APPEAL NO. 991728

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 19, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that respondent (claimant) had made a "good faith effort to find work commensurate with her ability," that claimant's unemployment was a direct result of her impairment and that claimant was entitled to supplemental income benefits (SIBS) for the 13th compensable quarter.

Appellant (carrier) appeals both the direct result and good faith findings, arguing that 18 job contacts (with four interviews) during the quarter is insufficient to show good faith, that claimant had not fully cooperated with carrier's vocational rehabilitation specialist, that claimant's job search was "self-limiting . . . to her immediate home vicinity," that claimant had been denied SIBS for a prior quarter on essentially the same evidence and that the Texas Workers' Compensation Commission's "lack of consistency is sending confusing signals to the claimant which contributed to the claimant's lack of good faith job searches." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable (low back) injury on _____, that she reached maximum medical improvement with a 15% impairment rating, that claimant has not commuted impairment income benefits and that the filing period for the 13th compensable quarter was from January 14 through April 14, 1999. (The hearing officer's Finding of Fact No. 1.G erroneously states the filing period was in 1998 but this is obviously a typographical error.) Claimant offered into evidence medical records and reports from some 18 health care providers, mostly during the 1995/1996 time frame. Since it is undisputed that this is not a total inability-to-work case, we will simply note that claimant injured her low back (L3-4, L4-5, L5-S1) in a twisting, slip-and-fall injury while working as a dishwasher at a cafeteria. Claimant has not had spinal surgery, testified through a translator and the medical records reflect she has a sixth grade education in country 1.

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.

Most of the testimony at the CCH dealt with the nature of claimant's job search and job contacts. Attached to claimant's Statement of Employment Status (TWCC-52) are 19 forms showing job contacts claimant made (one on January 13, 1999, is one day outside the filing period). Most of the contacts were for sales, front desk, and clerk/receptionist positions. Claimant's address was verified as being in (City 1), State 1, with four of the job contacts being listed as being in (City 2), State 1 (and one in City 3, State 1). Claimant testified that her injury makes driving difficult and that she is afraid or does not like to drive on the City 2 freeways because of her injury and because she is unfamiliar with "the City 2 area." Carrier's vocational rehabilitation specialist testified that she had sent claimant a list of 31 referrals and that claimant had only followed up on five, four of which resulted in interviews. Claimant testified that the referrals from the carrier were in City 2 and she did not feel capable of driving on the City 2 freeways. Carrier's vocational rehabilitation counselor verified some job contacts, failed to verify others and testified that claimant presented herself well to employers when she went for interviews. Claimant testified that her condition is worsening. The hearing officer, in her Statement of the Evidence, commented:

> Claimant was credible in her account of how she is intentionally searching for a job with a smaller Employer wherein she would not have to work at such a fast pace, but at a slower pace more consistent with her impairment from the compensable injury. Claimant testified that she lives in a small town that does not have public transportation. Although Claimant's record[s] do not mention a driving restriction, Claimant prefers not to drive as a result [of] her impairment from the compensable injury, so she has limited her job search area to remain close to home. Claimant's searches were based on cold calling, referrals received from Carrier's vocational rehabilitation counselor, from the news paper and from referrals from family.

First, carrier contends that of the 18 job contacts, only nine could be confirmed, that claimant refused or failed to follow up on all the referrals carrier's vocational rehabilitation counselor had made and that the hearing officer "must look to objective manifestation of good faith such as manner of job searches . . . ." There is no evidence that the hearing officer failed to do so. In fact, the hearing officer summarizes claimant's job search, a portion of which is quoted above, and found claimant credible in her account. 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 respective witnesses for that of the hearing officer.

Carrier also contends that claimant's job search was self-limiting "to her immediate home vicinity" and that "claimant does not live in a small town as the hearing officer indicates but in a suburb of City 2, the 4th largest city in the country . . . ." Claimant did testify that she did not like, or was afraid, to drive in City 2. However, there was no evidence that City 1 is a small town, or a suburb of City 2, and the parties did not request the hearing officer (or us) to take official notice of relative distances and the size of City 1 vis-a-vis City 2. (Claimant did testify that there was no bus service in City 1.) In such a case, we must rely on the hearing officer's judgment, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)) with the responsibility to resolve conflicts in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)) to determine what facts have been established and whether claimant's conduct was reasonable and amounted to good faith.

Carrier next cites an Appeals Panel decision for the proposition "that an injured worker who maintains the same job patterns for several Quarters . . . fails to satisfy good faith job search met in earlier quarters." We again emphasize that whether claimant met the good faith job search requirement of SIBS is the function of the hearing officer and we will reverse that finding only if it is incorrect as a matter of law or is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.* Carrier refers to another hearing officer's decision denying entitlement to SIBS for the 12th quarter. (That case was affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 991152, decided July 12, 1999 (Unpublished).) In that case, we held that we did "not find overwhelming evidence supporting a contrary finding." Further, we have often noted that another fact finder in a particular situation could have reached a different conclusion on the same evidence but that is not a sound basis for us to reverse the hearing officer's decision. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). This is one of those situations where one hearing officer saw it one way and on similar evidence in a succeeding quarter another hearing officer saw it another way. The fact that that may send confusing signals is not a basis for reversal.

Applying our standard of review as cited above in Cain, *supra*, we affirm the hearing officer's decision and order.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge