

APPEAL NO. 980206  
FILED MARCH 20, 1998

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 December 15, 1997, with hearing officer. The issues at the CCH were whether the respondent, who is the claimant, was entitled to supplemental income benefits (SIBS) for her second and third compensable quarters.

The hearing officer found entitlement for both quarters.

The carrier appeals. First, the carrier argues that the hearing officer departed from periods of time for each quarter which were stipulated to because the parties agreed at the CCH that the dates reported from the benefit review conference were not correct. Second, the carrier argues that claimant had the ability to work, with restrictions, but made no search for employment during the filing period for the second quarter other than to contact her employer at the time of her injury, and that she also failed to prove any search was made relative to the third quarter. The carrier further argues that her stated reason for not seeking other employment, a desire not to lose future employment with her employer while out on a disability leave, has been determined by the Appeals Panel as insufficient to alleviate a worker from the statutory duty to search for work commensurate with ability to work. The carrier points out that this desire to stay with the previous employer, and not impairment, directly resulted in unemployment for the periods of time in issue. The claimant responds by agreeing that a "clerical error" was made in stating the beginning and ending dates of the SIBS quarters. The claimant then asks that, after this correction, the decision be affirmed. The claimant asserts that she sought work as soon as medically able to work and that her search with her previous employer was a good faith one, because this was the employer most likely to provide work commensurate with her physical ability to work. The claimant asserts that her ability to work was "intermittent," for only a few weeks out of each filing period due to carpal tunnel syndrome (CTS) surgeries. The claimant argues that the evidence proved her CTS to be a factor directly causing her unemployment, and that it need not be the sole factor.

DECISION

Reversed and rendered.

Claimant worked for (company) (employer) when she sustained bilateral CTS; the date of injury was \_\_\_\_\_. At the time of her injury, she worked reception, and said this involved use of the switchboard. Claimant had a college education. At the beginning of the CCH, the parties stipulated that the second compensable quarter ran from March 24 through June 23, 1997 (which would make the filing period in issue run from December 24, 1996, through March 23, 1997). The third quarter was stipulated to run from June 24

through September 23, 1997 (and the filing period would correspond to the time frames for the second quarter).

The claimant indicated that she took disability and medical leaves at various times after her injury. She understood it to be employer's policy that if you searched for work while on medical leave, termination would result. The written policy in evidence also makes clear that this termination will extend to applications for unemployment insurance benefits. Therefore, she agreed that she did not look for work until "officially" terminated from the company as of July 15, 1997. Claimant had understood, however, that her employer would not take her back unless she had an unrestricted release, and agreed that when she brought in restricted releases from her doctor, both after February 7th, and after April 8th, she was told by the employer that it would not accommodate her restrictions from her doctor. She also said that when she was given an unrestricted release (at her insistence) after May 22nd, she was told at that time that her position had been transferred to another office in another part of the state. Claimant applied for unemployment insurance benefits through the Texas Workforce Commission and a claim file was established effective May 18, 1997.

Pertinent to the filings periods in question, claimant had two surgeries, one on her right wrist, the other on her left. The first surgery occurred January 27, 1997, and claimant said her right wrist was in a cast for two weeks. After that, she was restricted by (Dr. G) to no use of her right hand, and advised to take 10-minute breaks every hour. On February 28th, she was given leave to use both hands but with a 10-pound lifting limit. Her left arm surgery occurred March 24th and she was in a cast until April 8th. Her post- surgical restrictions imposed the 10-minute break limit (according to claimant) and a 10-pound lifting limit for the right hand.

Claimant began sending out resumes after July 15th; she stated that she had to "wait" until this time because she was "under" the employer. There was considerable evidence brought forward about whether claimant did or did not cooperate with a vocational counselor employed by the carrier. Claimant said that she felt the referrals made to her were beyond her physical abilities but offered no evidence that she undertook independently to locate employment and, in fact, stated unequivocally that she did not go beyond asking the employer to return to work on the limited basis. Claimant drew short term disability payments during her medical leave.

Because the hearing officer especially mentions the unwillingness of the employer to take claimant back or accommodate her restrictions, we would note that this may be relevant to the "direct result" criterion but is not determinative of whether an injured worker has made a good faith search for employment commensurate with the ability to work. Nor was the claimant discharged from an obligation to look for work because she wished to preserve the possibility of returning to her previous employment. Texas Workers' Compensation Commission Appeal No. 970828, decided June 20, 1997. Analysis of the efforts at searching for employment is done with reference to the "filing" period, or that

quarter which precedes the compensable quarter. See 28 TEX. ADMIN. CODE. §§ 130.101 and 130.104(a) (Rules 130.101 and 130.104(a)).

There are two eligibility criteria that must be met to qualify on a continuing basis for SIBS, set out in Section 408.143(a): that the employee has earned less than 80 percent of the pre-injury average weekly wage as a direct result of the impairment, and that the employee has made a good faith search for employment commensurate with the ability to work. It is the duty of the employee to seek work, not the duty of the employer at time of injury to offer it. Good faith 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 Appeal No. 960107, decided February 23, 1996. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Appeal No. 94150, decided March 22, 1994.

Because claimant made essentially one effort to find employment during each of the filing periods for both the second and third quarters, which amounted to a contact with her employer to see if her restrictions would be accommodated, and no other contacts were proven, and given further evidence that she had the ability to work with restrictions for most of the filing period, we hold that the hearing officer erred, as a matter of law, in holding that claimant made a good faith search for employment. See Texas Workers' Compensation Commission Appeal No. 960964, decided June 26, 1996. The sending of resumes and more formal efforts that the claimant testified about did not, according to her admission, occur until after her "official" termination which she said was July 15th. However relevant such efforts may be for future SIBS eligibility, they could not be considered as a discharge by the claimant of her responsibility to search for employment pertinent to the quarters in issue here. We accordingly reverse the decision that claimant was eligible for her second and third quarters of SIBS, based upon our reversal of the hearing officer's decision that claimant made a good faith search for employment. We render the decision that the claimant did not make a good faith search for employment during the second or third quarter filing periods, and is thus not eligible for SIBS for those quarters. We would note that the severity of the claimant's condition, warranting surgery during the time period in question, and the employer's statement that she could not return with her restrictions, is enough to support the direct result finding.

Susan M. Kelley  
Appeals Judge

CONCUR:

Elaine M. Chaney  
Appeals Judge

Judy L. Stephens  
Appeals Judge