APPEAL NO. 000611

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 29, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the 13th quarter. The hearing officer determined that the claimant was not entitled to SIBs for the 13th quarter because during the qualifying period for that quarter he failed to make a good faith effort to obtain employment commensurate with his ability to work. The claimant appeals, asserting that he looked for employment at food service establishments because cooking is about the only thing he thought he could do and that he also went to the businesses identified by the vocational consultant. The respondent (carrier) urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, while employed by (employer); that he reached maximum medical improvement on July 15, 1995, with an impairment rating (IR) of 25% and did not commute any portion of his impairment income benefits (IIBs); that the qualifying period for the 13th quarter began on September 6, 1999, and ended on December 5, 1999; and that the 13th quarter began on December 19, 1999, and ended on March 19, 2000.

Not appealed are findings that claimant was unemployed as a direct result of his impairment; that he was able to work in some capacity; and that he looked for employment commensurate with his ability to work every week of the qualifying period and documented his job search efforts. These findings have become final. Section 410.169. In addition to the dispositive conclusion, claimant does appeal the finding that he did not make a good faith effort to obtain employment commensurate with his ability to work.

Claimant testified that following his compensable injuries he underwent multiple surgical procedures for his low back and hernia injuries. He said that during the filing period for the 10th quarter, he made approximately 40 job contacts and that he did not apply for SIBs for the 11th and 12th quarters nor did he find work during those quarters. He stated that during the qualifying period for the 13th quarter, he was restricted from heavy lifting and frequent bending; that he had no telephone or car; that he made 27 job contacts; that he had no resume; that he learned of some of the potential jobs from the occasional newspaper he would acquire or from talking to people; that he got two job leads from an employment service; that he just walked into the other businesses; and that he listed some of the businesses more than once on his Statement of Employment Status (TWCC-52) because he was told to check back at a later time to see if they were hiring. Claimant further testified that he concentrated his job search on cook jobs at small restaurants because he had previously done some cooking, knows a little bit about cooking, and thought he would enjoy it. He also said he is to avoid prolonged

standing; that he can stand as long as he can move around; and that if he obtained work at a food service establishment he would just have to try it to see if he could do it.

The carrier introduced a report documenting efforts to verify claimant=s employment search contacts. According to this report, seven employers were not hiring, two could not be reached, three had no applications on file, ten did have applications on file, and one could not be identified from the information claimant provided.

Dr. T wrote on May 12, 1999, that claimant remained neurologically stable without neurological deficit or radicular finding and that he was to avoid any unnecessary bending and heavy lifting and restricted claimant=s lifting capacity to no more than 25 to 30 pounds.

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.

Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' Rule 130.102(e) (Rule 130.102(e)) provides, in part, that in determining whether or not the injured employee has made a good faith effort to obtain employment under Rule 130.102(d)(5), the reviewing authority shall consider information from the injured employee which may include, but is not limited to, both the number and types of jobs sought, applications or resumes documenting the search, cooperation with the Texas Rehabilitation Commission, cooperation with a vocational rehabilitation program, the education and work experience of the injured employee, the amount of time spent in attempting to find employment, any job search plan by the injured employee, potential barriers to successful employment, registration with the Texas Workforce Commission, and any other relevant factor.

In her discussion of the evidence, the hearing officer notes that while claimant did sufficiently document his job search, which included each week of the qualifying period, as required by Rule 130.102(d)(5), he nevertheless failed to prove he made a good faith effort to look for work commensurate with his ability to work. It is clear from the discussion that the hearing officer believed that claimant was only Agoing through the motions@ of a search. Also noting that most of the businesses claimant contacted were food service establishments, the

hearing officer stated that claimant should have had a better plan than simply walking into or calling food service establishments, most of which were not hiring, and asking for a job. She further noted that claimant had not changed his pattern of job search from efforts that had earlier proved ineffective.

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)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the factual determination of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O=Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge