

APPEAL NO. 991743

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 July 21, 1999. The single issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 13th compensable quarter, which ran from January 18 through April 18, 1999. The hearing officer, finding that the claimant had some ability to work, made a good faith effort to find employment commensurate with his limited ability to work, and that his unemployment was a direct result of his impairment, determined that the claimant was entitled to SIBS for the 13th quarter. The appellant (carrier) urges that the hearing officer's findings and conclusions were not supported by sufficient evidence and that the decision should be overturned because the claimant did not carry his burden of proof. The claimant responds that there is sufficient evidence to support the decision and asks that it be affirmed.

DECISION

Affirmed.

Initially, we note that the decision and review of this case do not fall under the new SIBS rules which became effective for qualifying periods beginning on or after January 31, 1999. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102); Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999. The qualifying period in this case precedes the effective date of the more demanding requirements set forth in the new rule.

Although the position of the claimant at the hearing was in the alternative; that is, that he was not able to work according to his doctor, he did make a good faith effort to obtain employment commensurate with his ability to work by seeking some 27 job prospects. As indicated, the hearing officer found, and is supported by sufficient evidence, that the claimant had some limited ability to work; that issue, insofar as it was asserted that the claimant had no ability to work, is not on appeal; and the case will be evaluated on the good faith effort and direct result issues.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an impairment rating of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. A claimant's overt actions are factors to also

consider in establishing good faith. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The claimant sustained back, shoulder, and knee injuries in 1993 and meets the first and third requirements for qualifying for SIBS. He has not worked since his injury and has been recommended for back surgery which he rejected because of potential adverse results. Medical records show that he continues to suffer severe effects from his back injury and that his doctor, who has listed restrictions, does not think he is employable. Claimant testified, and is supported by medical evidence, that because of his injury he has sustained several falls when his leg gives out. He has a sixth-grade education in country 1, functions at the second-grade level, is very limited in the English language, and does not have skills other than general labor. During the filing period, he testified and submitted documentation showing some 27 job contacts for prospective employment, including some nine prospective jobs supplied by a carrier's vocational service. He tended to look for positions in the particular area of the city in which he resides, a city with a large Spanish-speaking population. He indicated that although he was not sure if he could perform all the duties at places he applied, he would accept and try if offered a position. He does not drive and stated he took public transportation in trying to find a job and would be taken by his daughter at other times.

Carrier introduced medical evidence from a carrier's doctor which indicated restricted ability to work but also concluded there was overlay and lack of motivational effort on the part of the claimant. A video was introduced which showed some limited physical activity and that the claimant walked with a cane. A report from a vocational employment specialist shows that the 27 job contacts listed by the claimant were contacted with indications that some were not hiring, some did not have an application on file, and others did not remember the claimant.

As stated, the hearing officer found that the claimant's unemployment was a direct result of his impairment. This is consistent with the injuries treated and the restrictions resulting as shown in the medical records and other evidence. We have stated that direct result can be found to be sufficiently supportive where there is a serious injury with lasting effects that results in restricted ability to work, particularly absent any other overriding circumstances. Texas Workers' Compensation Commission Appeal No. 960873, decided June 18, 1996; Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995. From our review of the evidence, we conclude there is sufficient evidence to support the direct result finding in this case.

Regarding the good faith job search, there was some evidence that could lead another fact finder to draw inferences different from those found most reasonable by the hearing officer, in that the search seemed to be somewhat concentrated and limited. However, that a different inference could be made is not a sound basis to reject the findings of the hearing officer. Garza v. Commercial Insurance Company of Newark, New Jersey,

508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude that the findings and conclusions of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound basis for reversal. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. Although we find the evidence of good faith to be somewhat marginal, we do not reach that conclusion here. And, as indicated, we do not review this case under the new rule standards.

Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge