

APPEAL NO. 991046

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 April 14, 1999. The issue concerned whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his 10th compensable quarter.

The hearing officer found that the claimant was not entitled to SIBS because he failed to make a good faith search for employment commensurate with his ability to work. The hearing officer further found that the inability to work was the direct result of his impairment.

The claimant has appealed, arguing that the decision flies in the face of the clear evidence of claimant's inability to work. He argues that in spite of the lack of ability, he made a good faith job search. The respondent (carrier) responds by reciting evidence in favor of the decision.

DECISION

Affirmed, as reformed.

First of all, we correct an obvious typographical error in which the quarter in issue is referred to in Findings of Fact Nos. 7 and 8 as the third quarter. We reform this to conform to the rest of the opinion and the issue at hand, and amend this to read "10th quarter."

The claimant injured his back on _____, while employed by (employer). He had two surgeries, the most recent of which took place in mid-1997. His doctor at that time and during the time of the CCH was Dr. G. The filing period for the quarter in issue ran from September 25 through December 26, 1998. The claimant did not dispute that he searched for employment at the location of only six employers. He said that all of these were referred to him by (vocational search company), for the employer. The claimant said his first job contact was on October 21, 1998. He made contact with these six companies because he believed he was supposed to do so, even though he felt he was unable to perform any work. The claimant pointed out that these companies had either filled the positions, or required a high school degree or GED and fluency in English, none of which he had.

The claimant said he continued to have back and right leg pain. Dr. G's reports throughout the filing period initially do not comment on claimant's work readiness, other than to comment that he is in work conditioning or work hardening therapy. On November 25, 1998, Dr. G wrote that claimant "should remain off work in any capacity." Earlier in the fall, on August 21, 1998, claimant had undergone a functional capacity evaluation, which agreed that claimant could not perform his previous level of work, but could work at the light level. A month later, on September 22nd, he was put at the light to medium level, falling short of a few requirements for medium. He could not lift more than 40 pounds on an

occasional basis at a lower shelf level. It appears that claimant was in work hardening therapy through December 7, 1998. Claimant agreed in his testimony that he began this program on November 11, 1998, after first saying late October.

There are two eligibility criteria that must be met to continue after the first quarter to qualify for SIBS, set out in Section 408.143(a). The injured employee must prove that he or she has earned less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment and in good faith sought employment commensurate with the employee's ability to work. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated 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. We have held that 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 that a finding of no ability to work must be based on medical evidence. 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 injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. 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. While the hearing officer's impression as to when work hardening ended may have been off by a few days, we do not agree that there was no support for the beginning date of November 11, 1998. We reform this fact finding to indicate that work hardening ended on December 7, 1998.

As to whether a search has been undertaken in good faith, this is a subjective concept and generally means honesty of purpose, freedom from intent to defraud, and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

In reviewing the record, we cannot agree that the hearing officer's decision is against the great weight and preponderance of the evidence. We therefore affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge