

## APPEAL NO. 991015

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 31, 1999. The single issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the 11th compensable quarter. The hearing officer determined that the claimant was not entitled to SIBS for the 11th quarter. The claimant has appealed the decision asserting the hearing officer's findings of fact that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work and that his failure to return to work during the 11th quarter was not a direct result of his impairment were erroneous as the claimant met his burden of proof by the preponderance of the evidence and that his unemployment was a direct result of his impairment and that he sought employment commensurate with his ability to work. The respondent (carrier) urges that there is sufficient evidence to support the findings and decision of the hearing officer and asks for affirmance.

### DECISION

The decision is affirmed; however, one finding is reversed and set aside.

The claimant sustained a back injury, for which he had spinal fusion surgery, in a slip and fall incident at work on \_\_\_\_\_. He reached maximum medical improvement with an impairment rating of 15% or greater and is seeking SIBS for the 11th quarter, the filing period for which ran from August 8, 1998, to November 6, 1998. During the filing period, the claimant states that he went to the Texas Rehabilitation Commission but they could not help him apparently because of his limited language and other skills. He testified he was attending classes during the period toward obtaining a GED and that he took some pain management classes. He testified that his doctor told him not to work and stated he had not been released to work. Although his doctor told him not to work, the claimant testified that he looked for work at some 18 to 19 prospective employers, acknowledging that some positions were not within his limitations. Although he did not submit the job contacts on his Statement of Employment Status (TWCC-52), he later (claimant indicated it was in December 1998) submitted a list and a copy of business cards from several businesses. He stated he got his job prospects from newspapers, friends, and signs indicating that help was wanted. He stated he got some interviews but could not remember where.

Medical records in evidence from the claimant's treating doctor, Dr. G, show that the claimant has continuing significant problems with his back and has ongoing pain. Dr. G's reports state his opinion that the claimant is not able to work and show that claimant remains under treatment, including a report dated October 14, 1998, which states that, due to the claimant's ongoing pain, "a myelogram with post CT of his lumbar spine" is recommended. Dr. G does not set out physical limitations but does indicate ongoing complaints of and treatment for pain and radiculopathy.

The carrier introduced a report from Dr. D, who examined the claimant in July 1998 and indicated that he did not feel the claimant will be able to return to regular duty and, "although he should be physically capable of returning to some type of limited duty, it is doubtful that he is motivated to do so." He limited the claimant's repetitive lifting or carrying of more than 30 pounds and twisting, bending, and stooping. He also recommended that the claimant be seen by a neuropsychologist regarding his pain "to determine what is functional and what is real." A functional capacity evaluation (FCE) report of June 18, 1998, refers to earlier FCEs where claimant was determined to be able to function at a light to light-medium level, states that he continues to have limitations on physical demand level and that he is not able to return to the work he was doing at the time of injury. A pain management program is recommended.

Testimony from an occupational specialist from (CDM) and a report from CDM were introduced into evidence by the carrier. In essence, the testimony and report show that during the filing period there were a number of position openings in the light-duty category, that some of the prospective employers listed or shown by business cards by the claimant were contacted by CDM, and that none of the employers contacted had any applications on file from or knew of the claimant.

Credibility was a key factor in this case and it is apparent that the hearing officer did not accept the claimant's testimony at face value, which she was not required to do, particularly concerning whether a good faith job search was shown. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The hearing officer found, and is supported by sufficient evidence, that the claimant did not show that he had no ability to work during the filing period. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Clearly, the evidence showed that there were significant limitations on the claimant's physical capabilities as a result of his injury and that he could not return to the work he was doing at the time of the injury; however, this does not establish no ability to work at all, that is, part time or in a restricted capacity. Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Although claimant testified that he made job searches during the period, there was contrary evidence, evidence that the hearing officer could find persuasive that a good faith effort had not been shown. Whether good faith is shown is generally a factual determination for the hearing officer to make from the evidence before her. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have reviewed the evidence of record and cannot conclude that the determination of the hearing officer that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work is 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, we affirm that determination and the conclusion that the claimant is not entitled to SIBS for the 11th quarter, since a good faith effort to obtain or seek employment commensurate with the ability to work is a necessary prerequisite to qualifying for SIBS. Sections 408.142(a) and 408.143.

Regarding the finding, based on the requirement that the unemployment be a direct result of the impairment to qualify for SIBS, that the "claimant's failure to return to work during the 11th quarter filing period was not a direct result of claimant's impairment," we conclude from our review of the evidence that this finding is against the great weight and preponderance and is clearly wrong. The medical evidence is compelling that the claimant sustained a serious injury; that he has been under continuing treatment for the injury including surgery, injections, and physical therapy; that the claimant continues to suffer lingering effects of the injury; and that he clearly cannot return to the type of work he was performing at the time of the injury. There is nothing to suggest any intervening injury or other circumstance (other than not making a good faith effort to seek employment) that would eliminate the compensable injury as a direct cause of the unemployment. Texas Workers' Compensation Commission Appeal No. 960873, decided June 18, 1996. Further, we have stated that the direct result requirement is not intended as a second look at the good faith job search requirement. Texas Workers' Compensation Commission Appeal No. 951730, decided November 30, 1995; Texas Workers' Compensation Commission Appeal No. 950849, decided July 7, 1995. From our review of the evidence, the overwhelming weight of the evidence shows that the claimant's not returning to work during the filing period was a direct result of the impairment, among other causes. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Thus, we reverse and set aside this finding; however, we affirm the decision and order of the hearing officer, having determined that her finding of a lack of a good faith job search is supported by sufficient evidence.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge