

APPEAL NO. 990476

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 8, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the ninth quarter for supplemental income benefits (SIBS) began on November 24, 1998, and would end on February 22, 1999. The hearing officer determined that the filing period for the ninth quarter began on August 25, 1998, and ended on November 23, 1998, and that during that filing period the claimant's unemployment was a direct result of his impairment from the compensable injury. Those determinations have not been appealed and have become final under the provisions of Section 410.169. The hearing officer also determined that the claimant did not seek employment during the entire filing period, that during the filing period he did not in good faith seek employment commensurate with his ability to work, and that he is not entitled to SIBS for the ninth quarter. The claimant appealed those determinations. He stated that he was enrolled in a Texas Rehabilitation Commission (TRC) program since August 1998 and qualified as a full-time student in the computer field, urged that he in good faith sought employment commensurate with his ability to work, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for the ninth quarter. The carrier responded, stated that the claimant testified that he did not start attending computer classes until January 1999, urged that the evidence is sufficient to support the appealed determinations of the hearing officer, and requested that the decision of the hearing officer be affirmed.

DECISION

We strike part of a finding of fact and affirm the decision and order of the hearing officer.

The Statement of Employment Status (TWCC-52) for the ninth quarter for SIBS filed by the claimant indicates during the filing period for that quarter he sought a job on August 31; September 7, 11, 16, 21, and 30; October 5, 9, 14, 20, and 29; and November 3 and 13, 1998. He sought employment with 13 employers on 13 days during the filing period and filed a TWCC-52 dated November 14, 1998. He was asked what he did during the last few days of the filing period and responded that he was working on trying to get into the TRC-sponsored computer training program. The claimant testified that the computer classes were scheduled to start on January 11, 1999; that his starting class was delayed; and that he started attending classes a few days after the scheduled starting date. He explained how he was qualified for each of the jobs that he applied for and said that the requirements for each of the jobs he applied for were within his restrictions.

Whether good faith in seeking a job commensurate with the claimant's ability to work was shown is usually a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. Consideration can be given to the manner in which a job search is made and timing, forethought, and diligence may be considered in determining whether a good faith job search was made.

Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996. In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel rejected the contention that a certain number of job applications showed good faith and stated the following about good faith:

In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.

In Texas Workers' Compensation Commission Appeal No. 982269, decided November 9, 1998, the claimant sought work with 36 prospective employers during nine consecutive days in one filing period and with 36 prospective employers during three weeks of another filing period. The Appeals Panel reversed determinations that during those filing periods the claimant in good faith sought employment commensurate with his ability to work and that he was entitled to SIBS for those quarters, rendered a decision that the claimant did not in good faith seek employment commensurate with his ability to work and is not entitled to SIBS for those quarters, and wrote:

Of great significance also in this case is the fact that the claimant limited the period in which he made any search to a fraction of the total 90-day period. We have reversed and rendered decisions where a job search is limited to only a fraction of the filing or qualifying period, stating that generally the job search requirement spans the whole period in issue. [Citations omitted.] We have also stated that the pattern of the job search is pertinent to a finding of good faith and that the manner of the job search with respect to timing, forethought, and diligence must be looked to in making a determination. [Citations omitted.]

However, in Texas Workers' Compensation Commission Appeal No. 980492, decided April 20, 1998, the Appeals Panel reversed and remanded a decision that the claimant was not entitled to SIBS because he did not begin his search for employment until approximately three weeks into the filing period, stating that it had not and did not hold as a matter of law that a finding of good faith is precluded because a search was not undertaken during three weeks of a 90-day filing period. In Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel stated that the hearing officer, in determining whether the claimant in good faith sought employment commensurate with the ability to work, sometimes assesses whether contacts made with prospective employers constitute a true search to reenter employment or were done instead only to meet eligibility requirements for SIBS.

In a brief statement of the evidence the hearing officer wrote “[claimant] said from August 25, 1998 until around November 13, 1998 he looked for jobs in sales, as a motel manager, and as a cashier.” He made the following finding of fact:

FINDING OF FACT

5. During the filing period for the ninth compensable quarter Claimant sought employment with 13 to 18 employers. Claimant sought employment within his physical limitations, but did not search for employment during the entire filing period. Claimant did not make good faith efforts to seek employment commensurate with his ability to work during the filing period for the ninth compensable quarter.

During the filing period, the claimant sought employment with one employer a week during nine weeks and sought employment on a Monday and a Friday during two weeks. He did not seek employment during the last 10 days of the filing period. The hearing officer's finding of fact that "[c]laimant . . . did not search for employment during the entire filing period" is subject to different interpretations. That the claimant did not search for jobs during the last 10 days of the filing period is not a sufficient basis for a finding that he did not in good faith seek employment commensurate with his ability to work. The determination that he did not in good faith seek employment commensurate with his ability to work may be sufficiently support by the claimant's overall search efforts, including his seeking one job on two days during two weeks and on one day during nine weeks in the filing period.

In his appeal, the claimant contended that his enrollment with TRC was sufficient to establish a good faith job search during the filing period. He testified that he contacted TRC in November 1998 near the end of the filing period and that he started class in January 1999 after the end of the filing period. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The claimant's testimony concerning TRC and his attending class after the close of the filing period does not make the hearing officer's findings on good faith so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). The hearing officer's finding of fact that the claimant "did not search for employment during the entire filing period" is subject to various interpretations, is not necessary to conclude that during the filing period the claimant did not make good faith efforts to seek employment commensurate with his ability to work, and is struck as unnecessary. Considering all of the evidence concerning the claimant's efforts to seek employment during the filing period, the hearing officer's determination that he did not make good faith efforts to seek employment commensurate with his ability to work is supported by sufficient evidence and we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We strike part of a finding of fact and affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge