

APPEAL NO. 980301
FILED MARCH 25, 1998

Following a contested case hearing (CCH) held in (City), Texas, on January 13, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 13th compensable quarter. Claimant has appealed this determination challenging several findings of fact for evidentiary insufficiency. In its response, the respondent (carrier) urges the sufficiency of the evidence to support the challenged findings.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached maximum medical improvement on October 22, 1993, with an impairment rating of 16%; that claimant did not commute any portion of his impairment income benefits (IIBS); that the 13th compensable quarter began September 20 and ended on December 19, 1997; and that the filing period for that quarter began on June 21 and ended on September 19, 1997.

Claimant testified that on _____, he injured his back, neck, and shoulder at work when lifting a compressor unit and subsequently underwent six operations on his back and a shoulder operation on April 15, 1996; that during the filing period, he had medical restrictions against lifting more than 10 pounds and against performing overhead work and air conditioning work but was able to perform light-duty work and drive; that during the filing period, he was employed by his brother-in-law, Mr. P aka SP, Jr., doing business as (the company); that about 80% of claimant's job was to drive a truck to pick up and deliver materials to job sites and the remaining time was spent in supervision; and that claimant's last workday was September 19, 1997 (the last day of the filing period), because Mr. P's business "folded."

Claimant further testified that he was paid a "flat salary" of \$240.00 per week, whether he worked 10 hours or 50 hours in a week; that the job was basically an 8:00 a.m. to 5:00 p.m. job; that he was paid in cash and no income nor social security taxes were withheld from his wages; that he was not issued any 1099, W2, and W-4 forms but did file income tax returns for 1995 and 1996, prepared by a tax service; and that he had not and would not authorize the release of these returns to the carrier. Claimant introduced a 1997 IRS Form 941, Employer's Quarterly Federal Tax Return, bearing the name of the company. However, the form was otherwise blank.

Claimant indicated that the company was not a corporation or a partnership but that he understood it was Mr. P doing business as the company. The carrier introduced a certificate from the Texas Secretary of State dated November 19, 1997, certifying that a records search revealed no filing by a Texas or foreign corporation, limited partnership, or limited liability partnership under the name of the company. The carrier introduced a September 4, 1997, report of an investigation to determine the ownership of the company. According to this report, a September 2, 1997, search of the records of (P County) failed to disclose an assumed name on file for the company nor had any local printing shop printed business cards for the company, and a call to the number on a company business card was answered with a recording that the number was no longer in service.

Claimant's Statement of Employment Status (TWCC-52), dated September 17, 1997, reflects his receipt of \$240.00 per week for the weeks ending on June 27 through September 19, 1997. Claimant's evidence includes a handwritten statement dated September 17, 1997, bearing the purported signature of Mr. P, which states that claimant worked for Mr. P since June 1996 for a salary of \$240.00 per week, that all of Mr. P's employees are paid in cash, that there are no checks or check stubs, and that claimant is still employed with him at that time. Another handwritten statement, undated and bearing the purported signature of Mr. P, states that claimant works 50 hours and not less than 40 hours per week at \$240.00 per week and that he started on June 24, 1996.

Reports of Dr. W in February and August 1993 reflected that claimant was under a light-duty restriction. Dr. B, whom claimant identified as his current treating doctor, wrote on July 11, 1996, that claimant was doing well and would be released from his care, and that claimant will be allowed to return to his "full activity" but that it is not appropriate for claimant to return to his previous occupation, air conditioning and refrigeration.

The October 16, 1997, statement of Dr. B stated that claimant "is unable to return to any time [sic] of work at this time," that he is not to lift over 10 pounds, that he is not to engage in overhead activities, or sitting or standing for more than two hours, and that claimant will not be able to return to heating and air conditioning work due to his disability.

Claimant has appealed findings that, during the filing period, he did not work at the company, did not look for work, was unemployed, and did not make a good faith effort to obtain employment commensurate with his ability to work; that claimant did not sustain a serious injury with lasting effects; and that, during the filing period, claimant was not underemployed earning less than 80% of his average weekly wage (AWW) and his underemployment was not a direct result of his impairment.

In her discussion of the evidence, the hearing officer states that she did not find claimant's testimony credible. She compared the handwriting on Claimant's Exhibits

Nos. 4 and 12 with the handwriting on claimant's TWCC-52 and other examples of claimant's handwriting in evidence and is convinced that the handwritten statement of Mr. P verifying claimant's employment with the company is actually the claimant's writing. As she put it, that verification is "the handiwork" of claimant and she discounted it in its entirety. The hearing officer stated that claimant's evidence was insufficient to support a finding that he was working during the filing period, that claimant's testimony was not credible, and that claimant did not produce credible documentation of his employment or earnings.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's AWW as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. The IR and IIBS commutation criteria were disposed of by the parties' stipulations leaving the "good faith attempt" and the "direct result" criteria in issue.

The Appeals Panel has noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. Concerning the direct result criterion, the Appeals Panel has said that the good faith job search and the direct result requirements are different SIBS eligibility criteria, that the direct result criterion was not intended as another method to evaluate the job search requirement, that a claimant need not establish that his or her impairment was the only cause of the unemployment or underemployment to satisfy the direct result criterion but rather that it was a cause, and that a positive finding on the direct result criterion is sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. See, e.g., Texas Workers' Compensation Commission Appeal No. 960165, decided March 7, 1996; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996; Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1995. See also Texas Workers' Compensation Commission Appeal No. 962653, decided February 13, 1997, which cites to cases where other circumstances may "overshadow" the impairment as a direct result, e.g., general adverse economic conditions, evidence of a new or unrelated injury, removal of restrictions or limitations on employment, voluntary student status, and voluntary choice in employment sought.

The hearing officer quite clearly put no credence whatsoever in claimant's testimony and other evidence that he was in fact employed by his brother-in-law during the filing period and, thus, that he was underemployed as a direct result of his impairment and was not required to seek additional employment to satisfy the good faith attempt criterion.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal we will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge