

APPEAL NO. 991272

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 May 25, 1999. He (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 11th quarter. The appellant (self-insured) appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Reversed and rendered.

The claimant worked as a receptionist/clerk for a state agency. She sustained a compensable low back injury on \_\_\_\_\_. She reached maximum medical improvement on September 18, 1995, and was assigned a 17% impairment rating.

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 11th quarter was from March 9 to June 7, 1999, and the filing period for this quarter was from December 8, 1998, to March 8, 1999. At issue in this case is whether the claimant made the required good faith job search.

The claimant, who is 62 years old, testified that she is in chronic pain, intensified somewhat by weather conditions, and takes medication which makes her drowsy. She underwent surgery in July 1994 and has had four back surgeries prior to her current compensable injury. She said she has never been released to return to work by her treating doctor. A functional capacity evaluation (FCE) on December 3, 1998, placed her in a sedentary to light work category. A vocational evaluation report prepared by the Texas Rehabilitation Commission (TRC) on October 27, 1998, described both vocational strengths and limitations and recommended that she was "not able to work over 2 ½ hours at a time."

Dr. E examined the claimant at the request of the self-insured on July 7, 1998, and indicated his agreement with the FCE. He also placed her in a sedentary work category and observed that the claimant's "main concerns about returning to work is [sic] her value or asset to her employer due to her limitations." On November 25, 1998, an official of the TRC wrote that the claimant "is not suitable for employment right now."

The claimant submitted a Statement of Employment Status (TWCC-52) for 11th quarter SIBS in which she listed 12 employment contacts, and said she had submitted three other contacts, or applications, to a state agency. The first contact was on January 29, 1999, some seven weeks into the filing period. The contacts occurred over nine days of the filing period. The claimant testified that she did not "understand" the results of her FCE, particularly in terms of how much time she could work or what her limitations were, and that she began looking for work on January 29, 1999, because she "felt better" that day. She also said that she began looking for work around that time because of ideas or suggestions she received from the self-insured's attorney during cross-examination at a CCH convened to determine her entitlement to 10th quarter SIBS. Her job search plan consisted of looking in the newspaper for potential jobs and then sending a resume by fax or mail. On two or three occasions, she said, she appeared at the employer's office to obtain and submit an application.

The hearing officer considered the evidence and found that the claimant made the required good faith job search. The self-insured appeals this determination, contending that the employment contacts were arbitrarily limited in numbers and days spent searching for work; that the method of job searching involved primarily looking in the newspaper and faxing resumes; and that the claimant was only going through the motions of a job search with no intent to actually find employment. The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994. Whether the required good faith job search exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have also cautioned that good faith is not established simply by some minimum number of job contacts, 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 requirement for a good faith job search generally spans the filing period where there is a return to light duty for the whole period. See *generally* Texas Workers' Compensation Commission Appeal No. 951832, decided December 15, 1995. Limited job contacts on only several days during a 90-day filing period generally are not sufficient to establish that a good faith job search was made. Texas Workers' Compensation Commission Appeal No. 982599, decided December 17, 1998. And in Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel stated that the trier of fact, in determining whether the claimant in good faith sought employment commensurate with the ability to work, sometimes assesses whether undeniable contacts made with prospective employers constitute a true search to reenter employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS.

What concerns us in this case is both the limited number of contacts (about 15) and the few days spent in making the contacts (nine) over a 90-day filing period. The claimant did not assert that during the filing period she had no ability to work, and the hearing officer's finding that the claimant had some ability to work has not been appealed. Even

though her treating doctor had not released her to return to work, the statutory requirement for a good faith job search still applied and had to be considered in light of her activities throughout the filing period. Her only explanation for the limited contacts were that on these days she "felt better." She provided no description of what efforts she made on other days and did not even suggest that she looked in the newspapers on a more or less daily basis, or why it was that some days were better than others. The hearing officer gave no explanation of why he considered this limited search on these limited days commensurate with the claimant's ability to work. We are mindful that a factual determination of a good faith job search is subject to reversal on appeal 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)), and that good faith is not simply a matter of the number of job searches. In this case, not only was there a minimal number of job contacts, but these efforts were made on a greatly restricted number of days during the filing period. Having reviewed the record in this case, we conclude that the hearing officer's finding of a good faith job search is against the great weight and preponderance of the evidence.

For the foregoing reasons, we reverse the determination that the claimant was entitled to 11th quarter SIBS and render a decision that the claimant did not establish this entitlement.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge