

APPEAL NO. 012252
FILED NOVEMBER 8, 2001

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 September 5, 2001. The hearing officer resolved the disputed issues by determining that the appellant (claimant) failed to make a good faith job search during the qualifying periods for the 6th, 7th, 8th, 9th, and 10th quarters of supplemental income benefits (SIBs); that the claimant is not entitled to SIBs for the 6th, 7th, 8th, 9th, and 10th quarters; and that the claimant has permanently lost entitlement to SIBs pursuant to Section 408.146(c). The claimant has appealed on evidentiary sufficiency grounds, and the respondent (carrier) has responded urging affirmance.

DECISION

Affirmed.

It is undisputed that the qualifying period for the 6th quarter was from February 5, 2000, through May 5, 2000; the qualifying period for the 7th quarter was from May 6, 2000, through August 4, 2000; the qualifying period for the 8th quarter was from August 5, 2000, through November 3, 2000; the qualifying period for the 9th quarter was from November 4, 2000, through February 2, 2001; and the qualifying period for the 10th quarter was from February 3, 2001, through May 4, 2001. At issue in this case is whether the claimant made a good faith job search during the qualifying periods for the disputed quarters.

The claimant sustained a compensable injury to his coccyx, lumbar spine, and left elbow on _____. The claimant testified that he continues to suffer from the effects of his injuries, and that due to his constant pain he takes numerous medications which affect his memory and make him tired. The claimant testified that he is limited in the amount of time he can sit, stand, and walk. The claimant did not assert that he had a total inability to work during the relevant time periods. The claimant described his job search as consisting of making approximately one telephone call per week to a prospective employer. The claimant obtained the names and phone numbers for his job search from the telephone book and newspaper. The claimant testified that he only made one telephone call per week because that is all he could do due to his pain, inability to get out of the house, and sleeping so much.

Section 408.142(a)(4) provides that in addition to the other eligibility requirements, which are not at issue in this case, an employee is entitled to SIBs if the employee has attempted in good faith to obtain employment commensurate with the employee's ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) (Rule 130.102(d)(5)) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has provided sufficient documentation as described in Rule 130.102(e) to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3), and (4), an injured employee who has not returned to work and

is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The hearing officer determined that during the qualifying periods for the 6th, 7th, and 8th quarters, the claimant did not make a well-structured, good faith effort to seek employment commensurate with his ability to work, and that he did not seek employment every week of the qualifying period for the respective quarters. As to the 7th quarter, in her Statement of the Evidence, the hearing officer says, "The Claimant's first documented job search for that quarter is dated May 23, 2000, with 17 days elapsing before Claimant conducted his job search." While we agree that is what the claimant's Application for Supplemental Income Benefits (TWCC-52) for the 7th quarter indicates, we do not agree that is what the evidence presented shows. The claimant's TWCC-52 for the 6th quarter, which is in evidence, documents a job search on May 8, 2000, which actually is in the first week of the qualifying period for the 7th quarter. The hearing officer has an obligation to view the evidence as a whole, and in this case the evidence presented at the CCH shows a documented job search for the 1st week of the qualifying period for the 7th quarter, even though it was recorded on the wrong TWCC-52. Similarly, in her discussion of the 8th quarter, the hearing officer says, "The Claimant's first documented job search for that quarter began on August 29, 2000, with 24 days elapsing before Claimant conducted his job search." We do not agree that is what the evidence presented shows. On the claimant's TWCC-52 for the 7th quarter, he documented job searches on August 8, 2000, and August 14, 2000, which actually occurred during the 1st and 2nd weeks of the qualifying period for the 8th quarter. Despite the above comments on the evidence, based upon the record before us, the claimant clearly did not document a job search for the 1st week of the 6th quarter, the second week of the 7th quarter, and the 3rd week of the 8th quarter, thereby making the claimant ineligible for SIBs for the 6th, 7th, and 8th quarters pursuant to Rule 130.102(d)(5) and (e).

We next turn to the hearing officer's determination that the claimant is not entitled to SIBs for the 9th and 10th quarters. The hearing officer determined that even though the claimant did conduct a job search during every week of the qualifying period for the 9th quarter, his efforts were minimal and there was no credible reason why the claimant could not make more than one phone call in any given week or on any given day. Consequently, the hearing officer determined that the claimant did not make a good faith effort to seek employment commensurate with his ability to work, and that he is not entitled to SIBs for the 9th quarter. As for the 10th quarter, the hearing officer determined that the claimant did not make a job search during week nine of the 10th quarter, and that even if he had conducted a weekly job search, his efforts were minimal since he followed the same pattern as during the 9th quarter. We note that our review of the record indicates that the claimant did have one documented job search for the ninth week of the 10th quarter.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Whether the claimant has made a good faith job search commensurate with his ability to work is a question of fact for the hearing officer to

determine from the evidence presented. The hearing officer heard the evidence and determined that the claimant's efforts were minimal and not made in good faith. Nothing in our review of the record indicates that the hearing officer's determinations are so against the great weight and preponderance of the evidence so as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Finally, Section 408.146(c) provides that an employee who is not entitled to SIBs for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. Since we affirm the hearing officer's determination that the claimant is not entitled to SIBs for the 6th, 7th, 8th, 9th, and 10th quarters, the hearing officer's determination that the claimant has permanently lost entitlement to SIBs is affirmed.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Michael B. McShane
Appeals Judge