

## APPEAL NO. 990001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 4, 1998, a hearing was held. She (the hearing officer) determined that the respondent (claimant) was not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter but was entitled to SIBS for the sixth quarter. Appellant (carrier) asserts that claimant did not show he attempted in good faith to find employment in the filing period of the sixth quarter, even though he made 26 contacts, noting that he limited his search to jobs for mechanics and opted not to have surgery. The appeals file does not contain a reply from the claimant.

### DECISION

We affirm.

Claimant hurt his knee when he jumped off a truck in 1995. In early 1998 his doctor, Dr. P, advised claimant to have a total knee replacement. Claimant has been reluctant to do that. Claimant's position at the hearing in regard to the fifth quarter was that he could not work; the hearing officer found no SIBS were due for that quarter; there has been no appeal of that determination.

Claimant looked for work during the filing period for the sixth quarter. The parties stipulated that claimant sustained a compensable injury with a 17% impairment rating; there was no commutation of benefits; the filing period for the sixth quarter began on May 9, 1998; and claimant was unemployed during the sixth quarter.

Claimant's past occupation was as a mechanic, but claimant also testified that he has worked as a mechanic supervisor before. The evidence does show that Dr. P was of the belief that claimant could not return to work as a mechanic, but could work with restrictions; it provides no information as to Dr. P's opinion regarding a mechanic supervisor. As the hearing officer found, claimant contacted 26 employers during the filing period in question relative to mechanic jobs. In attempting to find work he did not hide the fact that he has an impaired knee and wears a brace. He indicated that he attempted to persuade employers that he could either function as a mechanic by enlisting the assistance of his children to help with heavy work or that he had experience as a supervisor; he said that he has worked as a mechanic for years.

The carrier points out that the claimant's Statement of Employment Status (TWCC-52) indicates that the 26 contacts were made on five different days. (That may be true but those contacts cover a period from May 20 to July 24, 1998.) In stating that contact on only five days is insufficient, carrier cites several cases, the first two of which are Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996, and Texas Workers' Compensation Commission Appeal No. 960818, decided June 3, 1996. The first cited appeal remanded a decision that found no good faith based on only four job searches; it instructed the hearing officer to determine whether good faith was shown, but

not from "some mechanical mathematical formula." Appeal No. 960818 was an affirmance of no SIBS due because good faith was not shown. In that case, the panel commented that good faith is "basically a question of fact for the hearing officer," pointing out that there is "no specific number of job searches that must be made," but also indicating that number is one of the factors that "may" be considered. (In that case, there were three applications dated the same day.) The panel disassociated itself from comments that addressed looking for work every day.

The last case cited, and most recent in time of the cited cases, is Texas Workers' Compensation Commission Appeal No. 970046, decided February 20, 1997. That case did reverse an award of SIBS after stating that good faith continued to be an intangible quality and a question of fact for the hearing officer. It noted, though, that the claimant in that case listed no job contacts but merely testified to having approached "maybe five" homes about domestic work, one or more restaurants, and another unnamed business about sewing, on six days during the last 12 days of the filing period. The hearing officer's finding of good faith from the above facts was determined to be against the great weight and preponderance of the evidence.

Compare the last cited case to the evidence of 26 identified businesses listed on the TWCC-52 who were contacted on five days extending from May 20th to July 24th; applying the basic criterion that the hearing officer determines good faith as a factual decision and that numbers are one factor that may be considered, the evidence in the appeal relative to the sixth quarter is sufficient to support the determination that good faith existed in claimant's attempt to find work.

While the carrier also says that claimant was not qualified to work as a mechanic, citing Dr. P's statement, claimant provided an explanation as to why he thought he could find, and do, work in the mechanic area. His experience, his past supervision, and the fact that his family could assist him could be considered to remove the case from those in which a job is purposely sought for which there can be no hope of employment. That claimant could not do some of the jobs sought does not automatically disqualify him from consideration for SIBS. See Texas Workers' Compensation Commission Appeal No. 961671, decided October 1, 1996. While working as a mechanic is heavy work for which claimant may not be capable, the hearing officer was convinced that he reasonably applied for supervisory positions and/or positions in which he could enlist the aid of his family. While this strategy has not prompted a job offer, the hearing officer could still consider them in determining that good faith was present.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Judy L. Stephens  
Appeals Judge