APPEAL NO. 970605

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 March 10, 1997. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBS) for the third compensable quarter and that claimant's adjusted average weekly wage (AWW) as a seasonal employee is $170.00. In her appeal, the claimant asserts that the hearing officer's determination that she did not make a good faith job search in the filing period for the third compensable quarter of SIBS is against the great weight and preponderance of the evidence. In its appeal, the respondent/cross-appellant (carrier) asserts error in the hearing officer's AWW determination.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement on July 7, 1995, with an impairment rating of 16%; that she did not commute her impairment income benefits (IIBS); and that the third compensable quarter of SIBS ran from December 8, 1996, to March 8, 1997. The filing period for the third compensable quarter ran from September 8 to December 7, 1996. The claimant testified that she looked for work with 36 potential employers during the filing period; however, she acknowledged that she did not make any contacts from September 8 to October 14, 1996. In response to questioning by the hearing officer, the claimant admitted that she only listed 24 of the 36 employer contacts on her Statement of Employment Status (TWCC-52). She testified that she mainly applied for jobs at stores and restaurants, which she believed were within her restrictions and that she had two interviews in the filing period but she could not recall the dates of the interviews. In addition, she stated that she spoke to Dr. R, her current treating doctor, and that, with the exception of one of her applications with a restaurant, he agreed that the positions she sought in the filing period were consistent with her restrictions.

The claimant testified that she was hired by the employer to can chiles. She stated that she understood at the time she was hired by the employer that she would only be working for three months, August, September and October. She also stated that, if she wanted to work for the employer in the next fall, she would have had to apply for and receive the position. She stated that she was paid $4.25 per hour and that she worked 40 hours per week.

The hearing officer determined that claimant did not establish that she had made a good faith effort to seek employment commensurate with her ability to work in the filing period for the third compensable quarter as is required by Section 408.142 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). The question of whether the claimant has made the required good faith effort to seek employment commensurate with her ability to work is a question of fact. 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 of the evidence. As such, it is for the hearing officer to resolve conflicts and inconsistencies in the evidence. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. Civ. App.-Houston [14th Dist.] 1984, no writ). The hearing officer need not accept the testimony of the claimant, an interested witness, at face value; rather, that testimony raises questions of fact for the hearing officer to resolve. Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). In his decision the hearing officer noted that the claimant's testimony "was inconsistent and nonpersuasive." The hearing officer was acting within his province as the fact finder in determining that the claimant's job search efforts in the filing period did not rise to the level of a good faith search. Campos, *supra*. Nothing in our review of the record indicates that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for disturbing it on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer also determined that the claimant was a seasonal employee at the time of her injury and that a "fair, just and reasonable method to calculate the Claimant's average weekly wage is to determine the amount she earned on a weekly based [sic] on the amount of hours and earnings per hour." Therefore, he concluded that the claimant's adjusted AWW as a seasonal employee is $170.00, $4.25 per hour times 40 hours per week. The claimant does not deny that she was a seasonal employee. In arguing that no adjustment should be made, the claimant states that to permit an adjustment now, at the point of SIBS, is "unfair." She maintains that the carrier waived its right to raise the question of whether a seasonal adjustment was appropriate by not raising it at an earlier point in her claim. The claimant does not cite any authority for her proposition and we are unaware of any such authority. As noted above, there is no dispute that the claimant was a seasonal employee at the time of her injury. Accordingly, her AWW calculation is governed by Section 408.043 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.5 (Rule 128.5). Under Section 408.043 and Rule 128.5, a seasonal employee's AWW for purposes of IIBS, SIBS or death benefits is to be calculated by adding the total wages received by the employee in the twelve months preceding the date of injury and dividing that sum by 50. Section 408.043(c) provides for the use of a fair and just manner of calculating a seasonal employee's AWW if, "for good reason," the Texas Workers' Compensation Commission (Commission) determines that use of the prescribed method would be "impractical." The hearing officer indicated that he was using a "fair and just" method in this instance; however, he did not make any corresponding determination as to why the use of the prescribed method, namely dividing the claimant's earnings in the twelve months preceding her injury by 50, was "impractical" in this instance. Accordingly, we reverse the hearing officer's determination that the claimant's adjusted AWW as a seasonal employee for purposes of IIBS and SIBS is $170.00 and remand for reconsideration of the AWW issue in accordance with Section 408.043 and Rule 128.5. If the hearing officer determines that a fair and just method should be employed to calculate the claimant's adjusted AWW, he must make the corresponding determination as to why use of the prescribed method is "impractical."

The hearing officer's determination that the claimant is not entitled to SIBS in the third compensable quarter is affirmed. The determination that the claimant's adjusted AWW is $170.00 is reversed and the case is remanded for further consideration of that issue. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Christopher L. Rhodes
Appeals Judge