APPEAL NO. 980047

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 11, 1997 with hearing officer. With respect to the only issue before him the hearing officer determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter having in good faith attempted to obtain employment commensurate with claimant's "limited ability to work."

The appellant (self-insured) appealed contending that the claimant's 18 job contacts were inadequate, in both quality and quantity, to prove a good faith effort, that claimant's testimony was at odds with that of the self-insured's vocational rehabilitation counselor, that claimant failed to promptly follow up with Texas Rehabilitation Commission (TRC) and that claimant's underemployment was not the direct result of her impairment because claimant had sustained an injury in a subsequent (to the compensable injury) slip and fall. The self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds and urges 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 suffered a compensable low-back injury on _____, that she reached maximum medical improvement (MMI) on January 22, 1995, with a 15% impairment rating (IR), that impairment income benefits (IIBS) have not been commuted and that the filing period for the eighth compensable quarter was from June 3 through September 1, 1997. Claimant testified that she has had three spinal surgeries (one laminectomy and two fusions) with the most recent surgery in April 1996 being after a slip and fall in an unrelated accident on the premises of a large retailer. Claimant testified that she injured her neck and shoulders in that fall.

Although claimant submitted some medical evidence that she is unable to "seek or obtain any gainful employment" and that she is "totally medically disabled," the gist of her claim is that she made a good faith attempt to seek employment commensurate with her ability by making 18 job contacts during the filing period at issue, cooperating with the self-insured's vocational rehabilitation counselor, cooperating and seeking assistance from the TRC, listing with the Texas Workforce Commission (TWC) and seeking employment from newspaper ads, and the city and county job information postings ("job lines").

Claimant submitted a Statement of Employment Status (TWCC-52) with some 18 entries, some of which appear to be two applications, for different jobs with the same employer and testified how she obtained the specific contacts. At least several were on referral from the self-insured's vocational rehabilitation counselor. Claimant also submitted a copy of the resume she uses in her job applications and several rejection letters from some of the prospective employers. Claimant testified, and her resume attests, that her background and qualifications are with computers and that at one point she sought assistance from TRC to set up an Internet online service. A letter dated October 21, 1997, from the TRC counselor to the self-insured's vocational rehabilitation counselor states that claimant's response for information for equipment costs was "untimely and inadequate" and they were closing claimant's case. Claimant's ability to do some work is not at issue.

The self-insured also contends that an April 1995 slip and fall, for which claimant had filed a lawsuit against the retail chain, was instrumental in claimant's inability to work or that claimant's unemployment was not the direct result of her compensable impairment but rather the slip and fall.

The hearing officer accurately sums up the testimony and evidence and in his discussion comments:

> The Claimant was credible concerning the quarter in dispute and her attempts at employment. Certainly, the Claimant could have done more, but the Claimant did make honest and sufficient attempts to obtain employment. Worth noting is that the job lines would contain possibly multiple job listings or none. The Claimant's online service appears to have faltered because of her lack of diligence in expeditiously following up.
>
> There is no magic number of job attempts, and the quality of the search is more important than counting numbers. Here, the Claimant was credible in her testimony concerning quality inquiries with the listed 18 prospective employers, some with multiple job listings, and looking at the TWC for jobs. The Claimant may not have made a perfect job search but did attempt beyond a minimal level reaching a reasonable level needed to qualify in good faith.

The self-insured appealed several of the hearing officer's determinations, and while conceding "sheer numbers" of job applications are not determinative of good faith, complains that some of the contacts are duplicative and that claimant made at most 16 applications during the filing period. Self-insured argues that claimant was not diligent in working with TRC and that its vocational rehabilitation counselor had been unable to certify all of claimant's alleged job contacts. Self-insured complains that a functional capacity evaluation (FCE) showed submaximal effort and that claimant had failed to follow through on her exercise program and several other similar complaints. We note that all this information was before the hearing officer and that the self-insured in essence is asking us to substitute our judgment for that of the hearing officer. We have many times held that the hearing officer is the sole judge of the weight and credibility to be given to the evidence (Section 410.165(a)) and that good faith is a subjective notion characterized by honesty of purpose, freedom from intent to defraud and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994. Whether a claimant's job search efforts were actually made in good faith to obtain employment commensurate with the ability to work is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. The evidence of a good faith job search in this case was subject to varying inferences. The hearing officer found the claimant credible in her assertions that she was actually looking for and wanted to return to work.

On the issue of direct result, the self-insured points to claimant's 1995 slip and fall, the subsequent civil litigation, and "some psychological barriers" as preventing claimant from "obtaining employment." The hearing officer addresses self-insured's contention in the discussion portion of his decision stating:

> The Claimant did establish her unemployment was not necessarily "the" direct result of her impairment, but was a direct result of her impairment. Texas Workers' Compensation Commission Appeal No. 952082, decided January 10, 1996.

In essence the hearing officer found the slip and fall and other factors may have contributed to claimant's unemployment but that the impairment from the compensable injury was still "a" direct result even if not "the" direct result. We find the hearing officer's determinations supported by sufficient evidence.

The self-insured, with its appeal, submits some answers to interrogatories in claimant's suit against the retailer. We do not normally consider evidence raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission

Appeal No. 93111, decided March 29, 1993; *see also* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not consider those answers in another proceeding to be so material as to require a remand in this case.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge