APPEAL NO. 991266

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 10, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that appellant (claimant) had not made a good faith attempt to obtain employment commensurate with his ability to work and was therefore not entitled to supplemental income benefits (SIBS) for the fourth compensable quarter. The hearing officer's finding that claimant's unemployment was a direct result of his impairment was not appealed.

Claimant appeals, asserting for the first time on appeal why he had limited his employment search to only one employer and that because he had "vested rights" with the employer his job search was reasonable. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The City of (City 1), referred to as the self-insured or carrier, as appropriate, urges affirmance.

DECISION

Affirmed.

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.

Claimant testified that he is 49 years old, has some years of college, certificates in public administration and electrical engineering, and has obtained an LCDC (a licensed drug and alcohol counselor certificate) through retraining with the Texas Rehabilitation Commission (TRC). The parties stipulated that claimant sustained a compensable (neck, shoulder, mid and low back) injury on _____, with an 18% impairment rating, and that impairment income benefits have not been commuted. Claimant testified that he has had no surgeries yet but had eight or nine epidural injections. The filing period for the fourth quarter was the 90 days prior to January 15, 1999, or about October 13, 1998, through January 14, 1999. Claimant had been employed by the self-insured city as an "EO-35 equipment operator" and had sustained his injury shoveling sand.

Although there are three functional capacity evaluations in evidence and there was considerable discussion as to exactly when claimant had been released to what kind of work, it appears undisputed that claimant had some ability to work during the filing period, in either a sedentary or light-duty position and that claimant cannot return to his preinjury job as a heavy equipment operator. Claimant's testimony, and a journal admitted as part of claimant's Statement of Employment Status (TWCC-52), establish that before and during the filing period claimant had been working with the TRC in a job placement rehabilitation program. Claimant testified that on November 7, 1998, he began a course of study with the TRC which led to his graduation on March 25, 1999, as a licensed drug and alcohol counselor (the LCDC). While claimant was in that program, claimant attended classes six or seven hours a day on weekends with a little over one week of classes at the end (after the end of the filing period). Claimant's journal, attached to the TWCC-52, gives a day-by-day recitation of his job efforts, who claimant spoke with regarding his claim and how he felt on particular days. Claimant's testimony, and journal entries, indicate that he contacted one of the self-insured's recreational centers on December 4, 1998, and obtained a position as a counselor, receptionist, and general aide or assistant. After working about three days the self-insured employer notified claimant that he was not eligible for that position because it was a temporary position and claimant had permanent restrictions which precluded that position.

Claimant's testimony, both on direct and cross-examination, was to the effect that in the prior compensable quarter (the third quarter) he had made some 30 job contacts with a variety of potential employers, whereas in the filing period at issue he had only made four or five job contacts, all with various departments of the self-insured employer. The hearing officer noted that it was claimant's contention that the self-insured city "was more than just one Employer." The number and nature of the contacts are hard to identify because they are listed as part of claimant's journal and not listed separately on the TWCC-52.

The hearing officer, in her discussion, after reciting the evidence, concluded:

> Accordingly, I have found that the Claimant did not sustain his burden of proof in showing he made a good faith effort to obtain employment commensurate with his ability to work, as required by section 408.143(a) of the Texas Labor Code. Although the Claimant was attending a training program through TRC, the training was only on weekends and the Claimant made only a few contacts that were all with the same Employer.

Claimant, in his appeal, for the first time brings up that he has certain vested rights in the self-insured's retirement plan and that those rights may, in some unspecified way, be jeopardized if he accepted employment with an employer other than the self-insured. Claimant's appeal is best summarized in this quoted paragraph:

> Hearing Officers in [self-insured city] have had enough experience with [self-insured] cases to be cognizant of the [self-insured's] policies with respect to workers' compensation claimants. Basic fairness indicates that the good

> faith job search requirement is satisfied in cases where the claimant makes a good faith search within a large organization with many openings where that claimant has vested rights. This is particularly true because taking a job with another employer is seen as job abandonment and gives the employer grounds to terminate the claimant.

None of this was even mentioned at the CCH, although it may explain why claimant made 30 job contacts in the third quarter but only four or five contacts with the self-insured in the fourth quarter. We will only review the record made at the CCH, and the evidence before the hearing officer, in our review, unless there is newly discovered evidence not reasonably available at the CCH, which is not the case here.

Both parties emphasize that there are no "magic number" of job searches which would automatically qualify a claimant for SIBS. We also note that whether good faith in seeking a job commensurate with the claimant's ability to work was shown is usually a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. Consideration can be given to the manner in which a job search is made and timing, forethought, and diligence may be considered in determining whether a good faith search was made. Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996. In this case, the hearing officer was faced with the fact that although claimant had numerous contacts with various people in the self-insured's various departments, and had in fact secured a job at the recreation center before being told he was not eligible, for reasons unknown to the hearing officer, claimant had limited his search to various departments of the self-insured employer. This is not to suggest that had the hearing officer been made aware of claimant's efforts to protect his vested retirement rights with the self-insured, that fact would have mandated a different result. Whether claimant's efforts, whatever they may be, amount to good faith, is generally a factual determination for the hearing officer to resolve and the Appeals Panel will reverse that finding only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Applying our standard of review as enunciated in Cain, *supra*, and In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951), we find the evidence sufficient to support the hearing officer's decision and, accordingly, affirm the hearing officer's decision and order.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge