APPEAL NO. 991180

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 3, 1999. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fifth, sixth, and seventh compensable quarters. The hearing officer determined that the claimant was entitled to SIBS for the three quarters in issue and the appellant (carrier) appeals urging that there is no evidence or, in the alternative, insufficient evidence to show that the claimant's underemployment was a direct result of her impairment or that she made a good faith effort to seek employment commensurate with her ability to work. The claimant points to evidence that supports the decision of the hearing officer.

DECISION

Affirmed.

Not in dispute was the sustaining of a compensable injury to the back, shoulder, and neck by the claimant in a slip-and-fall incident on _____, resulting in an impairment rating of 15% or greater. Based upon the assertion of being underemployed during the filing periods (February 19, 1998, through November 17, 1998) for the three quarters in issue, she is seeking SIBS. She testified that she was released to restricted work about a year and one-half ago by her doctor and that she was limited in her ability to lift and other physical activity (supported by medical evidence which included notations of shoulder surgery). She stated that she found a position in a child day care center in October 1997 and worked there until she could not perform the work and left in February 1998. She states that her position was changed in the child day care center and that caused her neck and shoulder pain and symptoms to increase causing her to leave the job. She initially was involved with children who did not require lifting and she was able to perform without problem but was switched to small children requiring lifting and more attention. She talked to her employer about the problem and the need to be placed back into her former position but it was filled by someone else and no position was available in that area. Claimant stated that after she left, she started a child day care business in her home with children she did not have to lift. She also was helped out by her son and daughter. She testified that she was not state licensed and could only keep 6 children or less without a license. She stated that she filed for a status of "Doing Business As" (DBA) and that she had several children under her care during the filing periods involved. During the periods in issue she had income as follows: fifth quarter filing period - $1,060.00; sixth quarter filing period - $1077.50; and seventh quarter filing period - $1684.00. Evidence introduced indicated that her average weekly wage (AWW) was $279.31. Claimant also testified that she is in monthly communication with the child day care center she worked with but that a position with the level of children she is able to work with is not available. At one time they offered her a position at the second and third grade level but that she did not have the experience for that level.

The hearing officer found that during the periods in issue, the claimant's inability to earn 80% of her AWW was a direct result of her impairment from the compensable injury, and that she made a good faith effort to obtain employment commensurate with her ability to work. Carrier urges that there is no evidence, or insufficient evidence, to support either the direct result or the good faith job seeking requirements. It urges that the claimant voluntarily left the higher paying job ($7.00 per hour) with the child day care center to start her own business and thus there is no evidence to support that her underemployment was a direct result of the impairment, and further that she did not seek other higher paying employment during the periods in issue and turned down one position offered by the child day care center.

As carrier states, to qualify for SIBS, the underemployment must be a direct result of the impairment. Sections 408.142 and 408.143. Clearly, the claimant sustained an injury, the effects of which she still suffers as shown in her testimony and the medical records and opinions of her doctor. She testified, and there is consistent medical information, that she could not return to her preinjury job with duties of home care nursing. She has been released to restricted duty and indeed may well have exceeded the lifting limitations at times. Contrary to the carrier's assertion that she left the job at the child day care center on her own volition or voluntarily, she testified that her job duties had been changed to smaller children that required repetitive lifting, that she experienced increased pain, and that she was unable to continue in the position. It is apparent that the hearing officer believed her testimony and found that to be the fact in this case. Of course, the hearing officer was at liberty to assess the claimant's credibility and to give her testimony what weight he determined it deserved. Texas Employers' Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.); Section 410.165(a). From our review of the evidence, we cannot conclude that the determination of the hearing officer was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). The claimant, while having the burden of proof to establish that the underemployment was a direct result of the impairment is not required to prove that the impairment is the sole case of the underemployment. Texas Workers' Compensation Commission Appeal No. 952082, decided January 10, 1996. We conclude that there is a sufficient basis to affirm the hearing officer's direct result determination.

Regarding the good faith job search requirement, the hearing officer apparently accepted the claimant's testimony that shortly after she left the employment of the child day care center, she started her own small business of caring for children that she could handle within her restrictions in her home, although she kept in contact with the former employer to see if a position opened within her restrictions. The evidence shows that she earned increasing income over the period of the three filing periods in issue, that she was limited in the number of children she could care for not only because of licensing requirements but because of her physical condition associated with the injury, and that her condition may have been aggravated by her prior activity further restricting her ability. The hearing officer could believe her testimony and give weight to the evidence of her activities in her home child day care business and find that she made a good faith effort to seek employment

commensurate with her ability to work. Whether good faith has been shown is generally a question of fact for the hearing officer, and we do not disturb a factual finding of this nature unless there is no evidence to support the fact finding or the finding of fact is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Hutchinson, *supra*; Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. We do not find that to be the case here and thus affirm the decision and order.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Judy L. Stephens
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge