APPEAL NO. 990084

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, 1998. He determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the first quarter. The appellant (carrier) appeals this determination, contending that it is against the great weight and preponderance of the evidence. The claimant replies that the decision is correct and should be affirmed.

DECISION

Affirmed.

The claimant worked as an insurance debit agent. A significant portion of his job responsibilities included going to customers' residences to service policies and collect premiums. The job, he said, required him to carry a 20-pound briefcase. He sustained a compensable cervical spine herniation injury on _____, when he tripped on a stairway. He reached maximum medical improvement on October 3, 1997, and was assigned a 16% impairment rating (IR).

In a letter of October 28, 1997, Dr. LW wrote that the claimant's nerve root compression had resolved and he was "relatively symptom-free." He advised the claimant "to avoid activities which caused the root compression initially, *e.g.*, lifting, carrying, 'maneuvering' heavy stuff. No problem regular officer work, driving, etc." The claimant apparently interpreted Dr. LW's statement as a return to sedentary work. In a letter of October 29, 1997, from the employer to the claimant, the employer stated that Dr. LW had released him to work "with no restrictions." He was invited "to return to work as a sales representative/agent" effective November 3, 1997. He then returned to work, but said the employer refused to comply with these restrictions and would not permit him to do office work only, requiring he return to his previous job. In a letter of December 1, 1997, the claimant wrote the employer to advise that his last day of work would be December 12, 1997, and that "I am retiring as of that date." He offered to continue part-time work for the employer. Nowhere in the letter does he mention any physical restrictions or inability to do the assigned work. He testified that he was retirement eligible as of the date he proposed to quit.

The claimant, who testified that he had a master's degree in theology and pastoral work, started work as an "interim pastor" for a local church in November 1997. He described the work as "full time" and said that he was paid $125.00 per week, which was all the church could afford. He was not asked to further explain what he meant by "full time" or what his work schedule was, nor was it clear if he performed this job as a contractor or as an actual employee of the church.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an IR of 15% or more; has

not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior 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]." The first SIBS quarter was from September 5 to December 4, 1998, and the filing period for this quarter was from June 6 to September 4, 1998. At issue in this case was whether the claimant met the good faith job search and direct result standards of SIBS entitlement.

In a Statement of Employment Status (TWCC-52) for first quarter SIBS, the claimant listed four job contacts within the filing period. Two of the contacts were for church positions at two different churches. No job offer was made. Two other contacts were for substitute teaching positions at two school districts. According to the claimant's testimony and the TWCC-52, he was offered a position by each school district during the filing period, but did not actually work until after the first quarter filing period. The claimant admitted that he did not apply for any job in the insurance industry where, he said, he had significant experience. He said that if money were the motivation, he would have looked there, but that "making money was not a high priority." He said he took the interim pastor job (well before the filing period even began) because this was "best" for him and consistent with his "calling." He said that 90% of his work as interim pastor was sedentary. The hearing officer considered this evidence and concluded that the claimant made the required good faith job search commensurate with his ability to work. The carrier appeals this determination and argues essentially that the claimant's work restrictions were minimal, if any, and that he was a highly skilled and experienced worker who simply declined to seek employment that offered a realistic chance of earning more money. The claimant's reply was that he was working "full time" and that was the end of the matter; he met his requirement for SIBS eligibility. He further described his retirement as an "early retirement due to danger of re-injury."

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. 93181, decided April 19, 1993. Whether the required good faith job search has occurred is a question of fact for the hearing officer to decide, Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995, and is not established simply by some minimum number of job contacts. Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996. Contrary to the suggestion of the claimant both on appeal and at the CCH that his "full-time" work during the filing period conclusively established a good faith job search, the Appeals Panel has stated that a full-time job or a part-time job at the number of hours medically established was prima facie evidence of good faith. *See* Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997. In a given

case, such prima facie evidence may or may not be sufficient to meet the claimant's burden of proof of a good faith job search, particularly where as here there was little evidence on the precise nature of the claimant's restrictions or what he meant by a "full time" job. We have also observed that there was no "absolute" requirement that a claimant who is working full time must also be engaged in efforts to find a higher paying job. Texas Workers' Compensation Commission Appeal No. 962493, decided January 23, 1997. The obvious trade-off in such situations is between spending time working and spending time looking for better work. What is essential is that the claimant made a good faith effort to obtain work, not that he obtain work at a specific rate of pay. Texas Workers' Compensation Commission Appeal No. 960946, decided July 1, 1996. In the case we now consider, another hearing officer could well have concluded that the claimant did not make the required good faith job search, but arbitrarily limited his search to a few jobs and was content to work at substantially less than minimum wage. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong 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). While another hearing officer may have found otherwise in what we admit is a close case, we do not believe that this hearing officer's finding of the required good faith job search lacks sufficient evidentiary support as to require its reversal, particularly in light of the evidence that in addition to actually working, the claimant did make other job searches.

The carrier also appeals the finding of the hearing officer that the claimant's underemployment was a direct result of his impairment, arguing that the claimant voluntarily resigned his job in order to pursue his "calling" in another field and that his retirement, or leaving his former job, had nothing to do with his impairment from his compensable injury. We have held that retirement does not in itself preclude entitlement to SIBS and that a claimant need only prove that the underemployment is a direct result of the impairment, not that the impairment is the sole cause of the underemployment. Texas Workers' Compensation Commission Appeal No. 961981, decided November 18, 1996; Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. There was some evidence that the claimant asked the employer to continue to allow him to work full time in the office and not go on the road, but the employer for reasons not stated declined this request. Obviously, another hearing officer might have concluded from the vague evidence of the circumstances of the claimant leaving his position with the employer, that the claimant simply wanted a change of careers subsidized in part by SIBS. This hearing officer did not reach this conclusion. In consideration of established precedent that the impairment need only be a cause of the underemployment and in light of the belief of the hearing officer that the claimant was credible, we again are unwilling to conclude that the hearing officer's factual determination of direct result was so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Judy L. Stephens
Appeals Judge