APPEAL NO. 990193

Following a contested case hearing held on January 6, 1999, 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 finding that during the filing periods for the fourth, fifth, and sixth compensable quarters, the appellant (claimant) had some ability to perform some work and did not attempt in good faith to obtain employment commensurate with his ability to work, and by concluding that claimant is not entitled to supplemental income benefits (SIBS) for those quarters. Claimant has filed a request for review indicating his disagreement with these findings and conclusions, apparently on the basis of insufficiency of the evidence. The respondent (carrier) has filed a response which urges the sufficiency of the evidence to support the challenged findings and conclusions.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury to his low back, which later resulted in a 16% impairment rating (IR); that he was entitled to SIBS for previous quarters; and that the filing period began on November 5, 1997, for the fourth compensable quarter.

Claimant testified that on _____, while driving a tow truck for the employer, the frame broke and the cab of the vehicle went forward and drug on the pavement and he was thrown forward, striking his head and injuring his neck and back. Claimant stated that he received injections in 1995 and that his treating doctor, Dr. RP, proposed spinal surgery which was not approved. In evidence is the September 19, 1996, report of the designated doctor assigning a 16% IR for the lumbar spine.

In his opening statement, claimant indicated that he sought employment during the filing period for the fourth compensable quarter but had no ability to work during the filing periods for the fifth and sixth compensable quarters. He testified, through a Spanish language translator, that he did look for work during the fourth quarter filing period, even though he failed to list any such contacts on his Statement of Employment Status (TWCC-52) for that period. Claimant stated that in the fourth quarter filing period, he looked for work two or thee days each week and specified that he went to construction sites on the outskirts of town, to stores and filling stations, and also to a carpenter and to a car painter. He said he could not recall the dates of these contacts or the names of the businesses except for the auto painter and two stores. Claimant indicated that he got a job with the car painter and worked two days sanding cars for $50.00 but could not continue because of his drowsiness from medications.

As for the fifth quarter filing period, claimant said he sold tamales and menudo but could not work at companies because of his pain, that employers would not put up with the pain. He indicated that he made from $10.00 to $30.00 per day with these sales. He

indicated he did not reflect these earnings on his TWCC-52 forms because "its nothing, really," and because it had not occurred to him to do so. Claimant stated that he also did not look for work during the sixth quarter filing period, indicating that he was better off doing what he was doing because an employer could ask him to do something that he could not do, and that he is "making it" selling used clothes and running a taqueria outside his house.

Claimant further testified that the Texas Workers' Compensation Commission (Commission) made an appointment for him with the Texas Rehabilitation Commission and that he missed it, explaining, "I'm always drugged up," an apparent reference to his drowsiness from medication. He said he did not reschedule the appointment but rather just started looking for work. He also said that two or three months ago, he went to two bars where he knew the owners to see if they would teach him bartending but that nothing came of these efforts.

Dr. RP's April 28, 1998, response to a Commission inquiry stated that claimant has persistent low back pain with radiation to the left lower extremity and left foot weakness; that claimant has refused surgery recommended by Dr. RP, and that in Dr. RP's opinion, claimant "is unable to do any kind of work." A "Disability Certificate" signed by Dr. RP on May 8, 1998, states that "[f]or the time frame you inquired about, January 1997 - present, [claimant] has not been able to work at any level."

Dr. R reported on July 6, 1994, that he examined claimant, that claimant demonstrated positive Waddell's signs and his pain drawing demonstrated pain in a nonphysiologic distribution, that prior and repeat x-rays are normal, and that a lumbar spine report indicated mild disc dessication at L3-4 and L4-5 with degenerative-type disc bulging. Dr. R further stated that claimant has numerous nonorganic findings and that he feels claimant is capable of returning to regular work and recommends a vigorous aerobic and back exercise program. Dr. R further stated that claimant "was unhappy with [his] opinion and did not seem to like the idea of the exercise therapy."

Dr. D, who examined claimant for a second spinal surgery opinion, reported on June 5, 1995, that claimant said he feared undergoing lumbar spine surgery. Dr. D, who indicated his disagreement with surgery for claimant, also stated that he did not feel that claimant could return to his previous employment, with or without surgery.

Dr. TP, who examined claimant for the carrier, reported on September 26, 1997, that claimant reported that he "does nothing" at home except a little bit of walking and occasional bike riding, and that claimant's biggest problem is functional overlay and his chronic pain syndrome, which Dr. TP recommends be managed by a pain management program. Dr. TP further stated that the orthopedic literature would suggest that returning claimant to the work force is difficult, that nearly zero percent of individuals out of work for longer than two years because of back problems return to work, and that it might be reasonable to try to return claimant to some kind of productive activity if he can be rehabilitated into a sedentary job.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

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.

In finding that during the filing period for the fourth compensable quarter claimant did not make a good faith attempt to obtain employment commensurate with his ability to work, the hearing officer could consider not only the number of job search contacts made by claimant but also that claimant could not remember the dates of his contacts nor the names of the prospective employers contacted except for two stores and the auto painter. The Appeals Panel has cautioned that good faith is not established simply by some minimum number of job contacts (Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996) and that good faith encompasses "the manner in which a job search is undertaken with respect to timing, forethought, and diligence" (Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995).

As for the finding that claimant failed to make good faith efforts during the filing periods for the fifth and sixth compensable quarters, the Appeals Panel held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No.

950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

The hearing officer could consider all the medical evidence indicating that claimant did have some ability to work and he was not bound by Dr. RP's opinion to the contrary. 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, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)), and determines what facts have been proven from the conflicting evidence (St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)).

We are satisfied that the appealed findings of fact, which support the dispositive legal conclusions, are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge