APPEAL NO. 992029

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 August 17, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the ninth and 10th compensable quarters. The appellant (carrier) appeals, urging that the claimant did not make a good faith effort to seek employment commensurate with his ability to work; that the claimant's underemployment, if any, is voluntary; and that the decision rendered by the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the carrier accepted liability for an _____, injury; that the claimant had an impairment rating of 15 percent or greater from the _____, injury; that the claimant did not elect to commute any portion of impairment income benefits; that the ninth compensable quarter is from February 4, 1999, through May 5, 1999; and that the 10th compensable quarter is from May 6, 1999, through August 4, 1999. The claimant testified that on _____, he was working as vice-president of operations for employer, a supplier of non-ferrous metals, when a warehouse door broke off of its track and hit him, injuring his back and left hip. As a result of the injury, the claimant had a lumbar fusion in August 1994, surgery on his hip in 1997, and will need a hip replacement in the future. The claimant testified that during the filing periods, his treating doctor, Dr. K, released him to work with restrictions of no lifting over 30 pounds, turning, squatting or impact activity. The claimant testified that he is a certified hotel administrator and spent 18 to 20 years managing hotels before going to work for employer.

The claimant testified that during the filing periods he ran a restaurant that he owns; that his job involved day-to-day operations and was within his work restrictions; that he worked at least 40 hours per week at the restaurant; that he paid himself $350.00 per week in wages; that the restaurant was losing money, but he was attempting to market the restaurant to improve business; and that he applied for jobs in the field of hotel management. The claimant said that his plan is to sell the restaurant and go back into the hotel industry. According to the claimant, he followed up on the job referrals recommended by the carrier's vocational consultant, but many of the jobs she referred were not appropriate for his qualifications because they were entry-level management positions, and paid approximately what he earned at the restaurant.

The carrier asserts that the claimant did not make a good faith effort to seek employment commensurate with his ability to work, but rather devoted his time to his

business voluntarily, and that the claimant's underemployment is voluntary. The carrier argues that the claimant represented on his Statement of Employment Status (TWCC-52) for the ninth quarter and in a recorded statement that he earned $700.00 a week. The claimant testified that he made a mistake when he listed an income of $700.00 per week on the TWCC-52 because he was paid $700.00 biweekly. In evidence are pay stubs indicating the claimant was paid $700.00 biweekly for the period beginning October 31, 1998, through January 8, 1999. The carrier argues that the claimant owns 100% of the corporation that owns the restaurant, that a profit and loss statement for 1998 indicates the restaurant had a gross income of over $276,000.00 for 1998 and that such gross income indicates that the claimant earned more than 80% of his preinjury average weekly wage (AWW).

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 [AWW] as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Good faith is a subjective notion and generally means honesty of purpose, freedom from intent to defraud and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994. We have held that the good faith effort necessary for SIBS is to obtain employment commensurate with the ability to work, not to obtain employment at a certain wage scale. Texas Workers' Compensation Commission Appeal No. 960946, decided July 1, 1996. Self-employment, as well as a search for employment with third persons, may fulfill the good faith requirement. Texas Workers' Compensation Commission Appeal No. 951356, decided September 27, 1995. In Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997, the Appeals Panel considered whether all gross amounts received by a self-employed worker are considered as wages for purposes of computing SIBS and, in determining that they did not, the majority stated:

> Although we agree that Appeal No. 950819 [Texas Workers' Compensation Commission Appeal No. 950819, decided July 6, 1995] was correctly decided under the facts of that case, we believe that the quoted provision was overbroad to the extent it equated all gross receipts to gross wages. . . . We cannot apply the decision in Appeal No. 950819 to remove from the hearing officer the ability to evaluate the facts of the case before him, because the statutory provisions focus not on income but on "wages." While it could be argued that amounts retained for a company's growth are discretionary, the expenses required to operate the business, such as equipment and materials purchases, are not. They must be expended in order to produce income.

The hearing officer found that during the ninth quarter filing period the claimant earned $350.00 a week in wages for personal services, that his underemployment was a direct result of his impairment, that the claimant was self-employed working 40 hours a week or more, that the claimant made applications for eight positions in hotel management, and that the claimant made good faith efforts to seek employment commensurate with his

ability to work. The hearing officer found that during the 10th quarter filing period the claimant earned $350.00 a week in wages for personal services, that his underemployment was a direct result of his impairment, that the claimant was self-employed working 40 hours a week or more, that the claimant made applications for about 14 positions in hotel management, and that the claimant made good faith efforts to seek employment commensurate with his ability to work. In evidence was a profit and loss statement for the claimant's business for January through December 1998 which indicated a gross profit of $276,630.87 and a net income of -$7,888.20. The claimant testified that he is currently $30,000.00 "in the hole" and that he is marketing the restaurant to try and improve sales with promotional handouts, business card drawings, and a catering business.

Whether the claimant made a good faith effort to seek employment commensurate with his ability to work and his underemployment was a direct result of his impairment during the filing periods presented the hearing officer with questions of fact to resolve. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The trier of fact may believe all, part or none of a witness' testimony. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight 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). We find there was sufficient evidence to support the hearing officer's determination that the claimant made a good faith effort to obtain employment commensurate with his ability to work, that the claimant's underemployment was a direct result of his impairment, and that the claimant is entitled to SIBS for the ninth and 10th compensable quarters.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge