APPEAL NO. 991739

Following a contested case hearing held on July 12, 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), by limiting his job search to (employer), did not make a good faith attempt to seek employment commensurate with his ability to work, and by concluding that claimant is not entitled to supplemental income benefits (SIBS) for the fourth compensable quarter. Claimant has requested our review, asserting that during the filing period he was still employed by the employer and that it made no sense to look for another job while the employer was looking for a job for him that would be within his capacity to work. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable back injury; that claimant reached maximum medical improvement on July 28, 1997, with an impairment rating (IR) of 15%; that claimant did not commute any portion of the impairment income benefits (IIBS); that during the filing period for the fourth compensable quarter, claimant had no earnings; that the fourth compensable quarter for SIBS was from March 9 through June 7, 1999; and that the filing period for the fourth compensable quarter for SIBS was from December 8, 1998, through March 8, 1999.

Claimant testified that he had been employed by the employer for approximately eight years and was a "threader operator" working with heavy pipe when he injured his low back at work on _____; that he had a discectomy on May 1, 1997, followed by rehabilitation and that his pain continued; that on June 19, 1998, he underwent two-level lumbar spine fusion surgery (with insertion of screws which are still in place) by Dr. R followed by about eight weeks of rehabilitation; and that he was subsequently released for light duty with restrictions against heavy lifting, bending, stooping, twisting and so forth. Claimant said that he never returned to work following his injury; that on May 1, 1997, he commenced medical leave; that the employer's medical leave program expires after two years after which the employment of employees on that program is terminated; that the employer paid for his insurance until May 1, 1999; and that he considers himself employed by the employer because he still has his badge, he has never received notice that his employment has been terminated, and because he still has his profit-sharing plan. As claimant stated, "I'm still employed there" and "I still want to work there." He said he has not resigned. Claimant acknowledged that he had no earnings during the filing period and that he did not look for any employment other than continuing to contact the employer's human resources office two or three times a month, as he has done since September 1998, in the hope of obtaining a light-duty job within his restrictions. He said the employer had various light-duty jobs but that he has not yet been offered a light-duty job within his restrictions. Claimant further stated that given the standing, heavy lifting and exertion

required, he cannot return to his former job which paid $15.00 per hour with benefits. He also indicated that subsequent to the filing period, he contacted the Texas Rehabilitation Commission (TRC) and underwent aptitude testing with a view towards getting involved in whatever retraining and assistance the TRC may offer him.

Dr. R's September 29, 1998, report states that claimant is almost three months status post anterior lumbar fusion at L4-5 and L5-S1; is feeling great, with his pain much better; and that he is going to start claimant on some extremely light duty with no lifting and start him on therapy "to start building him back ready for full duty." A January 7, 1999, report of a functional capacity evaluation (FCE) concluded that claimant cannot return to his previous job because he is unable to perform in the heavy work category and cannot lift up to 100 pounds but that he can lift up to 30 pounds which places him in the light work category. Dr. R's January 12, 1999, report states that claimant is about seven months status post anterior lumbar fusion at L4-5 and L5-S1 and doing quite well; that claimant just underwent an FCE which indicated that he could do light to medium work; that he will be sent to the employer and cleared for that type of work; and that if the employer cannot find something for him, he will have to go to the TRC for retraining. Dr. R wrote on March 16, 1999, that claimant has not been able to find a job at the medium work level with the employer and is going to the TRC, which he recommends, to get retrained.

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.

Claimant challenges findings that he made no other effort to seek employment during the fourth quarter filing period (in addition to contacting the employer two to three times a month during the remainder of the filing period after being released for light duty on January 12, 1999) and that by limiting his job search to the employer, he did not make a good faith effort to seek employment commensurate with his ability to work. He argues that he should have been given "ample opportunity" to obtain a light-duty position with the employer and that "[i]t just didn't make sense to automatically give up the good job that I had while my employer was telling me that they were looking for me another position [sic]."

The carrier cited two cases to the hearing officer. In Texas Workers' Compensation Commission Appeal No. 970828, decided June 20, 1997, the injured employee testified that to her knowledge she was still employed by the employer, although her position had been filled, and that she had been told not to return until she was "100%." The employee acknowledged that she did not look for other employment in the filing period and her doctor had not given an opinion on her ability to work. The Appeals Panel reversed the hearing officer's decision, rendering a new decision that the employee was not entitled to first quarter SIBS and stating that "[w]hile the facts presented at this hearing appear to place claimant in a quandary as to whether to look for another job or wait for a return to her past employment, such a dilemma does not set aside the requirements for SIBS which calls for a good faith attempt to obtain employment commensurate with a claimant's ability."

In Texas Workers' Compensation Commission Appeal No. 980206, decided March 20, 1998, where the evidence indicated that the injured employee, during the two filing periods, contacted only her employer at the time of her injury, the Appeals Panel reversed and rendered a decision that the employee was not entitled to first and second quarter SIBS. Our decision stated that because the employee made essentially one effort to find employment during each of the two filing periods, which amounted to a contact with her employer to see if her restrictions would be accommodated, and given evidence that the employee had the ability to work with restrictions during most of the two filing periods, the hearing officer erred as a matter of law in holding that the employee made a good faith attempt to obtain employment.

In his discussion of the evidence, the hearing officer indicated that he appreciated that, like the claimants in the two above-mentioned cases, claimant was on the horns of a dilemma, given his longevity and the employer's high pay scale on the one hand, and the unlikely prospect of his returning to work for the employer on the other. However, the hearing officer felt that while claimant's belief that he was still an employee was not unjustified, he was obligated to seek other employment, and that his limiting his job search efforts to the employer did not meet the statutory requirement of making a good faith effort to obtain employment. 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 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.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge