

APPEAL NO. 980315
FILED MARCH 30, 1998

Following a contested case hearing held in (City), Texas, on January 6, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 19th compensable quarter. Claimant has requested review of this conclusion and several findings of fact on the grounds of evidentiary insufficiency. The response filed by the respondent (carrier) asserts the sufficiency of the evidence to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury in the course and scope of his employment, that he reached maximum medical improvement (MMI) on February 13, 1992, with a 20% impairment rating (IR), that he has not commuted any impairment income benefits, and that the 19th compensable quarter began on October 2 and ended on December 31, 1997. Not appealed are findings that the filing period for the 19th compensable quarter began on July 3 and ended on October 1, 1997, and that during the filing period, claimant had some ability to work.

Dr. M Report of Medical Evaluation (TWCC-69) reflected the aforementioned MMI date and IR and stated that claimant had "two degenerative herniated disc [sic] with decreased range of motion in the lumbar spine" and on July 7, 1997, Dr. M reported that claimant continued to have significant pain and discomfort, that his medication would be changed, and that he was to return on an "as needed" basis. Claimant testified that he was restricted from climbing stairs and from heavy lifting, that during the filing period, he contacted 29 business establishments seeking employment, and that some of the businesses were provided by (search firm), the company retained by the carrier to help him find employment, and the rest he contacted on his own. Claimant's Statement of Employment Status (TWCC-52), which reflected that he had no earnings in the filing period, and had attached lists of employers provided by the search firm and pages of copies of business cards, most from auto body shops. Claimant also introduced copies of 15 business cards annotated on the back to indicate he had been there. Most indicated they were not hiring. Claimant said he went to these establishments, mostly auto body shops, on his own and asked them to sign the business cards so "they would know I went there." Claimant also indicated that he made some follow-up contacts, that he visited the Texas Workforce Commission monthly, that he did not look for jobs in newspaper advertisements, and that it had been

a long time since he had contacted the Texas Rehabilitation Commission, which had indicated they could not help him because he did not speak English.

Ms. N, a case manager for the search firm, testified that claimant received his mail at his aunt's address and that during the filing period she sent him three letters with job leads and none of the letters were returned. She said she advised claimant about a company known as "SS" (contractor) which obtained a large government contract to make reflective clothing for the U.S. Marine Corps and which would hire persons with disabilities and who could not speak English, that she arranged an appointment for claimant which he failed to keep, and that she asked claimant to make another appointment and he failed to do so. She said she made appointments for claimant at (auto shop) two locations and that he did not keep one appointment and, at the other location, he picked up an application but failed to return it. Ms. N said that she referred claimant again in September 1997 to the contractor and that the contractor is still hiring and needs workers. Ms. N said that of the 25 auto body shops she contacted, none had openings and one said claimant had picked up an application but did not return it.

Claimant has challenged findings that his testimony was "non-persuasive," that during the filing period he did not make a good faith effort to look for work commensurate with his ability, that he did not make 29 job contacts as he had indicated, and that his unemployment was not a direct result of his impairment.

For continuing entitlement to SIBS, claimant had the burden to prove that during the filing period he in good faith sought employment commensurate with his ability to work and that his unemployment was a direct result of his impairment. Section 408.143; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Whether claimant met his burden of proof presented the hearing officer with questions of fact to resolve. 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).

We have 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. The hearing officer could consider the evidence that most of claimant's job contacts were at businesses which were not hiring and where he just stopped by, made the inquiry, and got someone to sign a business card. The hearing officer could also consider the evidence of claimant's failing to keep appointments made for him by Ms. N and evidence that the contractor, who was hiring throughout the filing period, would hire persons with disabilities who did not speak English.

As for the direct result of impairment criterion, the hearing officer could conclude from the evidence that claimant's unemployment was not a direct result of his impairment but rather the result of his not desiring to be employed.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge