APPEAL NO. 950303

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on January 26, 1995, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the periods from June 9, 1994, through September 7, 1994, and September 8, 1994, through December 7, 1994. The claimant appeals urging error by the hearing officer in his determination of non entitlement to SIBs asserting that his doctor had not returned him to work, that he worked with the Texas Rehabilitation Commission (TRC) in attempting to set up his own business which was a good faith effort to find employment, and that his impairment rating (IR) was still in dispute during at least part of one of the qualifying periods. No response has been filed.

DECISION

The decision and order are affirmed.

Briefly, the claimant, a truck driver by occupation, injured his back on (date of injury), (the finding of fact erroneously indicates January 22, 1991) and underwent lengthy conservative treatment. Medical records indicate spondylolisthesis which preceded the incident of (date of injury). An impression of one examining physician was degenerative lumbar disc disease and chronic pain syndrome. In any event, following a dispute and an evaluation by a designated doctor, it was determined that the claimant had a 15% IR. His treating doctor placed the claimant on work restrictions of no prolonged standing or sitting, and no heavy lifting, bending or stooping. His doctor also indicated that the claimant was unable to return to work as a truck driver.

According to the testimony of a case worker, the claimant first went to the TRC in May, 1992. He apparently was enrolled in some courses and after a lengthy investigation was approved for a self employment business involving videotaping photographs, slides and films with narrative, subtitles and music. Apparently the process of getting approval of the business started in the May 1993 time frame. Ultimately, the TRC approved the plan and the process of the TRC purchasing the various items of equipment began in 1994. During the qualifying period in issue March 9 - June 9, and June 10 - September 10, 1994, the claimant testified that he continued doing such things as talking to people about the business, developing flyers and forms, making telephone calls and things of that nature. During the period of April 23, 1994 to June 10, 1994, he was on an extended vacation with his wife. The claimant testified that he never looked for any other work from (date of injury), other than setting up his own business since he needed time to build a business and that he could not build a business at night. Apparently, all of his equipment did not come in until late in 1994 and he stated that during the periods in issue he did not make any money out of the business.

The hearing officer found that the claimant did not attempt in good faith to obtain employment commensurate with his ability to work. In his discussion, the hearing officer indicated that neither the TRC program, claimant's physical limitation, nor the absence of a full release to duty prevented or justified claimant's failure to attempt to find employment. Under Section 408.142, to qualify for SIBs, two of the requirements are that a claimant has not returned to work or is earning less than 80% of his average weekly wage as a direct result of the claimant's impairment, and that he has attempted in good faith to obtain employment commensurate with his ability to work. The Appeals Panel has addressed the matter of "good faith" and, while recognizing that it is an intangible and abstract quality, embraced the definition found in Black's Law Dictionary, Sixth Edition, West Publishing Co., 1990. Texas Workers' Compensation Commission Appeal No. 950135, decided March 10, 1995. We have also stated that whether good faith has been shown is a question of fact for the fact finding hearing officer. Texas Workers' Compensation Commission Appeal No. 950172, decided March 17, 1995; Texas Workers' Compensation Commission Appeal No. 950023, decided February 16, 1995. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. And, in determining the facts in a case (Section 410.168(a)), the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence.

The claimant's urging that his doctor did not release him to work is, as we view the doctor's letter, a misapprehension of what action the doctor took. Clearly, the doctor was of the opinion that the claimant could only work with restrictions and could not return to his previous job of driving a truck. The Appeals Panel has stated that the inability to perform the previous job, as opposed to being able to perform some other work, is of marginal relevance because the statutory provision on SIBs specifically contemplates that an injury could also lead to "underemployment." Texas Workers' Compensation Commission Appeal No. 950198, decided March 23, 1995. And, while we have stated that a claimant is not necessarily required to seek employment from a third party, he must demonstrate that good faith efforts have been made to actively engage in an income earning business. *See* Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994. In Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995, the author Appeals Judge, with one concurring opinion, upheld a hearing officer's factual determination that a good faith effort had been made in the claimant's endeavor to go into self employment noting that the even though reasonable inferences different from those drawn by the hearing office could find support in the evidence, such was not a solid basis to reverse. The author pointed to evidence of the claimant's long working hours and his activity in seeking business which supported the hearing officer's determination. The concurring opinion stated that the hearing officer's determination was not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, thereby justifying reversal. A vigorous dissent would have reversed the decision as against the great weight and preponderance of the evidence and pointed out that SIBs should not be expected to be an insurance policy to soften the economic hazards inherent in business start up.

Unquestionably, the determination of good faith can be a close call and can be very factually specific. Here, there was sufficient evidence to support the hearing officer's determination. Given the nature of the injury, the restricted duty opinion of the doctor, the lengthy time frame involved, the degree of activity and the rapidity, or lack thereof, of motion in attempting to establish the business in question, the extended vacation during one of the reporting periods, together with the specific and somewhat restrictive statutory requirements for entitlement to SIBs, a sufficient basis was formed to support the hearing officer's findings and conclusions. Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge