APPEAL NO. 991088

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 April 28, 1999. She (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the sixth quarter. The appellant (carrier) appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable low back injury on _____, and had spinal surgery in1995. 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 sixth SIBS quarter was from January 11 to April 11, 1999, and the filing period for this quarter was from October 12, 1998, to January 10, 1999.

The parties stipulated that the claimant could work at the sedentary job level. She submitted a Statement of Employment Status (TWCC-52) in which she listed 34 job contacts, mostly with fast food restaurants or retail stores. She described her job search as reviewing the help-wanted advertisements in two newspapers. Her daughter would then take her to the various employers and help her fill out applications. Invariably, she would present herself at one place of employment on each Monday, Wednesday, and Friday of the filing period, including Christmas and New Year's Day. She cannot read or write English and has limited education and job skills. On the advice of her attorney, she did not cooperate with the carrier's vocational assistant nor did she visit the Texas Rehabilitation Commission (TRC) or Texas Workforce Commission (TWC) during the filing period. She insisted in her testimony that she was sincerely seeking to obtain employment. She was not offered a job and was unemployed during the filing period.

Mr. H, the vocational assistant, testified that he sent numerous job leads to the claimant and that she followed up on none. He said he sought to verify the job contacts listed on the TWCC-52 and could only confirm about three and was unable to contact some of the listed employers.

The hearing officer considered this evidence and concluded that the claimant made the required good faith job search and established that her unemployment was a direct result of her impairment. The carrier appeals these determinations, arguing that it was "only reasonable" that she look for work more than three days a week and at more than one business per day and that she cooperate with Mr. H. The carrier also challenges the claimant's assertion that she made all of these contacts in view of the carrier's inability to confirm most of them and suggests that evidence establishes only that she was trying to meet the requirements for SIBS entitlement, not to find a job.

The Appeals Panel has defined good faith as a subjective notion characterized by honesty of purpose, freedom from intent to defraud, and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994, and Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993. Whether a claimant's job search efforts were made in good faith to actually obtain employment commensurate with the ability to work is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. Good faith is not established simply by the number of job contacts made, 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. The claimant, as of this filing period, was not required to cooperate with Mr. H. Her refusal to do so was a proper consideration for the hearing officer on the question of good faith. The fact that a job contact could not be confirmed does not necessarily mean the contact was not made. The claimant testified that she did honestly and in good faith try to find a job. The hearing officer commented that she found the claimant credible. 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 decline to substitute our opinion of the credibility of the claimant for that of the hearing officer. The evidence in this case on the question of good faith was obviously subject to varying inferences and another hearing officer may well have found no good faith. Nonetheless, applying our standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's finding that the claimant made the required good faith job search during the sixth quarter filing period.

The carrier also appeals the direct result finding, contending that if, because she did not make a good faith job search (including cooperation with the vocational assistant, the TRC and the TWC),[1] she could not establish that her unemployment was a direct result of the impairment. In light of our affirmance of the finding of a good faith job search, this argument becomes considerably less effective. We find the evidence sufficient to support the direct result determination based on evidence of a serious injury with lasting effects and the inability to reasonably perform the type of work she was doing at the time of her injury.

[1]No assertion was made that such cooperation was required as a matter of law. *See* Rule 103.102, effective January 31, 1999.

Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Dorian E. Ramirez
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. While I am acutely aware that a question of good faith is generally a factual matter for the fact finder to make, there are some basic or minimum standards for demonstrating a good faith effort which I conclude are not reached here. In my opinion, the factors which demonstrate that the minimum standards have not been met here include: limiting any job search to just a couple of days a week during the whole period; refusing to cooperate in any way with a vocational counselor provided or to even inquire about job prospects suggested and supplied; seeking no assistance from the Texas Rehabilitation Commission; seeking no assistance from the Texas Workforce Commission; asserting, incredibly to me, job-seeking attempts on Christmas Day and New Year's Day; and the lack of any verification of job contacts when inquiries on carrier's behalf were made at places the claimant stated she sought employment. In sum, in my opinion, this does not measure up to even the minimum standards for establishing good faith. We have stated repeatedly, that it is the pattern of the job search that must be evaluated; that is, the forethought, diligence, and timing. Texas Workers' Compensation Commission Appeal No. 982987, decided February 4, 1999; Texas Workers' Compensation Commission Appeal No. 982210, decided November 4, 1998. I do not find the evidence here legally sufficient to uphold the decision of the hearing officer and would accordingly reverse and render.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge