

APPEAL NO. 980308  
FILED APRIL 2, 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 January 12, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer.

She determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the seventh and eighth quarters and that the claimant permanently lost her entitlement to SIBS because she was not entitled to them for 12 consecutive months. The claimant appeals these determinations, expressing her disagreement with them. The appeals file contains no response from the respondent (self-insured).

DECISION

We affirm.

The claimant sustained a compensable low back injury on \_\_\_\_\_, while working as a custodian for the self-insured, and was assigned a 15% impairment rating (IR).

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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, "filing 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]" for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. The seventh quarter was from May 31, 1997, to August 29, 1997, and the eighth quarter was from August 30, 1997, to November 28, 1997. The filing periods for these quarters were the preceding 90 days. The key question in this case is whether the claimant made the required good faith effort to obtain employment commensurate with her ability to work during each of the filing periods.<sup>1</sup>

The claimant did not work during either of the filing periods. She testified that she is in regular contact with the self-insured for a possible return to work, but no job within her restrictions has been offered to her. The latest documented contact in

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<sup>1</sup>The findings that the claimant's unemployment during the filing periods was a direct result of her impairment have not been appealed and have become final. Section 410.169.

evidence was a letter of October 1, 1996, from the self-insured which asked the claimant for a functional assessment to determine if she could return to regular duties. Dr. A, her treating doctor at the time, diagnosed a lumbar sprain and released her to light duty with lifting and pushing/pulling restrictions of 20 pounds. He also limited her standing, walking, and reaching and prohibited climbing, jumping, running, balancing, stooping, kneeling, crouching, crawling, sweeping, and mopping. On December 8, 1997, after the close of the eighth quarter filing period, the claimant requested to change treating doctors to Dr. P because she was not satisfied with Dr. A. In a report of January 12, 1998, Dr. P commented that "the patient does not feel that she is ready to go back to work because of the ongoing pain."

The claimant submitted a Statement of Employment Status (TWCC-52) for the seventh quarter on which she listed 18 job contacts. Nine of the contacts were for what she described as "home based employment" which she found in the want-ads of the newspaper. These jobs involved buying materials which were to then to be sold by the claimant. She said she had no money to do this. Otherwise, her job search consisted largely of going to various businesses to see if they had any job openings. In the seventh quarter filing period she submitted three applications. She was not offered a job and, in most cases, no jobs were available. She testified that she limited her applications and inquiries to part-time employment believing that this was consistent with Dr. A's limited work release. The nature of the jobs applied for were mostly "sales" positions. On her TWCC-52 for the eighth quarter, claimant listed 33 job contacts and three applications actually submitted. Most of the employers were restaurants and the type of employment sought was anything available. The claimant also said she went to the Texas Rehabilitation Commission (TRC) for assistance, but was only given a limited number of bus passes for transportation. She said she also contacted the Texas Workforce Commission (TWC), but was given no referrals. According to a TWC document in evidence, the claimant indicated she did not seek janitorial work or "shrimp processing work." The claimant explained this by saying that these types of jobs were beyond her work restrictions.

The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994. Whether the required good faith job search exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have also cautioned that good faith is not established simply by some minimum number of job contacts, but a hearing officer may consider the manner in which the job search is undertaken "with respect to timing, forethought and diligence." Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996. The hearing officer found that the claimant did not make the required good faith job search effort in either of the filing periods in issue. In her discussion of the evidence, the hearing officer explained that her findings were based on the number of actual job applications submitted; her conclusion that the claimant limited her applications to part time employment only, which the hearing officer considered was

inconsistent with the actual work restrictions; and her conclusion that the claimant's registration with the TWC was "illusory, as it was improbable that it could substantially assist her in obtaining employment." The hearing officer's factual determination that the claimant did not make the required good faith job search effort is subject to reversal only if it is so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to this case, we are satisfied that the evidence was sufficient to support the decision of the hearing officer that the claimant was not entitled to seventh and eighth quarter SIBS because she did not make the required good faith job search during the relevant filing periods.

Section 408.146(c) provides that "an employee who is not entitled to [SIBS] for 12 consecutive months ceases to be entitled any additional income benefits for the compensable injury." The parties stipulated that the claimant was not entitled to fifth and sixth quarter SIBS. We have affirmed the findings of the hearing officer that the claimant was not entitled to seventh and eighth quarter SIBS. Under these circumstances, we find no error in the determination of the hearing officer that the claimant has permanently lost her entitlement to SIBS.

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Alan C. Ernst  
Appeals Judge

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CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Robert W. Potts  
Appeals Judge