

APPEAL NO. 990427

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 February 3, 1999. With respect to the issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fourth compensable quarter of November 1, 1998, to January 31, 1999. In its appeal, the appellant (self-insured) argues that the determinations that the claimant made a good faith job search in the filing period, that his unemployment is a direct result of his impairment, and that the claimant is entitled to SIBS are against the great weight of the evidence. The appeals file does not contain a response to the self-insured's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to his low back on _____; that he was assigned a 17% impairment rating; that he was entitled to SIBS for the previous quarters; and that the filing period for the fourth compensable quarter began on July 25, 1998. The claimant testified that he looked for work in the filing period. He stated that he primarily applied for positions as a vehicle driver, general laborer, and custodian because he had job experience in those areas. The claimant testified that he has a current class B driver's license and that he drove a school bus for the self-insured for eight of the 10 years he worked for the school district.

The attachment to the claimant's Statement of Employment Status (TWCC-52) lists some 32 job contacts. The hearing officer noted that "nine of those were in July before the filing period started, but they are useful from the aspect of determining good faith on the Claimant's part." The claimant explained that he chose the employers he contacted by consulting classified advertisements in the newspaper and through job referrals from the Texas Workforce Commission (TWC). He explained that he began to consult the newspaper after the adjuster handling his claim complained that he needed to do more than drive around making cold calls on employers to see if they were hiring. He stated that because of his limited knowledge of English, his daughter helps him in translating the newspaper and that she accompanies him when he contacts the potential employers. He stated that his daughter was available two days per week to assist him in the filing period and that he made several contacts each day he looked for work. The attachments to the claimant's TWCC-52 also demonstrate that he was given four job referrals by the TWC. He maintained that he contacted each of those employers. Two of the referrals appear to be dated July 31, 1998, and the claimant applied for those positions on September 4th and September 7th, respectively. The claimant denied that he waited for over a month to contact those employers, insisting that he contacted them as soon as he received the referrals. On cross-examination, the claimant acknowledged that two employers he contacted about a trucking job told him that they would not hire him because he is taking

medication for his compensable injury; however, he denied "knowing" that no employer would hire him to drive a truck when he is on medication.

In a report of April 15, 1997, Dr. D, who appears to have been the designated doctor, opined that the claimant could return to work with a limitation of light lifting, under 25 pounds. In a report of February 7, 1997, Dr. P, who examined the claimant at the request of the self-insured, stated, "I do not believe that he will be able to return to work as a custodian, but believe that, as was noticed in his functional capacity evaluation, that he might be able to do more sedentary or supervisory kind of work."

Initially, we will consider the self-insured's challenge to the hearing officer's determination that the claimant made a good faith effort to look for work commensurate with his ability to work in the filing period. Good faith is a question of fact for the hearing officer, as the sole judge of the weight and credibility of the evidence under Section 410.165(a), to resolve. In arguing that the hearing officer's good faith determination is against the great weight of the evidence, the self-insured notes that the claimant applied for driving positions, which it asserts he is not qualified to do because he takes prescription medication and because he has a back injury and "there is no way he could sit and drive for long periods." The self-insured likewise argues that the claimant cannot establish good faith "merely looking in the newspaper" and receiving limited referrals from the TWC. The self-insured made the same arguments to the hearing officer and it was solely within his province as the fact finder to determine the significance, or lack thereof, of those factors. In this instance, the hearing officer considered the evidence presented by the claimant about his job search efforts and was persuaded that the claimant sustained his burden of proving that he made a good faith job search in the filing period. The hearing officer was acting within his province as the fact finder in so finding. Our review of the record does not reveal that the good faith determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The self-insured also asserts error in the hearing officer's determination that the claimant's unemployment was a direct result of his impairment. In that regard, the self-insured argues that "[t]he evidence clearly showed that none of the employers refused Claimant a job due to his impairment." We have previously noted that in light of the Americans with Disabilities Act, "it is unreasonable to expect a potential employer to say, much less write, that it is not hiring an employee because of an impairment or handicap." Texas Workers' Compensation Commission Appeal No. 950849, decided July 7, 1995; see *also*, Texas Workers' Compensation Commission Appeal No. 950298, decided April 10, 1995. It is well-settled that a determination that the claimant's unemployment is a direct result of the impairment from the compensable injury is generally supported by evidence that the claimant sustained a serious injury with lasting effects and cannot reasonably perform the type of work he was doing at the time of his injury. Dr. P, who examined the claimant at the request of the self-insured, opined that the claimant could not return to his work as a custodian. The direct result determination is supported by sufficient evidence

and is not so contrary to the great weight of the evidence as to compel reversal on appeal.
Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge