APPEAL NO. 990965

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 14, 1999. With regard to the only issue before her the hearing officer determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 10th compensable quarter, having made a good faith effort to seek work commensurate with his ability during the filing period. The hearing officer's determination on "direct result" has not been appealed and will not be further addressed.

Appellant (carrier) appeals the "good faith" findings, contending that claimant looked for work "only two-thirds of the qualifying period," that claimant "did not utilize newspaper want ads" in seeking employment, and, generally, that claimant's efforts did not amount to good faith efforts. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, stating that the hearing officer's decision is not against the great weight and preponderance of the evidence and urges affirmance.

DECISION

Affirmed.

Both parties make reference to prior quarters of SIBS and we note that Texas Workers' Compensation Commission Appeal No. 981946, decided September 30, 1998 (Unpublished), deals with the seventh quarter and Texas Workers' Compensation Commission Appeal No. 990101, decided March 3, 1999 (Unpublished), deals with the eighth and ninth compensable quarters and, in both cases, we affirmed the hearing officer's decision.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* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (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.

The parties stipulated that claimant sustained a compensable (low back) injury on _____, that claimant has an impairment rating of 15% or higher, that impairment income benefits have not been commuted, and that the filing period for the 10th quarter was from October 15, 1998, through January 13, 1999. The hearing officer made an unappealed finding that claimant had "a very sedentary ability" to work.

Claimant testified that he is 57 years old and has had two surgeries for his work-related injury. Claimant said that one surgery was on June 17, 1996, for a three-level fusion and the other was March 4, 1997, for an ulnar nerve transplant. Claimant's treating doctor, Dr. D, as late as December 17, 1998, was of the opinion that claimant "is not able to do any sedentary work because of the persistent pain in his low back" and neck. Claimant apparently saw Dr. D at least on October 12, 1998, and December 17, 1998. At other times claimant would call in and obtain prescriptions for pain medication. Dr. W is carrier's independent medical examination doctor and in a February 1998 report was of the opinion that claimant is only capable of performing "at the most sedentary of jobs." In a report dated December 14, 1998, Dr. W says that he Dr. W does not "feel this patient has gotten much better" and that his opinion on claimant's ability to work "has not changed."

Attached to claimant's Statement of Employment Status (TWCC-52) is a list of 23 job contacts, 18 of which are during the filing period. Claimant testified that he went to employers that had help wanted signs or which he knew had a high turnover rate. In early January 1999 carrier assigned a vocational case manager, Mr. D, to claimant's case. In a report dated January 5, 1999, Mr. D indicated that he had contacted 16 of claimant's listed contacts and concluded that regarding claimant's "job search efforts it is my opinion that he demonstrates improved efforts in seeking employment" based on prior quarters. Carrier, at the CCH, and on appeal, complains that claimant did not make any job contacts in the last month of the filing period; however, it appears that his last job contact was December 18, 1998, and claimant filed his TWCC-52 on December 22, 1998. In her Statement of the Evidence, the hearing officer commented on Mr. D's report stating:

> In that report, [Mr. D] confirmed applications at all the places that still had applications on file. It is even more important that [Mr. D] noted that Claimant's job search, though still cold calls, was more extensive that [sic] the last two quarters. It cannot be overlooked that Claimant had an [sic] limited work ability. Claimant has expanded his search efforts from the previous quarters. Based on the totality of the evidence, Claimant established that he made a good faith job search during the filing period for the 10th quarter.

Carrier, in its appeal, does not dispute any of the hearing officer's fact findings, but only argues that seeking employment "during only two-thirds" of the filing period and then no more than one contact a day, that failure to utilize newspaper want ads, making cold calls, and failing to consult his treating doctor more frequently does not amount to such a good faith job search necessary for entitlement to SIBS. All of these factors were pointed out to the hearing officer, who, based on a totality of the evidence, found that claimant had made a good faith effort to seek work commensurate with his ability ("with his limitations") during the applicable filing period. Based on our standard of review, as set out in Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); and In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951),we cannot conclude that the hearing officer's determinations and findings are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Accordingly, we affirm the hearing officer's decision and order.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge