APPEAL NO. 990975

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 in two sessions, the first of which convened on January 15, 1999, and the second on March 17, 1999. The issues at the CCH were whether the respondent/cross-appellant (claimant) was entitled to supplemental income benefits (SIBS) for the 16th compensable quarter, and what was the claimant's average weekly wage (AWW). The hearing officer determined that the claimant was entitled to SIBS for the 16th compensable quarter and that his AWW was $517.06. The appellant/cross-respondent (self-insured) appeals the determination that the claimant was entitled to SIBS for the 16th quarter, urging that it is supported by insufficient evidence. The claimant appeals the hearing officer's determination on AWW in that it did not include any amount for the employer's retirement plan, and urges there is sufficient evidence to support the entitlement to 16th quarter SIBS.

DECISION

Affirmed on both issues.

The evidence showed that the claimant sustained injuries to her knees in a fall on _____, which resulted in several surgeries, including bilateral knee replacement, the last of which occurred in January 1998. She was assessed a 16% impairment rating. Initially, she was paid income benefits based on an AWW which apparently did not include some fringe benefits. The 16th compensable quarter ran from September 18 to December 17, 1998. The claimant testified that as a result of her injury and impairment she was no longer able to perform the job functions she performed at the time of her injury. She also testified and presented documentary evidence that during the filing period preceding the 16th quarter, she sought employment at over 20 prospective employers, she responded to newspaper advertisements, she put out flyers to provide child care, she contacted the Texas Rehabilitation Commission and was referred for possible training at Goodwill Industries, she started classes to obtain a GED since she was not accepted at Goodwill Industries because of limited educational skills, and she followed up on some of the job prospects. The adjuster assigned to her case indicated that only six job contacts were verifiable. The self-insured also pointed out that the claimant turned down a couple of child care possibilities during the period, which the claimant explained was because she could not commit for a definite period to care for a child.

The hearing officer apparently found the claimant credible and states that she showed through her testimony and other evidence that she "made an honest and diligent attempt to find employment that she could do during the filing period." The self-insured describes the claimant's efforts as lacking some degree of forethought and urges that a minimum standard for a good faith effort had not been shown. Clearly, from the evidence presented, there was room for disagreement as to whether the claimant's efforts showed a good faith attempt to seek employment commensurate with her ability to work spanning the full filing period and establishing diligence and forethought in her job search; however, we

cannot conclude from our review of the evidence that the determination of the hearing officer was 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). The claimant's testimony, believed as it must have been, together with the other evidence could show a good faith effort. Accordingly, we affirm the decision that the claimant is entitled to 16th quarter SIBS.

The only issue on appeal regarding the AWW is whether the employer's contribution, if any, to a pension plan should be included in the AWW. According to the evidence and positions advanced, the employer, a governmental subdivision hospital district, had a noncontributory pension plan for employees which "vested" after five years of employment but was only payable upon reaching various disability or retirement qualifications. According to the self-insured, there are no funds paid by the hospital district into the pension fund for an employee and benefits under the pension plan are paid to the employee from the general funds authorized by the county court based upon a budget item for funds for disability and retirement for a given year. The self-insured also stated that the claimant was still an employee and still covered under the plan and that even if there were some dollar value shown for the pension plan, it would be subtracted out from the determination of any income benefits. The self-insured also argued that the claimant had the burden to prove the market value of this type of fringe benefit and had failed to do so by only showing the dollar value of the plan if the claimant were receiving the retirement benefit.

The claimant offered evidence as to the amount she would receive if she were retired under the plan and urged that this amount be included in the AWW. Claimant had subpoenaed payroll records and information concerning the pension plan and the value of any contribution on behalf of an employee. The hospital district submitted payroll records and information; however, because of the retirement plan system coming from the general fund, it asserts that it did not have information or any calculation of the market value of the contribution for purposes of including any contribution as a part of the AWW for any specific individual.

The hearing officer determined an AWW that included other fringe benefits but did not include any amount for a contribution by the hospital district for the pension plan and found that the evidence did not show that these contributions will become vested until the claimant actually retires. Claimant urges on appeal she was vested after five years; that the value of the contribution should be included in the AWW; and, that if nothing else, the amount of the contribution should be calculated on the fair, just, and reasonable method, and using that method the amount should be determined to be the amount due under the retirement formula.

Even were we to conclude for purposes of including the amount of any employer contribution to the pension fund on the basis that the claimant was vested for purposes of receiving benefits (Texas Workers' Compensation Commission Appeal No. 950516, decided May 17, 1995), there clearly is no evidence as to the market value of a contribution

to the plan by the hospital district. The claimant has the burden to prove the market value of a fringe benefit contribution that he or she seeks to have included in an AWW. *See generally*, Texas Workers' Compensation Commission Appeal No. 950860, decided July 12, 1995. That value has not been established here. The self-insured further asserts that as a continuing employee, the claimant is still covered and will received the pension benefit in the future. Under these circumstances, the hearing officer concluded that Texas Workers' Compensation Commission Appeal No. 93683, decided September 24, 1993, applied where the Appeals Panel held that employer contributions to a pension fund were not included in the AWW if those funds are not payable to a claimant until retirement. In any event, we conclude that the calculation of the AWW by the hearing officer, which did not include any contribution by the employer in the pension plan under the circumstances present, was correct and supported by the evidence before her. Accordingly, we affirm the AWW decided by the hearing officer.

The decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge