

APPEAL NO. 991596

Following a contested case hearing held on July 1, 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 the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the third compensable quarter. Claimant has appealed, challenging the sufficiency of the evidence to support the adverse legal conclusion as well as a number of factual findings in support of that conclusion. The respondent (carrier) asserts in response that the evidence is sufficient to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement (MMI) on July 21, 1997, with an impairment rating (IR) of 19%; that he has not commuted any portion of the impairment income benefits (IIBS); that the third compensable quarter began on February 23, 1999, and ran through May 24, 1999; and that the filing period began on November 24, 1998, and ran through February 22, 1999.

Claimant testified that he was injured on _____, when the tractor of a tractor-trailer truck he was driving became separated from the trailer and turned over; that he subsequently underwent two operations on his left elbow for ulnar nerve repair; and that his injury included nerve damage in his left shoulder and neck. The Employer's First Report of Injury or Illness (TWCC-1) dated September 6, 1996, reflects the injured body part as the left elbow and states that the trailer turned over and violent jerks caused the elbow to hit the door. Claimant indicated that sometime later he went to work part time at a (store) and that "things were going pretty well" and he "felt like [he] was headed in the right direction" in terms of recovery from his work-related injury. However, he also stated that he quit the store job due to problems with his elbow. He further testified that on (Date of home injury), he fell from a ladder while hanging Christmas lights at home and injured his back. Though there was no extent-of-injury issue before the hearing officer, claimant maintained at the hearing, apparently for the first time, in view of the benefit review conference report, that his fall from the ladder was caused by his lack of grip strength in his left hand and that had the carrier earlier authorized the MRI his doctor, apparently Dr. S, had requested before the fall, his left upper extremity problems and loss of grip strength could have been diagnosed and treated and the fall avoided.

The Date of home injury, record of Dr. K, which is among the (hospital 1) records both parties introduced, states in the history portion that claimant sustained a lumbar fracture in a motor vehicle accident four years earlier and underwent a decompressive laminectomy and three-level fusion with pedicle screws; that the hardware was removed two years ago and claimant was doing well until yesterday when he fell approximately six

feet and landed on his buttocks after attempting to hang Christmas lights; and that he developed acute onset of left leg weakness and his wife brought him to the emergency room. Dr. K's impression was acute lumbar radiculopathy following a fall. Claimant said he underwent spinal surgery on December 6, 1998, for the repair of two herniated discs. Dr. K's operative report of December 6, 1998, reflects the preoperative diagnosis as spinal stenosis, L2-3; herniated lumbar disk, left L2-3; foraminal stenosis, bilateral L3-4 with acute lumbar radiculopathy; and the procedure performed as a bilateral decompressive L2 laminectomy; bilateral L2-3 and L3-4 medial facetectomy and foraminotomy; and left L2-3 discectomy. Dr. K's records further reflect that claimant was readmitted on December 18, 1998, for exploration and repair of a dural tear and postoperative lumbar pseudomeningocele. Claimant testified that he developed a post-surgery infection and his records reflected that he previously had Hepatitis C.

Claimant introduced an undated "To Whom It May Concern" letter from Dr. S stating that following the _____, truck accident, claimant has had left-sided arm pain including elbow, forearm, and hand with numbness and tingling and, most recently, progressive weakness; that he had a left ulnar nerve transposition but that his symptoms have remained the same; and that he is not at MMI "nor has he completed his process for being treated for this injury which I believe is due to the original rollover in 8/96." Dr. S further stated that further investigation and possible treatment is warranted including a possible reoperation on the elbow; that the cervical spine may be involved; and that he recommends rescission of the MMI date and continued work up and investigation since claimant is "nowhere near symptoms resolution."

The carrier introduced a handwritten "Physician's Statement" dated "4/28/99," bearing an illegible signature, which states that claimant was treated at (hospital 2) on "4/28/99" for a lumbar spine condition, that he is still experiencing severe disabling pain, that he is presently unable to resume work, and that it is difficult to predict when and if he will recover enough to resume his prior duties. Dr. S wrote on June 15, 1999, that claimant had a delay in obtaining his MRI of the left elbow which delayed treatment of his ongoing cubital tunnel syndrome of the left elbow; and that if this MRI had been obtained in a timely manner, "by now, perhaps, he would have had less pain, and have avoided the fall from the ladder leading to his ongoing lumbar condition which keeps him disabled at this time."

Claimant's Statement of Employment Status (TWCC-52) reflected that he earned no wages in the 90 days preceding the start date of the compensable quarter and stated that claimant "could not find work." Claimant attached a list of 24 businesses he said he obtained from the newspapers and friends and which he contacted, mostly by phone. Most of the businesses were trucking firms or businesses which used trucks and claimant wrote by each that the position sought was that of "driver" or "truck driver," a job he conceded he could not then do and was not qualified for, in any event, since most employers required one year's experience immediately preceding the application. Claimant further stated that some of these businesses had supervisory and other jobs which supported the drivers and that he was seeking these types of jobs as well.

Ms. A testified that she was an adjuster; that on or about April 1, 1999, she attempted to contact six of the employers claimant listed on the TWCC-52 to verify his contacts; and that of the six, two of the phone numbers claimant listed were incorrect and the other four had never heard of him.

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.

Among the findings claimant disputes are findings that the evidence indicates that his inability to work is a result of the Date of home injury, noncompensable injury and is not related, in any way, to his _____, compensable injury; that claimant failed to prove that his unemployment was a direct result of his impairment; that claimant's job search documentation indicates that claimant looked for jobs he was unable to do and for which he was not qualified; and that claimant did not attempt in good faith to obtain employment commensurate with his ability to work.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, does not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge