

APPEAL NO. 991571

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 1, 1999, a contested case hearing was held. With regard to the only issue before her, the hearing officer determined that appellant (claimant) was able to work at a sedentary demand level, that claimant's unemployment was a direct result of his impairment but that claimant had not attempted in good faith to obtain employment commensurate with his ability to work and that claimant was not entitled to supplemental income benefits (SIBS) for the 10th compensable quarter.

Claimant only appeals the ultimate conclusion of law that claimant was not entitled to SIBS for the 10th quarter, asserting that the great weight of evidence is contrary to the hearing officer's decision without citing any specifics or authority. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) replies, urging affirmance.

DECISION

Affirmed.

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.

The parties stipulated that claimant sustained a compensable (low back) injury on \_\_\_\_\_, that claimant has a 16% impairment rating, that impairment income benefits have not been commuted and that the filing period for the 10th compensable quarter was from December 30, 1998, through March 29, 1999. Claimant testified, through a translator, that he has a sixth grade education in (Country). Claimant testified that he was a construction laborer and has worked at heavy manual labor. Claimant testified regarding the circumstances of his injury (fell when his foot got caught in a machine) and that he had spinal surgery in 1997. Attached to claimant's Statement of Employment Status (TWCC-52) is a list of 10 job contacts that he made on 10 different days in the filing period plus two days where he listed the names of doctors that he had appointments with. Claimant testified that he has contacted the Texas Rehabilitation Commission and has been cooperating with them. Also in evidence are three cover letters to three security guard

companies asking for a job/interview and stating that a resume was enclosed (no resume was in evidence). Also included in the evidence was a hearing officer's decision and order awarding SIBS for the ninth compensable quarter based on a good faith effort to seek employment based on 10 job contacts.

Claimant's treating doctor is Dr. A, who, in a note dated November 12, 1998, indicated claimant could return to work at a sedentary level but was "not to do any bending . . . limited crouching and kneeling, and reaching activities." Claimant was to be allowed to change positions every 10 to 20 minutes and not to do more than "10-20 minutes of walking at that time." Claimant was seen by a Dr. L, who, in a report dated December 21, 1998, noted that Dr. B had told claimant "that he has another recurrent disk herniation." Dr. L noted that Dr. A had released claimant to "sedentary level type work," that claimant complained of substantial back pain, that claimant uses a cane and walker, and concluded that "if [claimant] does have a recurrent herniated disk then I do not feel that he is capable, nor should he go back to work." Dr. A reiterated his position that claimant could return to work in "a sedentary level of work within his functional capacity evaluation limits" in a Specific and Subsequent Medical Report (TWCC-64) of a February 24, 1999, visit. Carrier offers reports from Cascade Disability Management, Inc., regarding claimant's job contacts. Carrier also points out that assuming the accuracy of claimant's contacts, claimant made no contacts at all in the first three weeks of January 1999 nor the last two weeks of March 1999.

The hearing officer summarizes the evidence in her Statement of the Evidence and comments:

The evidence shows that Claimant looked for work on ten of the ninety days in the filing period. He testified that some days he was unable to get out of bed, and had to have the assistance of his wife to get up and walk. The evidence was not sufficient to show that Claimant was unable to look for work for the remaining eighty days of the filing period. As such, Claimant has not shown that he made a good faith effort to look for work during the filing period commensurate with his ability to work. Claimant was not entitled to [SIBS] for the tenth compensable quarter.

The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994 (Unpublished). Whether the required good faith job search exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have also cautioned that good faith is not established simply by some minimum number of job contacts, but a hearing officer may consider "the manner in which the job search is undertaken with respect to timing, forethought and diligence." Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996.

In this case, the hearing officer determined that the 10 job contacts that claimant made during the filing period did not constitute a good faith effort to look for work commensurate with his ability. That conclusion is supported by the evidence and under our standard of review we affirm the hearing officer's decision. Our affirmation of that decision, however, is not to be interpreted that an injured employee in applying for SIBS is required to look for work each and every day of the filing period as the hearing officer's discussion might imply. We also comment in passing that because another hearing officer found a good faith effort in 10 job contacts in a prior compensable quarter does not automatically mean that that same level of effort would entitle claimant to SIBS in subsequent quarters.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge