APPEAL NO. 990579

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 12, 1999. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the ninth quarter. The appellant (self-insured) appeals this determination, contending that it is against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant worked as a custodian. She sustained a compensable lumbar herniation injury on _____, for which she was assigned a 15% impairment rating. She described her work limitations as no stooping or bending and no lifting over 25 pounds.

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 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]." The ninth SIBS quarter was from September 29 to December 28, 1998, and the filing period for this quarter was from July 1 to September 28, 1998.

The claimant submitted a Statement of Employment Status (TWCC-52) on which were listed 108 job contacts made during the filing period. She attached two job applications. She said she generally found these potential employers through the newspaper, called most and personally visited "some." Although many of the jobs were located in City 1, she said she did not have private nor public transportation from where she lived. At one point in her testimony, she said she thought she could do the jobs she inquired about, but at another point she said she did not think she could do the work, but would try if offered a job. She also testified that she is enrolled with the Texas Rehabilitation Commission and the Texas Workforce Commission, but neither have been of any service to her. None of the contacts resulted in a job offer.

Ms. J, a vocational consultant, was hired by the carrier after the ninth quarter filing period ended to assist the claimant in finding a job. She attempted to verify the job contacts listed on the TWCC-52. She testified that she was able to verify only six contacts. The remaining employers either did not respond to her inquiries or, because of the wrong information on the TWCC-52, Ms. J said, she could not contact the employers. She also

testified that failure to verify a contact was not the equivalent of no job contact. With regard to the two applications introduced into evidence, Ms. J noted that the work experience was not complete and that the managers signed the applications. In her experience, such a request to have a manager sign an application suggested to some employers that the person was just trying to obtain verification for benefits and was not really interested in a job.

The only medical record in evidence was a note of Dr. W, an orthopedic surgeon, of August 26, 1998, in which he identified low back pain radiating into the left hip and thigh and lower extremity. He considered surgery "unpredictable" and recommended continuing conservative care. His final comment was that he doubted she could be hired "with this much trouble."

The hearing officer considered this evidence, including the testimony of the claimant, and found that the claimant made a good faith effort during the filing period to obtain employment commensurate with her ability to work. 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 exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. In this case, the carrier argues on appeal that the finding of a good faith job search is against the great weight of the evidence for essentially three reasons: 1) that the claimant could not perform the jobs she ostensibly sought; 2) that she did not make most of the contacts she said she did; and 3) that even if offered a job, she had no transportation to the job site. With regard to the first point, our review of the record discloses that at one time in her testimony the claimant said she thought she could perform the jobs she sought. At another time, she seemed to say she could not perform any of the jobs, but if offered one would certainly try. Thus, we believe the evidence presented a more complicated picture than simply the proposition that the claimant said she could not do any of the work. We also note that there was no evidence that the jobs sought were in the heavy-duty category as suggested by the evidence in Texas Workers' Compensation Commission Appeal No. 951024, decided August 7, 1995, cited by the carrier in its appeal. With regard to the second point, Ms. J testified clearly that just because she could not verify a contact does not mean a contact was not made. Finally, addressing the third point, we note that the claimant said if offered a job she would try to work out the transportation. In considering this evidence as a whole, the hearing officer could base her findings of fact on the extent of the claimant's compensable injuries and impairment and on her existing skills and level of education as to the pool of prospective jobs. The hearing officer could also consider that a search for jobs at this essentially unskilled level could properly involve a wider scope, with the not unreasonable hope that something would turn up that the claimant could do, rather than a tailored job search as may be more appropriate for those with greater skill levels and job experience. The question of transportation raised by the carrier may be troubling, at least at first glance. The hearing officer, we believe, could accept the claimant's explanation that when she was offered a job, she would try to solve her transportation problems as evidence of her good

faith in searching for a job. We do not believe that the lack of transportation during a job search perhaps precluded this claimant from entitlement to SIBS. 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). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of a good faith job search.

The carrier also appeals the hearing officer's finding that the claimant's unemployment during the filing period was a direct result of her impairment, arguing vaguely that the "medical evidence was insufficient to support Claimant's burden" and again that her unemployment was caused by the lack of transportation. The medical evidence of the claimant's restrictions was somewhat sketchy. The claimant testified as to lifting, stooping and bending restrictions. Such evidence could be considered on the issue of direct result. *See* Texas Workers' Compensation Commission Appeal No. 972329, decided December 22, 1997, for the proposition that a claimant can through her own testimony establish "practical work restrictions" provided they are based on doctor-imposed restrictions and do not significantly depart from those restrictions. *See also* Texas Workers' Compensation Commission Appeal No. 990572, decided May 3, 1999. We also do not find persuasive the carrier's argument that the claimant's lack of transportation established this as the cause of her unemployment. There was evidence that the claimant actually engaged in a job search, heavily reliant on use of the telephone, and that the lack of transportation did not preclude a job search. It is somewhat premature to argue that lack of transportation caused her unemployment in the absence of evidence that employment was ever offered. It should also be noted that the unemployment need only be a direct result of the impairment; the impairment need not be the sole cause of the unemployment. Texas Workers' Compensation Commission Appeal No. 961981, decided November 18, 1996. Under our standard of review, we find the evidence sufficient to support the determination of direct result in this case.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge