APPEAL NO. 001533

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 June 2, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 15th compensable quarter. The claimant has requested our review, asserting that the hearing officer's determination is against the great weight of the evidence. The respondent (carrier) contends that the evidence is sufficient to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, reached maximum medical improvement with an impairment rating (IR) of 15% or greater, and did not commute any portion of his impairment income benefits (IIBs); that the qualifying period for the 15th compensable quarter was from November 30, 1999, through February 28, 2000; and that the claimant had no earnings during the qualifying period.

The claimant does not challenge findings that he had an ability to work during the qualifying period; that he sought employment with several potential employers during the qualifying period; that his job search encompassed each week of the qualifying period and he sought work with one to four employers each week; that he would contact several employers, go one day to pick up and deliver his applications, and that as he lived in a rural area, this search was reasonable; that he utilized newspapers in making his job search; and that his unemployment was a direct result of the compensable injury. The claimant does challenge the sufficiency of the evidence to support the hearing officer's dispositive legal conclusion as well as factual findings that the evidence showed that he was looking for work merely to qualify for SIBs and that the totality of the evidence established that he did not make a good faith effort to look for work during the qualifying period.

The hearing officer's Decision and Order contains a thorough recitation of the evidence with which neither party takes issue. Accordingly, we will limit our recitation of the evidence to that directly bearing on the two appealed findings.

The claimant testified that in August 1993 he injured his low back at work; that he underwent a 360E spinal fusion surgery procedure on October 13, 1998, by Dr. G; that he also has an unrepaired hernia related to his surgery; that he has excruciating pain which makes it difficult for him to get out and look for work; and that his doctor has never released him to return to work. In evidence is a letter from Dr. G dated March 2000, stating that "[the claimant] was unable to perform any type of work during the qualifying period of 11/30/99 to 02/28/00, due to his on-the-job injuries he sustained on or about _____." His representative mentioned in closing argument that the claimant uses a cane. The

claimant also indicated that he had an earlier low back injury for which he had surgery and that the carrier had succeeded in obtaining contribution. The claimant further stated that he has a sixth grade education; that he lives in a rural area; that it has been so long since he has worked that he lacks the ability to work but yet needs to support his family; that he looks in the newspapers on Wednesdays and Sundays for job postings and also talks to friends about jobs; that he sought jobs in several towns in the area where he lives; and that his biggest problem is the cost of gas. He further testified that he acquires the names of various employers to contact from newspapers, drives to a number of these businesses just on certain days in order to conserve gas, picks up employment applications, takes them home, completes them and makes copies, and then on another day returns the completed applications. He also said he keeps a "journal" to prove he contacted the businesses listed in order to meet the good faith requirement. The claimant also said he called back to several of the businesses he contacted but was not successful in getting employment. He had no documentation of any follow-up contacts. The claimant indicated that he contacted the Texas Rehabilitation Commission (TRC) in February 2000 and was told he could not be assisted. He introduced documentation of his February 2000 contact. He also said he was unfamiliar with the Texas Workforce Commission (TWC). He also indicated that shortly after the qualifying period he obtained employment at a service station/convenience store but quit after one week because he had to do too much standing and bending. The claimant indicated that what he would really like to do is get back to truck driving but that he cannot do it.

The claimant's Application for Supplemental Income Benefits (TWCC-52) reflects that 37 contacts within the qualifying period and two just after that period; that most of the contacts were for cashier and clerk jobs; and that the remaining three were for cook/helper and guard jobs. Attached to the TWCC-52 in evidence is a copy of the claimant's "Journal of Employment Contacts" and copies of numerous completed employment applications. The "journal" consists of several pages of a typewritten form or matrix with columns for the dates of the contacts, names and addresses of the businesses, names of the persons contacted, title of position, certain additional data. The claimant also introduced a copy of his "journal" for the 14th quarter which was entirely typewritten including the entries in the matrices and which also showed that the predominant number of jobs sought were for clerk, cashier, and checker positions.

The carrier introduced a March 15, 2000, report of Ms. M with (company), reflecting that of the 31 employers listed on the TWCC-52, 13 confirmed that the claimant submitted an application, one confirmed no application, six were unavailable for comment, two were unable to confirm information, one did not or would not confirm information, and for eight, there was insufficient information on the TWCC-52. This report also reflected that the person contacted at (business), which had an application from the claimant, advised Ms. M that the claimant informed the business "that he was required to look for work and in case any one called to confirm he had stopped by to look for work."

The carrier also introduced the September 20, 1999, report of Dr. S. Dr. S reported that the claimant is a 45-year-old truck driver; that he was injured at work when he strained

extremely hard to loosen a valve and felt a snap in his back; and that he underwent a global fusion at L3-4, L4-5, and L5-S1. Dr. S further reported on the functional capacity evaluation carried out at that time which concluded that the claimant has the ability to perform work in the light category. Dr. S went on to state that inconsistencies during testing indicated that the claimant gave minimal effort during testing and is likely capable of greater work performance.

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. Only the "good faith effort" criterion is in issue on appeal.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) (Rule 130.102(d)(5)) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has provided sufficient documentation, as described in Rule 130.102(e), that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that an injured employee who has not returned to work and who is able to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and shall document the job search. This rule further provides 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 the information from the injured employee which may include but is not limited to information regarding the number and type of jobs applied for, applications or resumes which document the job search efforts, cooperation with the TRC, 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 searches, registration with the TWC, and any other relevant factor.

The claimant had the burden to prove by a preponderance of the evidence that he made a good faith attempt to obtain employment commensurate with his ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them 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 hearing officer could conclude from all of the evidence, as she indicated, that the claimant was simply going through the motions of looking for work so as to qualify for SIBs rather than actually trying to get hired.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge