

APPEAL NO. 931160

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On November 15, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue to be resolved was: "Is CLAIMANT entitled to supplemental income benefits for the first compensable quarter?" The hearing officer determined that the appellant, claimant herein, did not make a good faith effort to obtain employment commensurate with his ability to work for the first quarter to which he was eligible for supplemental income benefits (SIBS) and consequently claimant is not entitled to SIBS for the first compensable quarter.

Claimant contends that the great weight of the evidence shows claimant applied for three jobs in May 1993 and this "surely constitutes a good faith effort to gain employment" and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, (City herein), responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

It is undisputed that claimant sustained a low back injury on (date of injury), while working for the City. Claimant sustained a lumbosacral strain and reached maximum medical improvement (MMI) on June 30, 1992, with a 15% whole body impairment rating. Forty-five weeks (15% x three weeks) impairment income benefits (IIBS) were apparently not commuted, with those benefits ending on May 11, 1993. The hearing officer found, and it is not disputed, that the first quarter for which claimant would be eligible for SIBS began on May 12, 1993.

Claimant testified he had not sought any employment prior to May 14, 1993, when he sought employment with three potential employers and that he has not yet returned to work. There was no specific evidence whether these employers were hiring or not, although claimant testified that when he spoke with the third potential employer he was told that employer "weren't hiring at that time." Claimant testified he had gone in person to the first two potential employer's place of business, did not have the name of who he spoke with, but completed an application and has not heard from those employers. Claimant testified he made no other applications in May of 1993. Claimant also testified that he subsequently (no evidence of when) went to the Texas Employment Commission (TEC) looking for work, but "they just had him look for work on his own." Claimant applied for and began receiving unemployment compensation from June through October 1993. Claimant testified he had sought other employment on June 18th and 21st, (all dates are 1993 unless otherwise noted) and July 2nd, 6th and 12th.

According to a Specific and Subsequent Medical Report (TWCC-64) claimant was released to a limited type of work on June 30, 1992, although that same report states claimant can never return to full-time work. A follow-up medical report dated May 29, 1992, states claimant's job restrictions to be ". . . no longer able to bend or lift anything heavier than 25 pounds." At some time in 1991, claimant was evaluated in a "work tolerance test." Claimant testified that the City had offered to provide a position within his physical limitations provided he "could bring his work tolerance test up to date" since his prior work tolerance test was from 1991.

The hearing officer determined that because claimant had not made a good faith effort to obtain employment commensurate with his ability to work for the first quarter for which he was eligible for SIBS, he was not entitled to SIBS for that quarter. The hearing officer noted in her discussion:

In order to determine eligibility of any quarter, the period prior to the beginning of that quarter must be examined. A determination that a claimant is not entitled to supplemental benefits for the first quarter in which the claimant would be eligible does not preclude re-application and eligibility for delayed supplemental income benefits (Rule 130.105(b)).

Claimant appealed, contending that the hearing officer in her statement of evidence stated that claimant had applied for three (3) jobs in May 1993 (albeit all in one day), and argues "This . . . surely constitutes a good faith effort to gain employment."

Section 408.142(a) (1989 Act as codified in the TEXAS LABOR CODE) provides:

SUPPLEMENTAL INCOME BENEFITS. (a) An employee is entitled to supplemental income benefits if on the expiration of the impairment income benefit period computed under Section 408.121(a)(1) the employee:

- (1) has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
- (2) has not returned 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;
- (3) has not elected to commute a portion of the impairment income benefit under Section 408.128; and
- (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

The SIBS provisions of the 1989 Act have been implemented in Tex. W.C. Comm'n 28 TEX. ADMIN. CODE §§ 130.101 through 130.110 (Rules 130.101 through 130.110).

Pertinent portions of those provisions provide:

**RULE 130.102 Determination of Entitlement of Supplemental Income Benefits;
Calculation of Amount**

(b)Entitlement. Entitlement to supplemental income benefits is determined prospectively for each potentially compensable quarter, based on criteria met by the injured employee during the prior filing period. Once determined, entitlement continues for the duration of the compensable quarter. [Emphasis added].

The hearing officer obviously had the cited provision in mind when she specifically asked the claimant if he had sought employment prior to May 12, 1993, and the claimant replied he had not. Rule 130.102(b), cited above, states that entitlement to SIBS is determined prospectively based on criteria met by the injured employee during the prior filing period. Consequently, in the instant case, claimant's good faith efforts to obtain employment commensurate with the employee's ability to work, made prior to May 12th are controlling. Evidence of good faith efforts to obtain employment commensurate with claimant's ability to work made after May 12th, may have a bearing on whether claimant is entitled to SIBS for the second quarter.

Pursuant to Rules 130.103(b) and 130.10 an employee's employment status is reviewed no later than 10 days prior to the last day of the IIBS period. The Commission apparently did so and as claimant testified, provided him with an Employee's Initial Request for Supplemental Income Benefits. Claimant completed the form, and in the space provided for response to "If you have applied for employment during the last 13 weeks, please list the employers contacted" stated "I have been to Texas Rehabilitation I have not found any work." The form is signed and dated "5/11/93." The Texas Workers' Compensation Commission (Commission) by Statement of Employment Status (TWCC-52) determined that claimant was not entitled to SIBS because of "No supportive documentation to reflect good faith effort to look for work or current medical to support any inability to perform and level of employment." Consequently, the hearing officer's determination that claimant had not made good faith efforts to seek employment commensurate with his ability to work based on criteria prior to May 12th, is amply supported by the claimant's testimony and documentary evidence.

Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determinations. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The hearing officer's decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge