APPEAL NO. 980244
FILED MARCH 26, 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 was held on January 15, 1998, in (City), Texas, with (SC) presiding as hearing officer. With respect to the two issues before her, the hearing officer determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 11th and 12th compensable quarters having made a good faith effort to obtain employment and that claimant's underemployment was a direct result of his impairment.

Appellant (carrier) appeals argues that the claimant "should have made a more extensive effort to seek employment in line with his ability to work." Carrier cites Appeals Panel decisions defining good faith and direct result. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

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 (neck and left arm) injury on _____, that claimant has a 24% impairment rating, that impairment income benefits have not been commuted and that the filing period for the 11th compensable quarter was from April 20 through July 19, 1997, with the filing period for the 12th compensable quarter being from July 20 through October 19, 1997.

Claimant testified that his limitations include a stiff neck, pain in his neck and shoulders, tingling in his left hand, that a doctor has imposed a 23 pound lifting limitation

and that he wears a TENS unit which prospective employers frequently ask about. Apparently, claimant's son or claimant and his son have a painting business. In his Statement of Employment Status (TWCC-52) for the filing period for the 11th quarter, claimant listed two job contacts, and listed two other jobs he has done as an independent contractor (one was a $600.00 painting job, the other a $250.00 sheetrock repair job). Claimant testified that he made other job contacts through the newspaper classified ads and calling whenever he sees a notice requesting painting help. Claimant testified, for both filing periods, that he had not listed more job contacts on his TWCC-52 because carrier's adjuster told him that he should just list the two or three best contacts. Claimant said that he had done so the past 10 compensable quarters and had not been questioned.

For the filing period for the 12th quarter claimant listed three job contacts on his TWCC-52, giving the same explanation as he had for the 11th quarter. In addition, claimant had become regularly employed the last three weeks of the filing period as a cabinet refinisher earning $180.00 a week. Claimant testified that he has continued employment with this employer and that the work allows him to work at his own pace. (The employer apparently gives claimant a number of cabinets to refinish and pays him $180.00 a week.) The evidence did not establish how many hours a week claimant spends doing this job.

Carrier at the CCH, remarked that although claimant's cabinet refinishing job was "some evidence of a successful job search. It still constitutes underemployment." Carrier argues claimant should have made a more extensive effort to seek higher paying employment and that claimant did not meet the direct result criterion.

The Appeals Panel has frequently defined "good faith" as 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. 972515, decided January 15, 1998. Good faith is not established simply by a claimant's assertion that he or she exercised the required good faith, but must be established by some objective manifestation of that good faith. *See* Texas Workers' Compensation Commission Appeal No. 960964, decided June 26, 1996. We have also noted that there is no minimal number of job applications that will as a matter of law establish a good faith effort, *see* Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996, and that the manner in which a job search is undertaken "with respect to timing, forethought and diligence" may be considered on the question of good faith. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. In this case the hearing officer could have believed claimant that he made more job contacts than those listed and he was relying on the adjuster's instruction to only list the two or three best contacts. The hearing officer could further note that in fact claimant succeeded in obtaining some employment during the quarters at issue. The hearing officer could also consider that claimant's wearing of a TENS unit caused comment from some prospective employers as demonstrating that claimant's underemployment was at least in part caused by claimant's impairment. We find the hearing officer's decision supported by sufficient evidence.

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge