APPEAL NO. 950364

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 3, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue was: "Is the Claimant entitled to supplement income benefits [SIBS] for the third compensable quarter (12/14/94 through 3/14/95)?" The hearing officer determined that claimant was not entitled to SIBS for the quarter in question because he had not made a good faith effort to obtain employment commensurate with his ability to work and claimant's failure to return to work was not the direct result of his impairment.

Appellant, claimant, contends that his "applications with over forty potential employers" demonstrated that he had made a good faith effort to obtain employment. Respondent, carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Pursuant to Section 408.142 an employee is entitled to SIBS if on the expiration of the impairment income benefits (IIBS) period the employee has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) 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), 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 parties stipulated that claimant sustained a compensable back injury on (date of injury), reached MMI on June 22, 1993, with a 17% IR as assessed by a designated doctor and that claimant's IIBS period ended on June 14, 1994. The parties further stipulated that claimant had not commuted any portion of his IIBS and that claimant had not returned to work earning at least 80% of his preinjury wage during the filing period. The parties stipulated that the filing period for the compensable quarter in question was from September 15, 1994, through December 13, 1994, inclusive.

Claimant had back surgery and (Dr. B), claimant's treating doctor, in a report dated August 24, 1994, indicated claimant could return to work, with restrictions of "sedentary [lifting 0 to 10 pounds]" with frequent change of positions "i.e., standing/ walking/sitting." In a September 2, 1994, report, Dr. B indicated claimant could return to light duty (lifting 10 to 20 pounds), with limited stooping and bending and frequent changes in position, i.e.;

standing, walking, sitting. On December 2, 1994, and January 4, 1995, Dr. B indicated that claimant was not released to return to work, apparently based on claimant's complaints of pain. However, in a January 30, 1995, report, Dr. B stated: "In my opinion there has been no change in [claimant's] employability since 8/24/94, and I feel he could continue to pursue work within light/sedentary limits." The hearing officer, based on that report, made a factual determination that during the filing period claimant was able to perform light duty work consisting of lifting 10 to 20 pounds, with limited stooping and bending and frequent changes in position.

Claimant testified, and the evidence indicated, that claimant filed three applications per week beginning the week of September 18, 1994, through the week of November 27, 1994, on Thursday of each week. (Claimant testified he completed 40 applications during the filing period and the hearing officer made a factual determination claimant had sought employment with 32 employers. Our review indicates only 25 actual applications were filed during the filing period beginning September 15th, several of the applications being dated before that date.) Claimant's testimony was that he applied for jobs involving feed sales, welding and warehousing, which the hearing officer indicated she did not consider to be light duty positions. Claimant's argument essentially was, and is on appeal, that filing three applications per week "exceeded the requirements of the Act" and constitute good faith.

Carrier retained (Ms. J) of (JRMS) to "assist" claimant in securing employment within his capabilities. Claimant asserts that Ms. J "came behind" him contacting the various employers after he completed applications and that such inquiries were detrimental to his job search efforts. JRMS did a transferrable job skills analysis and sent claimant a list of potential employers who were hiring, together with the name of a contact person. In a letter dated June 28, 1994, to claimant, JRMS outlined their vocational assistance program which included that "claimant personally visit three employers per week," and submit a copy of employment applications to JRMS weekly. Claimant was to notify JRMS of all job offers and interviews, and claimant was urged to "follow up each application to set up a job interview. . . ." JRMS purported to advise claimant on benefits and "to assist the claimant's good faith efforts to find employment under the Texas Workers' Compensation Commission guidelines." JRMS, in that notice, also purported to advise claimant of what constitutes fraud and that "A PERSON WHO OBTAINS EXCESS PAYMENTS IS LIABLE FOR FULL REPAYMENT PLUS INTEREST AND ALSO MAY BE PROSECUTED FOR FRAUD." Claimant was advised of the penalties for a Class A misdemeanor and a felony as well as administrative penalties for fraud. Apparently, claimant complied with the instructions the first week of the filing period, and not thereafter, as evidenced by weekly letters from Ms. J to claimant advising that JRMS had "not received the new employment applications that were due. . . ." In a letter dated November 15, 1994, JRMS wrote claimant:

> In follow up of Employment Data Sheets you submitted to [carrier], it was discovered that you left a Doctor's Note stating your medical restrictions at [name of potential employer]. It is important to identify and apply for jobs that are within your medical restrictions. By showing this Doctors [sic] Note to an Employer

as you initially apply, this action may discourage an Employer from talking with you further. We certainly advise you to only apply or accept jobs that meet those identified work restrictions. A more reasonable approach may be to inform the potential Employer during the interviewing process, that you are looking for a job that does not require more than sedentary activity.

Claimant testified that he requested that Ms. J and JRMS not "assist" him further in seeking employment.

The hearing officer made the following pertinent factual determinations:

FINDINGS OF FACT

15. The Claimant sought employment at approximately thirty-two employers during the filing period for the third compensable quarter.

16. The Claimant's search for employment as referred to in Finding of Fact 15 consisted of completing applications for employment with three potential employers on one day of each week beginning the week of September 18, 1994 through the week of November 27, 1994.

17. The Claimant applied for jobs consisting of welding, warehouse and feed sales during the filing period for the third compensable quarter, many of which were not within the Claimant's restrictions.

18. The Claimant did not make a good faith effort to obtain employment commensurate with his ability to work during the filing period for the third compensable quarter.

19. The Claimant's inability to obtain employment during the filing period for the third compensable quarter was not a direct result of the impairment.

Claimant, in appealing those determinations, equates number of applications with good faith stating:

. . . that the TWCC Form 52 . . . has but three lines for job applications for a three month period. I naturally assumed that my plus forty applications would more than suffice as a "Good Faith" effort to find employment during the Qualifying Quarter.

Claimant argues that he does not have to satisfy the carrier's test, but only satisfy the law. As noted above, claimant equates 40 applications as meeting the good faith requirements of the 1989 Act. The Appeals Panel has 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 individuals's personal good faith is concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone.
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> 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.

We reject claimant's contention that a certain number of employment applications (be it four, 40 or 400), automatically constitutes good faith. Rather, as denoted in the definition of good faith, it is that state of mind denoting honesty of purpose and being faithful to one's duty or obligation, of which the number of applications seeking employment is but one factor. We agree with claimant that neither the 1989 Act nor Texas Workers' Compensation Commission (Commission) Rule 130.104(a)(2) specify that claimant must cooperate with a carrier-employed vocational counselor; nevertheless, whether and to what extent claimant does so may have a bearing in the hearing officer's determination of whether claimant was, in fact, seeking employment in good faith. We further note that there was no evidence whether claimant had sought employment through the Texas Employment Commission (TEC) or sought assistance from the Texas Rehabilitation Commission (TRC). Nor is there any evidence regarding how claimant selected the prospective employers with whom he applied. On the other hand, Ms. J testified how she did the transferrable skills analysis report and how she determined the potential employers who were on the list sent claimant. She conceded, however, that her list of potential employers did not reflect actual job openings, and that it would be claimant's responsibility to call those employers to see if they had openings. A further item the hearing office might have considered as evidence of good faith, or the absence of such, is the claimant's disregard of, and, at times, refusal to even accept the vocational counselor's correspondence.

In that we are affirming the hearing officer on her determination that claimant has not attempted in good faith to seek employment commensurate with his ability to work, we need not address the determination that claimant's inability to obtain employment was not a direct result of his impairment. We would only note that there is no evidence of anything other than claimant's impairment which would preclude claimant's return to work as a welder, farmer or rancher and fail to see the evidence upon which the hearing officer based her determination. However, as our affirmance of the hearing officer on the lack of good faith

is dispositive of the appeal, we need not further discuss the apparent lack of evidence on this point.

In any event, as the claimant appears to recognize, it is the hearing officer that is the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). The claimant, in this and other cases generally, has the burden to establish that he is entitled to the benefits that he is seeking. Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). The finder of fact, in this case the hearing officer, 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer was able to hear and observe the demeanor of the witnesses and, absent some showing of passion, bias or prejudice, we will not substitute our judgment for that of the hearing officer regarding the credibility of the witness. Texas Workers' Compensation Commission Appeal No. 93755, decided October 6, 1993. We reject claimant's contention that there are a certain number of job applications which will automatically be presumed to constitute good faith efforts to obtain employment.

However, neither do we endorse the concept that carrier appears to be proposing, which is that good faith efforts to seek employment commensurate with one's ability requires a claimant to strictly comply with the policy and procedures of a carrier-employed vocational rehabilitation service, whatever those policies may be. We further specifically reject the notion that a claimant's "refusal to utilize such a resource must be justified by a demonstration that an equally effective job-search technique has been substituted by the claimant who operates in good faith." We refuse to raise claimant's burden of proof to a higher level if the claimant refuses, for whatever reason, to comply with the vocational counselor's requirements and will only note that refusal to cooperate with the carrier's vocational counselor, and in what respect, is a factor for the hearing officer to consider in determining whether claimant conducted a good faith job search.

Claimant, in his appeal, appears to claim prejudicial error where he was initially told that he need not read rules or portions of the 1989 Act into evidence, whereas carrier was allowed unlimited time to cross-examine claimant on each of his job applications. First, we find no parallel between these two items. Each of claimant's job applications stood or fell on its own, and carrier was entitled to inquire into each application. On the other hand, allowing a party to read portions of the Commission rules into evidence after they had been cited was within the discretion of the hearing officer. Subsequently, the hearing officer stated that claimant could "go ahead and read that [Rule 130.101 and portions of Rule 130.104] to me." We find no error in the hearing officer's rulings, much less such prejudicial error as to require a reversal.

Whether claimant exercised good faith in seeking employment commensurate with his ability in qualifying for SIBS is generally a factual determination for the hearing officer. An appeals level body is not a fact finder, and does not normally pass upon the credibility of

witnesses or substitute its own judgment for that of the trier 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, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find in this case and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Susan M. Kelley
Appeals Judge