APPEAL NO. 950300

This appeal is brought 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 January 24, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. Addressing the disputed issues, the hearing officer determined that the appellant (claimant herein) was not entitled to supplemental income benefits (SIBS) for the first or second compensable quarters because he did not make a good faith effort to obtain employment commensurate with his ability to work during the "relevant qualifying periods." The claimant requests review of this decision. The respondent (carrier) replies that the claimant's appeal is legally inadequate because it lacks specificity; that the appeal improperly refers to matters not introduced into evidence at the CCH; and that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed. We consider this pro se appeal by the claimant adequate to invoke the jurisdiction of the Appeals Panel. *See* Texas Workers' Compensation Commission Appeal No. 92292, decided August 18, 1992.

DECISION

We affirm.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS on the expiration of the impairment income benefits (IIBS) period, if the employee has: (1) an impairment rating (IR) of at least 15%; (2) has not returned to work or has earned less than 80% of the average weekly wage (AWW) as a direct result of the impairment; (3) has not elected to commute a portion of the IIBS: and (4) has made a good faith effort to obtain employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "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 parties stipulated that the claimant has an IR greater than 15%; that the first compensable quarter is August 16, 1994, through November 14, 1994; and that the second compensable quarter is November 15, 1994, through February 11, 1995. In a conclusion of law not appealed by either party, the hearing officer determined that the claimant did not elect to commute any portion of IIBS. The only substantive matter submitted for review is the determination of the hearing officer that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work during the 90 days preceding August 16, 1994, and the 90 days preceding November 15, 1994.

The claimant worked as a "processor" for a food manufacturer. He sustained a compensable low back injury on (date of injury).[1] (Dr. W), the claimant's treating doctor,

[1] Apparently, some documentation in the claims file incorrectly refers to a date of injury of (date). This

released the claimant to return to light duty on January 3, 1994, with the restrictions of avoiding repeated bending at the waist or lifting over 20 pounds. The claimant gave this release to (Mr. G), the employer's human resources manager, on December 21, 1993. The claimant testified that the employer could not comply with these restrictions and Mr. G so advised Dr. W by letter of January 4, 1994. On June 27, 1994, Dr. W gave the claimant another written restricted duty release with the condition that claimant "avoid lifting over 25 lbs for the next 3 months. He could do his old job as processor." The claimant admitted he "forgot" to give this second release to Mr. G until late August 1994, because he was thinking more about possible back surgery than work. He did, however, concede that he knew the labor agreement in force at the time required him to contact Mr. G by phone every two weeks about his medical status and to bring in medical documentation on a monthly basis. He admitted that the last time he had contact with Mr. G before their August 1994 meeting was in December 1993 when he presumably delivered Dr. W's first light duty release.

Mr. G testified that he set up a meeting with the claimant in August 1994 after he was contacted by labor representatives about why the claimant was not returned to work. Mr. G told them that he had not heard from the claimant since December 1993. Introduced into evidence were letters of October 28, 1992, and June 8, 1993, from Mr. G to the claimant advising him of the biweekly and monthly status reports required. Notes of Mr. G's meeting with the claimant on August 22, 1994, reflect that the claimant said he forgot to report his status and admitted he had no contact with the employer since the previous December. Mr. G testified that he could have accommodated the claimant's second limited duty release in the "processor" job, but the decision was made to terminate the claimant for his failure to comply with the reporting requirements. The claimant testified at the CCH that if the employer would take him back, he felt he could do his former job.

On July 21, 1994, the claimant completed a Statement of Employment Status (TWCC-52), in which he said he received no wages during the filing period for the first compensable quarter. He said he was advised by an unknown Commission employee to list three employer contacts on this form. For this reason, he said he listed his current employer as a contact even though he admitted in his testimony that during the first filing period he never contacted the employer and "thought" he was still "on the payroll." Since he thought he needed to list two more employer contacts on the TWCC-52, he wrote that he applied for a janitorial position at a child care center, but was told there were no openings, and inquired of a former employer if there was work available and was told there was none.[2]

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discrepancy has no bearing on the resolution of this appeal.

[2]The Commission approved SIBS for the first quarter and, even though disputing this determination, the carrier apparently paid SIBS for one month in an amount in excess of $1100.00.

The claimant submitted a second TWCC-52 on October 30, 1994. On it, he listed no wages during the qualifying period for the second compensable quarter, but 14 employer contacts. He said he was variously told by these contacts there was no work available, no applications were being taken, or that he did not have enough experience.

Although the carrier challenged the claimant's entitlement to SIBS based on both a lack of good faith effort to seek employment and his failure to establish that his lack of employment was the direct result of his impairment, the hearing officer found against the claimant solely on the basis that he did not meet the good faith effort criterion. With regard to the second qualifying period, the hearing officer stated in her discussion of the evidence that of the 14 employer contacts, the evidence showed that there was only one place where the claimant applied for work and the employer was actually hiring, but the job was filled by someone else. The claimant's position at the hearing and on appeal was that he did what was required to qualify for SIBS.

In Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993, the Appeals Panel wrote at length on the concept of good faith. This intangible quality "encompasses notions of honesty of purpose, freedom from intent to defraud and being faithful to one's obligations." Texas Workers' Compensation Commission Appeal No. 941292, decided November 9, 1994. Whether the claimant made the necessary good faith effort is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance, materiality, weight and credibility to be given this evidence. When reviewing a hearing officer's factual determinations on which a decision is based, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). The hearing officer was obviously not persuaded that the claimant made the required good faith effort to find work in either qualifying quarter. The claimant himself testified that his first TWCC-52 was inaccurate in some of the information it contained and that he completed the form because this is what he was told to do by a Commission employee. With regard to his second TWCC-52, the hearing officer, from the claimant's own testimony, concluded that only one potential employer contacted by the claimant actually had work available. While we find this evidence sufficient to support the determination of the hearing officer that in this case the claimant did not in good faith seek employment, our affirmance should not be interpreted to mean that good faith in all cases can only be established by contacting potential employers who have jobs available and are hiring at the time contact is made.

Having reviewed the record in this case, we are satisfied that there was sufficient evidence to support the findings and conclusions of the hearing officer on the disputed issues.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge