APPEAL NO. 001280

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 May 4, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter. Critical to her determination was her finding that the claimant sought jobs that were not within his restrictions.

The claimant has appealed and argues that there is no evidence to support the hearing officer's finding that the claimant applied for jobs he could not do. The claimant argues that the field of jobs as described on the Application for [SIBs] (TWCC-52) does not mean that the position applied for within that field was beyond his abilities. He argues that he has made a good faith search as required by the statute and rules.

The respondent (carrier) responds that the determinations of good faith are fact issues which should not be reversed by the Appeals Panel. However, some of its good faith arguments are formulated as if the claimant was contending no ability to work, which was not the case here.

DECISION

Affirmed based upon our standard of review.

The claimant worked previously as a maintenance man for an apartment complex. He was injured on _____, and had two surgeries. According to the records in the file, Dr. D advised that the claimant could perform work so long as it did not require more than 20 pounds of lifting. He said that he did not believe the claimant could climb either.

The claimant's testimony was translated. There were a couple of times in the record where confusion in making the translation was alluded to, in part because the claimant answered in mixed English and Spanish at one point. According to the claimant's TWCC-52, he sought jobs in every week of the qualifying period, which ran from October 10, 1999, through January 8, 2000. He applied for a range of positions, including some generally described as "maintenance."

The claimant said he could not do the heavy apartment complex maintenance work he had done before, which involved air condition repair. However, he felt he could do maintenance supervision even in this area. There was no evidence that positions, including maintenance positions, were known to him in advance to exceed a 20-pound lifting limit or in fact would have exceeded such limit. The claimant said that he discussed with prospective employers he interviewed with the fact of his injury and his limitations.

Vocational testing results by a counselor for the carrier in the file showed that the claimant read at the 10th grade level and performed arithmetic at the sixth grade level. The claimant's treating doctor was Dr. G, whose assessment was that the claimant should remain off work. The record showed that the claimant was beginning to work in December 1999 with the Texas Rehabilitation Commission on retraining. The record also showed that the claimant was meeting with the carrier's vocational counselor to come up with a plan to return to work, although at her first meeting in early October 1999 she noted that the claimant felt he needed more time to heal. There is evidence in the file showing that there were doctor's appointments throughout the period and one day, October 29, when three objective spinal tests were performed.

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. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a).

We agree that while it is not clear that all maintenance jobs could be considered, per se, to exceed the claimant's capabilities, the hearing officer could believe from claimant's testimony about being able to perform only supervisory maintenance jobs that he was more likely than not applying for positions that he would not be able to accept.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) (Rule 130.102(d)(5)) provides that an employee has made a good faith search for employment if he or she has provided sufficient documentation as described in subsection (e) of the rule. Subsection (e) requires a job search to be made every week and lists factors that must be considered, including the education and experience of the employee and the amount of time spent

attempting to find employment. While different inferences could be drawn in this case, and it appears from comparison with his last quarter that the claimant has made a move toward the statutory requirements, the hearing officer's decision is not so against the great weight and preponderance of the evidence that a reversal is mandated.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Gary L. Kilgore
Appeals Judge