

APPEAL NO. 980158
FILED MARCH 11, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 972329, decided December 22, 1997, we reversed the decision of the hearing officer which awarded the respondent (claimant) seventh quarter supplemental income benefits (SIBS) and remanded this issue for further consideration. On January 5, 1997, the hearing officer, issued a decision on remand in which he awarded seventh quarter SIBS. The appellant (carrier) appeals this determination, contending that it is not sufficiently supported by the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed as reformed.

The facts and applicable law are set forth in Appeal No. 972329 and need not be repeated here. Briefly, the hearing officer originally made findings that the claimant worked full time during six weeks of the filing period and premised his award of SIBS largely on this finding. The Statement of Employment Status (TWCC-52) submitted by the claimant mentioned part-time work in one week and full-time work in three weeks of the filing period. The purpose of the remand was for the hearing officer to make findings consistent with the evidence and make conclusions of law based on these findings. In his decision and order on remand, the hearing officer made the following Findings of Fact and a Conclusion of Law, which have been appealed by the carrier:

FINDINGS OF FACT

1. During the filing period for the 7th SIBS quarter Claimant worked part time during week 1 and full time during weeks 11, 12 and 13 for [employer].
2. During the filing period for the 7th SIBS quarter Claimant vigorously pursued full time employment with [employer].
6. During the filing period for the 7th SIBS quarter, Claimant attempted in good faith to find employment commensurate with his ability to work.

CONCLUSION OF LAW

3. Claimant is entitled to SIBS for the 7th quarter.

The carrier appeals Finding of Fact No. 1 on the basis that the claimant did not work during the first week at all and worked part time during the second week. We agree that this is clearly established by the evidence and conclude that the reference to the first week was simply a transcription error of no substantive importance. For this reason, we reform Finding of Fact No. 1 by substituting week "2" for week "1."

The carrier appeals Finding of Fact No. 2 by taking issue with the phrase "vigorously pursued full time employment." It contends that the claimant's contacts with his employer, which it describes as "limited," should not be considered a "vigorous pursuit" of full-time work. The concept of "vigorous pursuit" of employment is not a statutory standard. We consider it surplusage in this case and focus instead on Finding of Fact No. 6, which is phrased in terms of the statutory standard of a "good faith effort" to find employment "commensurate with the ability to work." See Section 408.142(a)(4). The hearing officer found a good faith effort in this case based on one week of part-time work and three weeks of full-time work. In doing so, he commented that the claimant had found full-time employment by the end of the filing period, which is *prima facie* evidence of a good faith effort during the filing period leading up to the employment. See Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997. He also considered that the claimant regularly presented himself to the employer for work, which was not available all the time because of the weather and customer demand. The carrier argues that under these circumstances, the claimant should have been looking for other, steadier work commensurate with his ability to work.

The statutory requirement is that the claimant make a good faith effort to obtain employment commensurate with the ability to work. A claimant working part time does not satisfy this requirement if he or she has an ability to work more hours or at a higher-paying job. See Texas Workers' Compensation Commission Appeal No. 961649, decided October 4, 1996. The key question was whether the claimant was working part time by virtue of a self-imposed limitation not related to the physical ability to work. In the case before us, the claimant repeatedly presented himself to the employer for more work and risked losing time if he did not make himself available. This additional effort together with evidence that he eventually found employment is, we believe, sufficient to support Finding of Fact No. 6 that the claimant made the required good faith effort to obtain employment. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge