APPEAL NO. 950135

On November 9, 1994, and January 5, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (claimant) disagrees with the hearing officer's decision that she is not entitled to supplemental income benefits (SIBS) for the fourth compensable quarter. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Pursuant to Section 408.142 an employee is entitled to SIBS if on the expiration of the impairment income benefit (IIBS) period the employee has an impairment rating (IR) of 15 percent or more; has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]."

The claimant injured her neck and back at work on (date of injury). The parties stipulated that the claimant reached maximum medical improvement on November 17, 1992; that she has an IR of 18%; that she did not elect to commute any portion of her IIBS; that her IIBS period expired on November 30, 1993, that the "entitlement period" for the fourth compensable quarter started on May 31, 1994, and ended on August 29, 1994, (this period of time will hereafter be referred to as the "filing period"); and that the fourth compensable quarter began on August 30, 1994, and ended on November 28, 1994.

The claimant worked in the employer's meat processing plant for about eight years when on (date of injury), she was knocked backwards when a chain slipped and a lamb struck her. The claimant is 57 years old and has a second grade education. She said she can not read or write. She said she last worked for her employer on (date). (Ms. H), the employer's human resources manager, testified that when the claimant returned to work three days after her injury she was offered a hide pulling job but the claimant elected to go on "voluntary layoff" status instead. Ms. H said that if the claimant had stayed with the employer the employer would have complied with any doctor's restrictions.

The claimant said she has been treated by (Dr. D), a chiropractor, since her injury. On December 21, 1992, (Dr. A), who is associated with Dr. D, reported that the claimant

"should have been able to return to some type of work," and that she was released to modified duty on or about October 1, 1992, "but apparently no position was available." On February 22, 1993, a physical therapist performed a functional capacity evaluation on the claimant and he reported that the claimant had a tendency toward symptom magnification and that the claimant's "physical demand level is that of a light classification." He stated that the claimant should be able to occasionally lift 20 pounds, frequently lift 10 pounds, and constantly lift a negligible amount of weight. On February 23, 1993, (Dr. P), who was apparently a designated doctor selected by the Texas Workers' Compensation Commission (Commission), reported that the claimant has an 18% IR. He diagnosed a herniated nucleus pulposus at C6-7 with no nerve root impingement, chronic lumbosacral strain with mechanical low back dysfunction, mildly reduced range of motion of the cervical spine, mildly reduced range of motion of the lumbosacral spine, and recurring headaches. He did not think that the claimant's condition would improve with further active medical treatment or surgical intervention. He stated:

> There are no restrictions or accommodations required of [claimant] as long as she works in the light physical demand level category as described by the Department of Labor in its Dictionary of Occupational Titles. This means that she should seek employment where she is not required to lift, push, pull, or carry over 20 pounds occasionally, 10 pounds frequently, and a negligible amount of weight throughout the work day. This does meet the previous physical demand level category of her job at the time of injury. It is recommended at this time that she seek active employment in the work place.

In July 1993 (Dr. L) examined the claimant and reviewed diagnostic tests, including a myelogram and an MRI, and he reported that he did not believe that the claimant is a surgical candidate. In a note dated November 1, 1993, Dr. D reported that the claimant had been under his care and that the claimant "is unable to work in her present condition." On February 11, 1994, Dr. D reported that the claimant remained under his care, that she was receiving chiropractic adjustments and modalities every two to three weeks as needed for pain relief, and that the claimant is "totally disabled due to her neck and back condition." He further stated that he did not "foresee positive changes of any sort in her condition that would allow her to function in an employable capacity." On May 16, 1994, (Dr. S), who had previously reviewed the claimant's medical records and reports at the request of the carrier, reported that he had reviewed a video tape of the claimant sent to him by the carrier and that it "clearly indicates her physical capacity at or near normal." He further stated that "it appears [claimant] could resume her full duties without restriction."

As previously noted, the filing period for the fourth compensable quarter was from May 31, 1994, to August 29, 1994. On June 22, 1994, Dr. D reported that the claimant "cannot work," and that her prognosis was poor for total recovery. On August 3, 1994,

(Dr. B) reported that he had examined the claimant at the request of the Commission for an assessment of the claimant's ability to work. He stated:

> Having considered the patient's physical examination, functional capacity evaluation, and other materials she demonstrates inconsistency in her performances, evidence of symptom magnification, and great guarding and hesitancy when asked to execute various commands. As a result, I feel that her evaluation is somewhat difficult. Taking into consideration her injury, medical evaluation and findings on examination, I believe that the patient would be capable of doing light duty work without incurring undue harm or risk of further injury. I would define light duty work as lifting less than 20 pounds with change of position allowed between standing, sitting, walking. Occasional stooping, squatting, kneeling, and bending would be allowed. I believe given all factors taken into consideration, this would be a reasonable level of work performance.

The claimant initially testified that she last worked on (date). However, she later testified that during the filing period she worked about 12 hours a month cleaning two houses and earned about $60.00 a month doing this. The claimant's daughter, (Ms. O), testified that the claimant had worked cleaning the two houses since before her accident. The claimant said that during the filing period her back, neck, and legs hurt, that she had headaches every three days, and that she went to Dr. D for adjustments once every two weeks. She testified that she is unable to work and that Dr. D has told her not to work. She said that during the filing period she applied for about 15 jobs as a dishwasher or cleaner. She indicated that she had done that type of work before her job at the meat processing plant. She said she was not hired at any place she applied and that the reason she was not hired was "probably" because of "the condition that I'm in." She said that all of the places she applied had job openings and that none of the employers told her that she was not hired because of her workers' compensation injury. She said she told employers about her workers' compensation injury only when asked. She said she applied for jobs because she wanted to see if she could do the work. However, when she was asked whether she applied with the intention to work, she said "No, I Don't. But they want me to look for a job." She also said she doesn't know if she could do the jobs she applied for.

The claimant listed in her Statement of Employment Status (SES) filed on August 10, 1994, that she applied for jobs at three places and was not hired. The owner of one of the places listed in the SES stated in an affidavit that the only reason the claimant was not offered a job was because he had no job openings. The owner of another place listed in the SES stated in an affidavit that the claimant did not inquire as to whether he had any job openings. Ms. H, the employer's human resources manager, said she went to the other place listed in the SES and found that it was "permanently closed," but she did not know how long it had been closed.

The claimant introduced into evidence copies of nine job applications dated within the filing period. She said her daughter filled out the applications for her and that she, the claimant, returned the applications to the prospective employers. One of the employers the claimant applied at stated in an affidavit that the claimant was not granted an interview because the job application was not completely filled out. Two other employers stated that when the claimant applied for work they had no openings. In regard to the remaining applications, the claimant's daughter, Ms. O, testified that she went to the places the claimant had applied for employment at and she was told that the claimant was not hired because someone else had already been hired, or that the employer was just looking over applications, or that the employer hired someone who was better qualified, or that the employer was not hiring. Ms. H testified that she went to several places that the claimant had applied at and she was told that the claimant was not hired because there were no job openings. The claimant testified that at one place she applied at (she could not recall the name of the company) she was told she could not be hired because she was under the care of a doctor.

The hearing officer found that the claimant was able to do light duty work during the filing period and that she contacted 12 prospective employers during the filing period. He also found that the claimant did not in good faith attempt to obtain employment commensurate with her ability to work and that the claimant had not shown that her unemployment or underemployment was a direct result of her employment. He concluded that the claimant is not entitled to SIBS for the fourth compensable quarter. The claimant disagrees with the hearing officer's decision.

The claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 13, 1994. Whether the claimant's unemployment or underemployment was a direct result of the impairment from the compensable injury and whether the claimant made good faith efforts to obtain employment commensurate with her ability to work were fact questions for the hearing officer to determine from the conflicting evidence. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. In regard to the requirement that the claimant make a good faith effort to obtain employment commensurate with her ability to work, we have previously observed in Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993, that "good faith" is defined in Black's Law Dictionary, Sixth Edition, West Publishing Company 1990, thusly:

> Good faith is an intangible and abstract quality with no technical meaning or statutory definition and 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, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone.

* * * * *

In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation.

In the instant case there is conflicting evidence as to the claimant's ability to work. The claimant and her treating doctor state that she is unable to work; however, several doctors state that the claimant is able to perform light duty work. There is also evidence that the claimant does some house cleaning work for pay. While there is evidence that the claimant applied for a number of jobs during the filing period, she also testified that she didn't make the applications with the intention of working. There is also conflicting evidence on the question of whether the claimant's unemployment or underemployment is as a direct result of her impairment from her compensable injury. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and to determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The finder of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals level body is not a fact finder and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the finder of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). This is so even though, were we fact finders, we might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Having reviewed the record we conclude that sufficient evidence supports the hearing officer's decision and that the decision is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge