence that claimant sustained a serious injury with lasting effects and that, during the filing period, he could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996. The hearing officer considered carrier's assertions regarding the reason for claimant's underemployment and made a direct result determination in claimant's favor. We will not substitute our judgment for his because his direct result determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

Carrier contends the hearing officer erred in determining that it is relieved of liability for second quarter SIBS only from March 22, 1999, through April 4, 1999. Carrier asserts that it did not receive the TWCC-52 until April 14, 1999, so the TWCC-52 was actually 23 days late. Carrier notes that the mail-tracking slip claimant offered as an exhibit listed the wrong zip code. A letter from claimant to the attorney for carrier states that she mailed her SIBS application for the second quarter on April 2, 1999, and that the packet was picked up by an employee for carrier on April 5, 1999. A “track/confirm” slip from the U.S. Postal Service regarding claimant's express mail package to carrier states, “your item was delivered at 11:15 am on April 5 in address.” The hearing officer heard the evidence in this regard and decided what facts the evidence established. We will not substitute our judgment for his because his determination in this regard is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge