

APPEAL NO. 990825

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 March 30, 1999. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the second and third compensable quarters. The hearing officer determined that the claimant was entitled to SIBS for both quarters and the appellant (carrier) has appealed. Carrier asserts error in a number of findings of fact and conclusions of law, attacking the hearing officer's determinations on both the good faith job search and the direct result requirements for qualifying for SIBS, and urges that the decision be reversed. The claimant responds that there was abundant medical evidence that she sustained continued and permanent impairment and that she made numerous job searches in good faith. Claimant also argues that the carrier is expanding the issue on appeal by urging the evidence did not show claimant continues to suffer a disability when the theory advanced at the hearing was directed toward the good faith job search effort. In this regard, the specific issues at the CCH were entitlement to SIBS for the second and third quarters.

DECISION

Affirmed.

The claimant worked as a car salesperson when she sustained head and back injuries in an accident at work on _____, subsequently reached maximum medical improvement and was assessed an impairment rating (IR) of 15% or greater. She states that she subsequently went back to work but realized something was wrong when she could not remember things, made a lot of mistakes and thought she was going crazy. The employer arranged to have others help her when she was not able to perform and told her she had a job for life since she was injured while working for the employer. Unfortunately, the business was subsequently sold and, although the claimant continued for awhile to work for the new owners, she was subsequently terminated because she was not able to perform at the required standard without assistance. Although she had problems related to her back injury, the primary cause of her seeking SIBS was her working limitation resulting from the head injury. She had difficulty remembering information when questioned at the CCH and blurted out that "I don't have a memory." She stated that in early January she was able to find a job as a cashier at a video poker establishment in (City 1) (about 15 miles from her home) and that she works about 30 hours a week, which is the most she can do.

Regarding the claimant's head injury and the effect it had on her employment, the employer submitted a letter dated January 11, 1999, which stated that the assistance she required was more than the employer could reasonably afford and that "due to a brain and back injury she sustained while in [prior owners] employ, she was not capable of maintaining a satisfactory level of performance relating to the position for which she was hired." While there are no medical reports specifically during the filing periods for the two

quarters, which ran from September 26, 1998, to March 26, 1999, medical reports from both before and after the periods in issue describe the nature and consequences of the claimant's head injury. A December 22, 1998, letter from the Department of Neurology of the (Medical Center) at (City 2) noted a 1996 CT scan showed orbital linear skull fracture with intracranial hemorrhage and compression fracture of a lumbar vertebrae. This report is consistent with an earlier report dated October 3, 1997. One of claimant's doctors, Dr. M, in a letter of June 24, 1997, states he has assessed a 24% IR based on her head and back injuries, and in a letter of February 1, 1999, states that the claimant has been under his care; that she has a number of specified physical limitations (sitting, lifting, standing, bending, stooping) related to her back; and that regarding her cognitive problems, "she does have memory impairment and depression, which have been evaluated on several occasions by neuropsychologists."

The claimant submitted Statements of Employment Status (TWCC-52) for the quarters in issue which showed her contact with prospective employers, some 12 during the second quarter filing period (although she stated she made more contacts than shown on the page the carrier had) and some 28 during the filing period for the third quarter. At one point she was hired in a part-time job that she was not able to continue because of her restrictions.

The hearing officer determined that the during the filing periods in issue, the claimant's underemployment/unemployment was a direct result of her impairment. While the medical evidence to support the findings and conclusions leading to the hearing officer's determination was basically from medical reports rendered outside the particular filing periods, we have held that while medical reports during the period are the more preferred, medical records from outside the particular period can and should be considered when they are relevant to the issue and period being litigated. Texas Workers' Compensation Commission Appeal No. 941696, decided February 8, 1995; Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996. Given the nature of the head injury and the extended period of time over which it was under evaluation and monitoring, together with the testimony of the claimant as to her decreased cognitive skills, and the statement of her former employer regarding the necessity to relieve her, we conclude there is sufficient evidence to support the determination that the claimant's underemployment/unemployment was a direct result of her impairment.

The hearing officer was similarly convinced that the claimant showed a good faith effort to seek employment commensurate with her ability to work. Again, there was medical evidence from which the hearing officer could reasonably infer that the claimant had distinct work limitations resulting from her injuries, that the claimant sought positions of employment during the filing periods in issue, that she did work part of the filing period and that she subsequently found a position during the third quarter but after the end of the filing period for that quarter. It is apparent that the hearing officer found the claimant's testimony to be credible and that there was corroborative evidence not only in the medical evidence but also in the documentation of her job search efforts. The hearing officer was satisfied from the evidence that good faith was shown. 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.

We have reviewed the evidence of record and cannot conclude that the determinations of the hearing officer on the direct result and good faith requirements are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Accordingly, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge