

## APPEAL NO. 990438

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 5, 1999, a contested case hearing (CCH) was held. With regard to the only issue before him, the hearing officer determined that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the sixth compensable quarter because claimant had not made a good faith effort to obtain employment commensurate with her ability to work. The hearing officer found that claimant's unemployment was a direct result of her impairment.

Claimant appeals a number of the hearing officer's findings, indicates disagreement with some of the stipulations that she made at the CCH, asserts that her job search was in good faith and raises the fact that impairment income benefits (IIBS) and SIBS checks were returned to the respondent (self-insured) to be replaced by her regular payroll checks. Claimant requests that we reverse the hearing officer's decision and render a new decision, increasing claimant's impairment rating (IR) and ordering SIBS payment for the sixth compensable quarter. The self-insured responds, questioning the timeliness of claimant's appeal, notes that portions of the appeal dealt with issues not before the hearing officer and generally urges affirmance of the hearing officer's decision regarding SIBS for the sixth compensable quarter.

### DECISION

Affirmed.

We must first note that a substantial portion, if not most, of the CCH dealt with the admissibility of the parties' exhibits and a somewhat unusual situation that apparently claimant's income benefits checks, including IIBS checks, were being returned to the self-insured school district in return for claimant's regular payroll checks. The hearing officer indicated that he would turn this matter over to the Compliance and Practices Division for investigation. As this did not involve an issue before the hearing officer, we will not address it further. On the timeliness of claimant's appeal, claimant states that she received the appeal on February 12, 1999, which was within five days of the date of distribution and therefore pursuant to Section 410.202; the appeal must be filed no later than March 1, 1999. Claimant's appeal is postmarked February 26, 1999, and was timely.

The only issue before the hearing officer in this case was entitlement to SIBS for the sixth compensable quarter. Although the self-insured made some mention that claimant may have been made a job offer, the hearing officer apparently accepted claimant's contention that the offer was made to someone else and not the claimant and made no comment or finding regarding that reference. In any event, that passing reference by the self-insured did not raise the issue of a bona fide offer of employment under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), therefore, arguments involving Rule 129.5 are not before us and are not considered germane to this decision.

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* 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. Claimant should note that the requirements for a good faith job search "commensurate with the employee's ability to work" is a statutory and regulatory requirement and the hearing officer did not err in applying that standard.

The parties stipulated that claimant sustained a compensable injury on \_\_\_\_\_, and has a 22% IR. Claimant argues that since another 37% IR was not disputed within 90 days, the 37% IR has become final. First, the 22% IR was stipulated and agreed to by the claimant at the CCH and cannot now be appealed. Secondly, the 90-day dispute provision of Rule 130.5(e) applies only to the first chronologically, in time, IR assessed, not the first IR assessed by a particular doctor. Rule 130.5(e) is inapplicable in this case and claimant has already stipulated and agreed that she has a 22% IR. The parties appear to agree that the applicable filing period is the 90 days prior to September 21, 1998.

Claimant testified, and is supported by the medical reports, that she was employed by the self-insured school district and worked with autistic children. On \_\_\_\_\_, a severely autistic child threw a tantrum and attacked claimant, grabbing claimant by the hair and knocking her down. Claimant sustained thoracic and cervical spinal injuries and injury to her left arm. The treating doctor is Dr. SW and the designated doctor who assigned the 22% IR was Dr. LW. In a letter dated July 26, 1997, Dr. SW stated that claimant has chronic pain, "would be unable to work an 8 hour day at even a sedentary job" and should be considered "unemployable in any capacity." A functional capacity evaluation performed on October 16, 1997, found claimant capable of working at a medium work level. In a letter dated January 13, 1999, Dr. SW discussed some of the jobs available in City, a small town of about 8,000 or 9,000 people and concludes that claimant is not able to do any work.

Claimant did not allege a total inability to work at the CCH. Attached to her Statement of Employment Status (TWCC-52) are 17 job contacts (14 of which were during the filing period at issue) for positions such as a cashier, "front desk helper," receptionist, checker and salesperson. Claimant testified that many of those contacts were by telephone to people that she knew and who might give her a job. The hearing officer could have believed that claimant went through the motions of a job search to qualify for SIBS. In response to the self-insured's question about what she did during the 60-plus days that she was not looking for employment, claimant replied that she stayed home and took care of her children. The hearing officer commented in his Statement of the Evidence, based on

claimant's testimony, that she has a fear of being attacked, that the community claimant lives in has "limited employment opportunities due to size and location" and that claimant has "a limited ability to drive due to spasm in her left hand." We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. A claimant's overt actions are factors to also consider in establishing good faith. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. Claimant correctly points out that "the mere fact that a claimant's job search encompasses only a limited period of time is not dispositive, in and of itself, of whether that claimant's efforts were made in good faith," citing Texas Workers' Compensation Commission Appeal No. 980492, decided April 20, 1998, and that there is no specific number of job contacts which make an employee's efforts to be classified as good faith. Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996. However, we have consistently held that whether a claimant's job search amounted to good faith was a factual determination for the hearing officer to resolve and we would reverse that determination only if it was so against the great weight and preponderance of the evidence as to be manifestly unjust or clearly wrong. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant also appears to be appealing the hearing officer's direct result finding; however, in that that portion of the decision is in claimant's favor, we will not discuss it further other than to point out that the "direct result" requirement in Section 408.143(a)(1) and Rule 130.103(a)(1) is entirely separate and different than the "good faith" requirement of Section 408.143(a)(3) and Rule 130.103(a)(2). Consequently, one cannot take the favorable direct result, add some other factors, and "all put together thereby meets the good faith SIB criterion." Claimant must establish both the "direct result" requirement, which she did in this case, and the "good faith" requirement. Finding that claimant met the direct result requirement cannot be "all put together" to establish the good faith requirement.

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

---

Elaine M. Chaney  
Appeals Judge