APPEAL NO. 000266

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 January 20, 2000. The hearing officer determined that the appellant (claimant) had some ability to work during the 9th and 10th compensable quarters; that he did not attempt in good faith to obtain employment commensurate with his ability to work; and that he, therefore, was not entitled to supplemental income benefits (SIBS) for the 9th and 10th compensable quarters. The hearing officer determined that the claimant's unemployment in the filing period for the 9th quarter and his unemployment/underemployment in the filing period for the 10th quarter were a direct result of his impairment.

In his appeal, the claimant contends that the hearing officer's determinations that he did not make a good faith effort to look for work commensurate with his ability to work in the filing periods for the 9th and 10th quarters are against the great weight of the evidence. The respondent (carrier) response urges affirmance. The carrier did not appeal the hearing officer's direct result determinations and they have, therefore, become final pursuant to Section 410.169.

DECISION

Affirmed.

This is a SIBS case decided prior to the effective date of the new SIBS rules. The filing periods for the 9th and 10th quarters ran from March 7 to June 5, 1998, and from June 6 to September 4, 1998, respectively. The claimant sustained a back and shoulder injury on _____. His testified that since his injury, he had worked off and on in various manual labor and construction jobs. The claimant said that sometime in January 1998, he just could no longer work with the pain anymore. He said that his treating doctor, Dr. B, had always questioned why he was working, pointing out that he could make himself worse. The claimant did not search for work during the filing period for the ninth quarter, insisting that he was unable to work during that time. The claimant continued to be off work until August 1, 1998, when he began to work for Company B, a job which continued through February 1999. The record does not clearly establish when the claimant made the search, resulting in his employment on August 1, 1998.

The medical evidence showed that claimant had a herniated disc at L4-5 for which surgery had been recommended. The claimant testified that he decided not to have back surgery in early 1998. Dr. B's reports of January, February, and March 1998 show that claimant was treated for pain with epidural injections. Dr. B's reports do not comment, one way or the other, about the claimant's ability to work. On October 5, 1998, Dr. B wrote that claimant was in severe pain and not able to lift from April through July 23, 1998. He wrote that claimant was totally incapacitated as a result.

Claimant's consulting surgeon was Dr. V. Dr. V recommended shoulder surgery on June 17, 1998, noting that conservative measures had failed. The claimant apparently also declined the shoulder surgery. He said that the reason he looked only for construction jobs or manual labor is that was all he could do. He said that his lifting limit had been 50 pounds and the job he had up to February 1998 did not require that. He had received SIBS in some prior quarters.

The hearing officer determined that the claimant did not make a good faith effort to look for work commensurate with his ability to work in the filing periods for the 9th and 10th quarters. The claimant's entitlement to SIBS in the 9th and 10th quarters are to be determined under the "old" SIBS rules. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact decides the weight to assign to the evidence before him and resolves conflicts and inconsistencies in the testimony and evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work in the filing periods for the 9th and 10th quarters. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. The hearing officer was not persuaded that the evidence from Dr. B was sufficient to demonstrate that the claimant had no ability to work in the filing periods for the 9th and 10th quarters. He was acting within his province as the sole judge of the weight and credibility of the evidence in so evaluating that evidence. Our review of the record does not reveal that the hearing officer's determination in that regard is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

It is undisputed that the claimant began working during the filing period for the 10th quarter, specifically on August 1, 1998. As noted above, the filing period for the 10th quarter ran from June 6 to September 4, 1998. In Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997, the Appeals Panel reversed the hearing officer's determination that a claimant was not entitled to SIBS and rendered a new decision that he was eligible to receive those benefits. In Appeal No. 971349, the claimant applied for employment during the filing period and was hired after the filing period had

ended. In rendering a decision that the claimant had made a good faith job search, that case states:

> What strikes us as especially erroneous about the hearing officer's determination that there was not a good faith search is that claimant actually undertook employment from an offer directly resulting from his search efforts during this quarter. Indeed, we believe that a search which yields an offer and then acceptance of employment is prima facie evidence of good faith, absent some showing that there was collusion between a claimant and an "employer" for purposes of assisting payment of SIBS.

We do not read Appeal No. 971349 to stand for the proposition that a claimant satisfies the good faith requirement as a matter of law if any job search effort he made in the filing period results in his obtaining employment. In this instance, the hearing officer apparently determined that because of the claimant's failure to make any job search efforts in the period from June 6 to either late July or August 1, 1998, the claimant failed to establish that he made a good faith effort to look for work commensurate with his ability in the filing period, even though he worked for the portion of the filing period from August 1 to September 4, 1998. Under Appeal No. 971349, the ultimate success of a job contact made during the filing period is evidence which weighs heavily in favor of a determination that the claimant has satisfied the good faith job search requirement; however, that factor is not in and of itself determinative of the question. The issue of whether the claimant in this case made a good faith effort to look for work commensurate with his abilities was a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. The hearing officer is the sole judge of the weight and credibility of the evidence under Section 410.165(a). He determined that, in spite of the fact that the claimant worked for over a month of the filing period, the claimant nonetheless did not sustain his burden of proving good faith. The hearing officer was free to consider the claimant's apparent inactivity in terms of seeking employment for the first two-thirds of the filing period in resolving the issue of whether the claimant made the required good faith search for employment. Nothing in our review of the record indicates that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for disturbing it on appeal. Pool, *supra*; Cain, *supra*. The fact that another fact finder may well have drawn other inferences from the same evidence, which would have supported a different result, does not provide a basis for reversing the decision on appeal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Philip F. O'Neill

DISSENTING OPINION:

I dissent from the denial of benefits for the 10th quarter, and would reverse the hearing officer's determination that the claimant was not entitled to supplemental income benefits (SIBS) for the 10th quarter. In my opinion, the determination of "good faith search for employment" is not purely a factual matter. The statute has divided SIBS entitlement into quarters and requires that the employment search with that period be evaluated. Although the current Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) speaks of a weekly job search, this rule was not effective during the period under consideration, and the hearing officer was freer to review the forest, rather than the trees, of the efforts made. For the time period in issue, the Appeals Panel had held that there was no "magic number" that would render a search in good faith, or not in good faith. The statute and rules only required that a "good faith" search for employment be made. Good faith is a subjective concept and generally means honesty of purpose, freedom from intent to defraud, and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996.

There can be no greater evidence that a sincere search for employment was undertaken than the acceptance of, and engagement in, employment during the period under review. We have noted before (even where the search was undertaken well into the quarter) that the acceptance of employment from an offer which results from a search is prima facie evidence that the search was undertaken in good faith. Texas Workers' Compensation Commission Appeal No. 981530, decided August 24, 1998; Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997.

While good faith may be a question of fact for the hearing officer, it must be tempered with proper application of the purpose and language of the law. It seems surreal to find, as the hearing officer did, that claimant made no good faith "attempt" to find employment during the 10th quarter filing period when he actually found, and worked at, gainful employment which continued thereafter for several months. This is exactly what the job search requirement for SIBS is all about.

If the contact that led to this employment was not "good faith," was it undertaken in bad faith? Clearly not. But the rhetorical question could be posed as to how the trier of fact should evaluate claimant's inactivity at the earlier portion of the filing period. My response would be: You apply the operative statutory language "attempted in good faith to obtain employment" by employing the longstanding, and recently reinforced, doctrine of liberal construction of the workers' compensation laws. Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999). In short, given two arguably supportable ways of interpreting the evidence

and applying the statute, you adopt the construction that carries out the remedial purpose of the act, in this case, that SIBS should guide the trajectory of a return to employment.

_____
Susan M. Kelley
Appeals Judge