

APPEAL NO. 950067
FILED FEBRUARY 24, 1995

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 was held with sessions on March 24, 1994, June 22, 1994, and December 5, 1994. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the first compensable quarter beginning November 19, 1993. The appellant (carrier) appealed requesting that we reverse the decision of the hearing officer and render a decision that the claimant did not make a good faith effort to seek employment commensurate with his abilities or remand for further development of the evidence. A response from the claimant was not received.

DECISION

We affirm.

The claimant injured his back, knee, and jaw on _____. (Dr. M) treated the claimant's back problems; (Dr. L), a dentist, treated jaw problems; and an orthopedic surgeon performed arthroscopic surgery on his knee. Medical records from Dr. M may include records of another patient and may not be accurate concerning limitations placed on the claimant; however, the claimant's testimony concerning limitations is consistent with the limitations in the records. The claimant testified that he was released to light duty by Dr. M, that he was not to lift more than 10 or 20 pounds, and that sitting, standing, and walking would be limited to four hours a day. The claimant testified that after he reached maximum medical improvement in November 1992 he attempted to return to work with his employer, (Employer 1). He said that he was told that Employer 1 had filed for bankruptcy and he was not able to get a job with them. He said that he then sought work through the Texas Employment Commission (TEC). In April 1993 the TEC sent him to a temporary service that did interviewing and testing for (Employer 2). He received a standard form letter in May 1993 advising him that he did not get the job. The claimant said that he sought employment with (Employer 3) in October 1993. The claimant testified that he completed two applications for employment with (Employer 4), got a job with Employer 4 in November 1993, worked for three weeks for Employer 4 at \$5.00 an hour, 40 hours a week, and quit for fear of being arrested for selling illegal material in this adult video store. He said that he went back to TEC, was sent to (Employer 5), and was hired at (Employer 6) on January 25, 1994, and started working for Employer 6 on February 3, 1994. Employer 6 pays him \$5.00 an hour. He tries to work 40 hours a week, but there is no guarantee, and he works close to 40 hours a week. The parties agreed that when the claimant worked for Employer 1 he was paid \$380.00 a week and worked about 30 hours a week. The claimant introduced a letter dated June 4, 1993, from the TEC to him advise him that he was required to make a minimum of one verifiable job search contact each week to remain eligible for benefits and encouraging him to make additional contacts. The

claimant also introduced a Statement of Employment Status (TWCC-52) dated October 12, 1993, showing that he applied for jobs with Employer 2, Employer 3, and Employer 4.

The dispute over eligibility for SIBS for the first quarter turns on whether the claimant made good faith efforts to obtain employment commensurate with his ability to work. The hearing officer found that he did. The carrier argues that some of the evidence indicates that some of the claimant's efforts to obtain employment are outside the 90 days immediately prior to the start of the first quarter on November 19, 1993. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) provides in part "[e]ntitlement to [SIBS] is determined prospectively for each potentially compensable quarter, based on criteria met by the injured employee during the prior filing period." Even though the hearing officer admitted evidence of efforts to obtain employment outside the quarter immediately preceding November 19, 1993, and may have considered the evidence to be relevant to the claimant's overall effort to obtain employment; the hearing officer's Statement of the Evidence, Discussion, and Findings of Fact in his Decision and Order indicate that he properly applied the provisions of the 1989 Act and Texas Workers' Compensation Commission Rules. Concerning the claimant's efforts to obtain employment in the filing period, the hearing officer in the Statement of the Evidence wrote "[c]laimant did work for three weeks during the 90 days preceding the first compensable quarter. . . ." and in Finding of Fact No. 6 found "[c]laimant made a good faith effort to obtain employment commensurate with his ability to work the 90 days immediately preceding the first quarter." The evidence establishes that the claimant was seeking employment through the TEC during the filing period and did obtain temporary employment through his efforts during the filing period. While working for Employer 1, the claimant made more than \$12.50 per hour and accepted a job with Employer 4 making \$5.00 an hour indicating that he would take any job within his limitations that became available. "Good faith" is defined as follows in Black's Law Dictionary, Sixth Edition, West Publishing Co. 1990:

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 or malice and the absence or design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone.

* * * * *

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 ones duty or obligation.

Under the circumstances presented in the record before us, we will not substitute our judgment for that of the hearing officer since he is the sole judge of the relevance and

materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). For the reasons set forth above, the decision that the claimant is entitled to SIBS for the quarter beginning on November 19, 1993, is affirmed.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge