APPEAL NO. 991997

On August 19, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were appellant's (claimant) entitlement to supplemental income benefits (SIBS) for the ninth and 10th quarters. The claimant requests that we reverse the hearing officer's decision that he is not entitled to SIBS for the ninth and 10th quarters and render a decision in his favor. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has an impairment rating (IR) of 15% or more, has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment, has not elected to commute IIBS, and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by claimant during the prior filing or qualifying period. Claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement on February 7, 1996, with a 19% IR; that he did not commute IIBS; that the ninth quarter was from March 10, 1999, to June 8, 1999; that the 10th quarter was from June 9, 1999, to September 7, 1999; and that claimant earned no wages during the filing period for the ninth quarter and the qualifying period for the 10th quarter.

Claimant testified that he was employed as a salesman in an appliance store on _____, when he injured his right shoulder and lower and upper back helping to lift a range at work; that he was initially treated by Dr. R, D.C.; that he changed treating doctors to Dr. N; that he continues to treat with Dr. N; that he takes pain medications; that he had shoulder and back pain during the relevant filing periods; that he believes that he can perform sales work if he does not have to do any lifting; that he looked for a sales job during the relevant filing periods; that he personally went to the employers listed on his SIBS applications and filled out job applications where there were job openings; that he did not get a job interview or a job offer; and that certain employers he went to had job openings but the jobs were filled when he applied. In November 1995 claimant underwent

surgery to remove a cyst in his cervical spine that was unrelated to his work injury. Dr. N wrote in August 1997 that claimant should consider retraining and that an occupation in a sales capacity may be a consideration.

In his application for the ninth quarter, claimant listed approximately 39 contacts with employers that he made during 24 days of the filing period and noted that most of the places he went to did not have job openings. In his application for the 10th quarter, claimant listed approximately 39 contacts with employers that he made during 26 days of the qualifying period and noted that some places he went to had no job openings in sales, some had job openings in sales but applications were not available, some had had job openings in sales but those openings had been filled, and some had job openings in sales and he filled out applications for those jobs.

There was extensive questioning of claimant regarding how and where he went about his job search. The hearing officer wrote in her decision that she found claimant to be unconvincing that he was making an honest attempt to find employment and that he was not simply going through the motions to qualify for SIBS. The hearing officer found that during the filing period for the ninth quarter and the qualifying period for the 10th quarter, claimant had an ability to work, he did not make a good faith effort to obtain employment commensurate with his ability to work, and his unemployment was not a direct result of his impairment. The hearing officer concluded that claimant is not entitled to SIBS for the ninth and 10th quarters. Claimant contends that the great weight of the evidence is contrary to the hearing officer's decision. Whether claimant made a good faith attempt to obtain employment commensurate with his ability to work and whether his unemployment was a direct result of his impairment were fact questions for the hearing officer to determine from the evidence presented.

In determining good faith the hearing officer can consider the manner in which a job search is undertaken with respect to timing, forethought, and diligence. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel rejected the contention that a certain number of job applications automatically constitutes a good faith effort to obtain employment and noted that, in common usage, good faith is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intent to defraud, and, generally speaking, means being faithful to one's duty or obligation. In Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel stated that in determining whether claimant has attempted in good faith to obtain employment commensurate with claimant's ability to work, the hearing officer must sometimes assess whether contacts made with prospective employers constitute a true search for employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge