

APPEAL NO. 990344

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 26, 1999. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the 11th compensable quarter and whether the recommendation for spinal surgery should be approved. The hearing officer determined that the claimant was not entitled to SIBS for the 11th compensable quarter but that the spinal surgery should be approved and that the respondent (carrier) was liable for the cost of the spinal surgery. The claimant appeals the determination that he is not entitled to SIBS for the 11th quarter arguing that although he only had a very limited and tenuous position to work at all and had a limited education, that he showed that he nonetheless made a good faith effort to look for work in a very light capacity. The carrier does not appeal the spinal surgery determination and responds that there is sufficient evidence to support the hearing officer's determination on the lack of entitlement to SIBS.

DECISION

Affirmed.

The claimant sustained a back injury on _____, underwent several surgeries, reached maximum medical improvement, and was assessed an impairment rating equal to or greater than 15%. The compensable quarter in issue ran from October 26, 1998, to January 24, 1999, the filing period for which was the preceding 90-day period. The claimant testified that although he was in constant pain, did not believe he had any capacity to work during the filing period, had not been returned to duty by his doctor, and was recommended for another surgery by his doctor in October 1998, that he nonetheless did make a good faith effort to seek employment commensurate with his ability to work. He introduced a Statement of Employment Status (TWCC-52) which shows a number of job contacts on a single day with the Texas Workforce Commission and testified that he looked other places that he did not document. He stated he would let the prospective employer know about his back surgeries, his limitations, and his education.

Carrier introduced a functional capacity evaluation from February 1998 indicating that claimant demonstrated the ability to perform physical activity at a medium physical demand level; a video, part of which was taken on June 19, 1998, which showed the claimant in various activities, including changing a radiator in a truck; and a report from a carrier doctor, Dr. McC, dated November 10, 1998, who examined the claimant and indicates his findings were so benign that he recommended against any spinal surgery. The claimant testified that the video does not show that someone was helping him, that he was on pain medication and that he had to rest. He also disagreed with Dr. McC's report and opinion.

The hearing officer determined that the evidence showed that the claimant could perform some work, at least at the light level. We agree that there is sufficient evidence to

support this determination although there was evidence offered to the contrary. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. It was for the hearing officer as the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence, to resolve such conflicts and inconsistencies. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Section 410.165(a). The hearing officer also determined that with some ability to work, the claimant did not establish an attempt in good faith to seek employment commensurate with his ability to work. Section 408.142 and Section 408.143. In considering whether a good faith effort is shown, the pattern of the search, the timing, forethought and diligence are factors to be considered. Texas Workers' Compensation Commission Appeal No. 971209, decided August 11, 1997. The hearing officer determined that the minimal efforts shown by the evidence failed to establish a good faith effort to seek employment commensurate with the ability to work. Clearly, her finding and conclusion regarding the lack of a good faith effort finds sufficient support in the evidence. Texas Workers' Compensation Commission Appeal No. 982210, decided November 4, 1998; Texas Workers' Compensation Commission Appeal No. 982987, decided February 4, 1999. Accordingly, the decision and order of the hearing officer that the claimant is not entitled to SIBS for the 11th compensable quarter are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge