APPEAL NO. 991292

Following a contested case hearing held on May 14, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that because he failed during the filing period to make a good faith effort to seek employment commensurate with his ability to work, the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter. Claimant has appealed, pointing out the evidence, including his unrefuted testimony and the inferences, which he believes should have resulted in a decision in his favor and which requires reversal. The respondent (carrier) urges that the evidence is sufficient to support the challenged findings and that an apparently erroneous finding that claimant did not look for work on a Sunday is harmless error.

DECISION

Affirmed as reformed.

The parties stipulated that on _____, claimant sustained a compensable injury to his lumbar and cervical spinal regions resulting in a 21% impairment rating (IR); that claimant did not commute any impairment income benefits (IIBS); that the fifth quarter began on February 1 and ended on May 2, 1999; that the filing period for the fifth quarter began on November 2, 1998, and ended on January 31, 1999; and that the carrier paid the first month of the fifth quarter SIBS to claimant but timely disputed entitlement for that quarter through filing a Request for Benefit Review Conference (TWCC-45) on February 12, 1999.

Claimant testified that he is 30 years of age, obtained a sixth grade education in country, and does not speak or write English; that at the time of his injury, he had been employed by (employer) for seven or eight months as a welder; that he had previously performed janitorial, roofing, and carpentry work and had no training or experience in office work; that on the day of his injury, he slipped and injured his back; that on or about May 16, 1996, he underwent surgery on two spinal discs; that he still has back pain which radiates down his right leg; that he cannot lift more than 10 to 12 pounds nor sit for long periods; and that he last saw his doctor, Dr. P, in February 1999. In evidence is Dr. P's January 19, 1999, letter stating that claimant was last seen on December 1, 1998, complains of lumbosacral spine pain, is advised to continue with conservative treatment, and in his opinion "continues to be disabled and unable to return to any type of gainful employment at this time." Claimant further stated that Dr. P has never released him to return to work; that he cannot do any work, such as welding, roofing, or janitorial work that requires bending or lifting more than 12 pounds; that he can drive and has been looking for a job as a cab driver but that he cannot sit for long periods of time; and that he could work at a job, such as placing screws and bolts in bags, where he did not have to bend or lift more than 12 pounds and where he could sit or stand as necessary. Claimant indicated that after his injury the employer assigned him to duties where he "put in small screws" and could sit or stand at will, but that when he asked for that job, he was laid off.

Claimant's Statement of Employment Status (TWCC-52) reflects that 27 businesses were contacted with 25 contacted during the filing period; that claimant made one contact on each of nine days in November 1998, 10 days in December 1998, and six days in 1999; and that he described the jobs he sought as waiter, janitor, maintenance, cleaning, and laborer. Claimant said that he just went to those businesses and inquired about openings; that, if the potential employer indicated that work was available, he would state that he required light duty and, if asked, would mention his surgery; and that, although he did not know the job qualifications beforehand, he was told when he inquired and would have tried to do any of the jobs he listed on the TWCC-52 had he been offered one. Claimant also stated that on the days he did not look for work, he was unable to because of back pain and that he did not look for work on Sundays because most businesses are closed and on that day his family goes for a ride. However, January 10, 1999, a date included on claimant's TWCC-52, was a Sunday.

In closing argument claimant indicated that he felt he met the "good faith effort" criterion under two theories, namely, that he had no ability to work during the filing period per the report of Dr. P, and that he made a sufficient job search effort per his TWCC-52. The carrier countered that Dr. P's report was too conclusory to constitute medical evidence of an inability to work and that claimant's job search efforts fell short of showing a good faith attempt.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. 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.

The Appeals Panel has 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." 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 light duty 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*.

Claimant has challenged Finding of Fact No. 15 which states that he made no effort to seek employment on Sundays. Since January 10, 1999, was a Sunday, that finding is erroneous and we reverse it. Having done so, however, we agree with the carrier that the error is harmless. We do not regard that finding as necessary to support Conclusion of Law No. 2 that claimant is not entitled to SIBS for the fifth compensable quarter nor do we regard it as reasonably calculated to cause and to have probably caused the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Claimant also disputes findings that his employment search method consisted exclusively of making cold calls; that he sought employment in such positions as a waiter, a janitor, in maintenance, and a painter; that his testimony that he is unable to bend, climb, or lift objects over 10 pounds, and can only sit or stand for very limited periods of time, is inconsistent with his search for the types of positions listed on his TWCC-52 form; that he sought employment that he believed was not commensurate with his physical abilities; that he did not possess the subjective intent to return to the work force during the filing period; and that he did not make a good faith effort to seek employment commensurate with his abilities during the filing period.

The Appeals Panel has held that the requirement to seek employment generally spans the whole filing period of the quarter at issue. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 960999, decided July 10, 1996. The Appeals Panel has also stated that "[e]vidence bearing upon whether a claimant has demonstrated good faith can encompass the manner in which a job search is undertaken with respect to timing, forethought, and diligence; the degree to which these are demonstrated involved questions of fact for the hearing officer." Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995.

We find the evidence sufficient to support the challenged findings which are, in turn, sufficient to support the challenged conclusion. 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

_____
Joe Sebesta
Appeals Judge