

APPEAL NUMBER 980253
FILED MARCH 26, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 14, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the first and second compensable quarters. The hearing officer determined that the claimant had some ability to work, did not make a good faith effort to obtain employment commensurate with his ability to work, and denied SIBS for the first and second quarters. The claimant appeals urging that the great weight of the evidence is contrary to the determination that he did not make a good faith search for employment during the first and second quarter filing periods since he was employed part time during part of the filing period for the first quarter and sought employment in good faith during both filing periods. The respondent (carrier) urges that there is sufficient evidence to support the decision of the hearing officer and asks that it be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

The evidence indicated that the claimant, a vacuum truck driver, sustained a compensable injury to his back and knee on _____, had fusion surgery in September 1994, apparently reached maximum medical improvement on June 4, 1996, and was assessed a 19% impairment rating. The claimant seeks SIBS for the first and second compensable quarters, the filing periods, which ran from April 9 to November 7, 1997. At the CCH, the claimant testified and advanced the position that he did not have any ability to work at all, and alternatively, that he did make a good faith effort to obtain employment commensurate with his ability to work. The appeal is predicated on the position that the evidence shows that the claimant did make a good faith effort to obtain employment for the two quarters in issue as shown by the fact that during part of the first quarter filing period, the claimant actually had a part-time job with an employer as a result of his job search efforts.

The claimant testified that the effects of his injury prevented him from sitting or standing for substantial periods of time, that he was in constant and severe pain, and that he had strict lifting restrictions. He did not feel he was able to work at all. During the filing period for the first compensable quarter, the claimant presented evidence that he had secured a part-time position with an employer starting on May 10, 1997, that he worked through the first week of July, but that he was not able to do the job and ended up in the hospital where an MRI was performed. He also presented evidence that he

looked for jobs at two different prospective employers during the filing period for the second quarter. He acknowledged that he did not look for dispatching jobs (except for one that he did not list on his documentation) "because they have to sit all the time" and that although he can drive, he did not look for any delivery type jobs, basically because the cost of insurance and the amount of pay did not make it worth it. He generally described his limited activity at home.

The hearing officer states in her discussion of the case that although the claimant did have a part-time position during part of the filing period for the first compensable quarter, and in her view, was not required to seek additional employment during the time he had the part-time job, the evidence indicates that he neither sought nor obtained any employment until almost half of the period had expired. We do not necessarily agree with the broad statement of not being required to seek additional employment while employed in a part-time position. See Texas Workers' Compensation Commission Appeal No. 972352, decided December 31, 1997; Texas Workers' Compensation Commission Appeal No. 951624, decided November 15, 1995. Of course, the hearing officer can consider such factors as the kind of work being done and the number of hours being worked, in addition to the period of time during the filing period that a job search was made. Appeal 951624, *supra*. While recognizing that a good faith job search generally spans the filing period (Texas Workers' Compensation Commission Appeal No. 971184, decided August 1, 1997; Texas Workers' Compensation Commission Appeal No. 960964, decided June 26, 1996) here it is clear from the evidence that the claimant was employed during two months of the filing period and inferentially looked for the position at (retail store) prior to that, although the evidence was not well developed in this case. We recognize that the hearing officer may not have found the claimant's testimony to be convincing in some particulars and while great deference is shown to factual determinations by the hearing officer, here there was overwhelming evidence that the claimant was actually working during virtually two-thirds of the filing period after seeking and obtaining a part-time position at (retail store). It is also supported in the record that he was under significant restrictions before and after the period he worked at (retail store) although the evidence was not developed or clear as to the level of his work capacity during this period, other than the rejected position of the claimant and his doctor that he was totally disabled. Under these particular circumstances, we conclude the great weight and preponderance of the evidence invokes the holding of the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997. In that case, the Appeals Panel concluded from the evidence that the claimant, as here, actually undertook employment from an offer directly resulting from his search efforts, held that such amounts to *prima facie* evidence of a good faith effort. Here, we conclude that the search resulting in actual employment for virtually two-thirds of the filing period in issue is compelling evidence of a good faith search.

Regarding the second quarter filing period, the claimant only sought two positions. The hearing officer found this not to amount to a good faith effort. Clearly, the extremely limited number of positions sought during a filing period can support a determination of a good faith effort not having been made. Texas Workers' Compensation Commission Appeal No. 980206, decided March 20, 1998.

We have reviewed the evidence and do not conclude that the determinations of the hearing officer regarding the second quarter were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, the decision and order regarding the second quarter are affirmed. As stated above, we conclude that the determination that the claimant was not entitled to SIBS for the first quarter is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, the decision and order regarding the first quarter is reversed and a new decision rendered that the claimant is entitled to SIBS for the first compensable quarter.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge