APPEAL NO. 991753

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 21, 1999, a contested case hearing (CCH) was held. With respect to the only issue before him, the hearing officer determined that the respondent (claimant) had attempted in good faith to obtain employment commensurate with his ability to work, that claimant's underemployment was a direct result of his impairment and that claimant was entitled to supplemental income benefits (SIBS) for the third compensable quarter.

Appellant (carrier) appeals several of the hearing officer's findings, contending that claimant's three job searches in a four-week period (prior to finding part-time employment) did not constitute a good faith effort, that the doctors had not limited the number of hours claimant could work and that claimant's underemployment was not a direct result of his impairment. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from claimant.

DECISION

Affirmed as modified.

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.

Although not stipulated, it is undisputed that claimant sustained compensable neck, right shoulder, bilateral knee and hand injuries on _____, in a slip and fall at work. The parties stipulated that claimant reached maximum medical improvement on January 16, 1997, with a 31% impairment rating, that impairment income benefits were not commuted, that the filing period for the third compensable quarter was from January 29, 1999, through April 29, 1999, and that during the filing period claimant failed to earn 80% of his preinjury wage. Claimant testified that during a part of February 1999 he made two job contacts before contacting a friend at the local newspaper about a job around February 24, 1999. Claimant told his friend about his restrictions and was hired in a part-time supervisory capacity working two days a week, five or six hours a day. Claimant testified that he continued working that job throughout the filing period but that he eventually had to quit in

May 1999 because his neck and shoulder pain became so severe.

The medical records reflect that claimant is about 66 years old, that he had right shoulder rotator cuff repair in July 1995, that he had two cervical spine surgeries, an "anterior cervical disk and fusion" at C5-C6 in September 1995 and a posterior diskectomy and foraminotomy at C5-C6 in June 1996. Claimant also had a right carpal tunnel syndrome release on November 10, 1998, by Dr. R, claimant's treating doctor. In a note dated January 27, 1999, Dr. R remarked claimant was "symptomatic from a cervical radiculopathy," that claimant was "unable to work at this time" and that claimant's restrictions were "no overhead work, no lifting more than 5 pounds, no repetitive use of the right arm, and no gripping with the right hand." Apparently at carrier's request, a functional capacity evaluation (FCE) was performed by Dr. O on March 8, 1999. The FCE noted that complaints of pain during the FCE were inconsistent with his heart rate. Dr. O summarized:

> As such, based on these findings, he primarily can perform Sedentary to Light work. He does not have the endurance to do anything more than that. As a matter of fact, he stated he is working part-time as a supervisor. I see no reason why he could not continue working as a supervisor, as he would qualify for Sedentary and Light work based on the Dictionary of Occupational Titles. His maximum lift should not exceed 35 pounds, and frequent lifting should not exceed 11 pounds. He can sit or stand at least 2 hours without a short break before repeating. He should not climb ladders or work at unprotected heights. He cannot perform repetitious pinch and grip with his upper extremities. Other than this, he can perform any job in the Sedentary to Light Category.

Claimant was seen by Dr. R on April 13, 1999, and was given a return appointment "in two to three months." In a note dated April 30, 1999 (claimant denies seeing Dr. R at that time or asking him to write the note), Dr. R states claimant "is unable to work due to continued neck pain and radiculopathy. Therefore, the number of hours he can work per day is 0." Claimant testified that he continued working the part-time supervisor job at the newspaper for about two more weeks after the date of the note.

The hearing officer made the following challenged findings:

FINDINGS OF FACT

6. Claimant worked each day until the pain from his _____ injury became unbearable.

10. During the filing period for the 3rd compensable quarter, Claimant attempted in good faith to obtain employment commensurate with his ability to work.

11. Claimant's decrease in earnings during the filing period for the 3rd compensable quarter is a direct result of Claimant's impairment from his compensable injury of _____.

Carrier argues that claimant made a total of only three job contacts "during the first few weeks of the filing period" and did not begin his job until "approximately five weeks into the filing period." We note that the filing period began on January 29th and that claimant began his job on February 26th, exactly four weeks from the beginning of the filing period. Whether three job contacts, one of which led to part-time employment, constitutes a good faith search is a factual determination for the hearing officer to resolve. We do, however, hold that Finding of Fact No. 6, quoted above, is unsupported by any evidence. Claimant testified, it is undisputed, and the hearing officer found in an unappealed fact finding that claimant worked an average of two days per week for an average of five to six hours per day. The finding that claimant worked each day until he was forced to quit is unsupported and we hereby reverse that finding as being against the great weight of the evidence.

Claimant argued at the CCH that seeking and finding a job during the filing period constituted a prima facie indication of a good faith effort. We have held that the fact that an injured worker accepts employment that results from a search can constitute a prima facie case that the search leading to the offer was made in good faith, absent evidence of collusion between the worker and the prospective employer. Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997; Texas Workers' Compensation Commission Appeal No. 982880, decided January 21, 1999. The critical question becomes whether the part-time employment was commensurate with claimant's ability to work. Carrier argues that no doctor has limited claimant to a certain number of hours per day or days per week. We have recited the restrictions and limitations placed on claimant by Dr. R and Dr. O. In addition, claimant testified that he was incapable of working more due to the pain and the need to recover after working. Carrier argues that pain "is a very subjective factor" and that claimant had not established that the pain was a direct result of his impairment. All of these factors were presented to the hearing officer whose duty it is to resolve conflicts and contradictions in the evidence. We have often noted that 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. Claimant did obtain a part-time job and claimant's testimony, as well as Dr. O's FCE summary, support that job as being commensurate with claimant's ability to work.

With the exception of Finding of Fact No. 6, we find that the hearing officer's decision is supported by sufficient evidence and, accordingly, with the deletion of Finding of Fact No. 6, we affirm the hearing officer's decision and order.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Judy L. Stephens
Appeals Judge