APPEAL NO. 991701

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 13, 1999. With respect to the sole issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fourth compensable quarter, March 27, 1999, through June 25, 1999. The appellant (carrier) appeals, urging that the hearing officer's determinations on direct result and good faith are against the great weight and preponderance of the evidence and that the decision should be reversed and rendered in favor of the carrier. The claimant replies that the evidence is sufficient to support the hearing officer's decision and it should be affirmed.

DECISION

Affirmed.

Not appealed are the hearing officer's findings that on _____, the claimant sustained an injury while she was engaged in the exercise of her job duties with employer; that as a result of her compensable injury of _____, the claimant has a whole body impairment rating equal to or greater than 15% and that the claimant commuted no portion of the impairment income benefits. The medical records indicate that the claimant sustained a skull fracture, intracranial hemorrhage, and an L-1 compression fracture when she fell off a ramp while performing job duties as a car salesman on _____. The claimant testified that she suffers back pain and residual effects from the brain injury, including memory and comprehension problems. According to the claimant, the effects of her brain injury did not improve in the filing period.

The filing period for the fourth quarter was approximately December 26, 1998, through March 26, 1999, although not specifically identified by the parties. The claimant testified that at the beginning of the filing period she was employed at a (employer), but the job required her to lift heavy wedding gowns which was too physically demanding, and she was forced to resign employment on January 10, 1999; that after January 10, 1999, she looked for work every chance she had, until obtaining employment as a cashier at (NMC) on January 28, 1999; that NMC started her working 30 hours per week, three days per week, earning $6.25 per hour, and she did not work any more hours because it would have been too painful; and that her stamina has improved to the point that she is able to and has been working 40 hours per week. According to the claimant, she did not seek other employment when working 30 hours per week for NMC, and did not ask her treating doctor for his opinion as to her work restrictions because she felt that he would not have considered a cashier job to fall within her work restrictions.

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 (AWW) 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. Tex. W.C.

Comm'n, 28 TEX. ADMIN. CODE § 130.104(a) (Rule 130.104(a)), provides that an employee initially determined by the Texas Workers' Compensation Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period: (1) has been unemployed, or underemployed as defined by Rule 130.101, as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. Rule 130.101 provides that "underemployment" occurs when the injured employee's average weekly earnings during a filing period are less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury. The claimant has the burden to prove entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The carrier asserts that the claimant did not make a good faith effort to seek employment commensurate with her ability to work because there is no medical evidence to indicate that the claimant was restricted to working 30 hours a week, and the claimant did not seek employment during the period of time she was not employed. The carrier cites Texas Workers' Compensation Commission Appeal No. 961469, decided September 11, 1996, and Texas Workers' Compensation Commission Appeal No. 960480, decided April 24, 1996, in support of its position. In Appeal No. 961469, Appeals Panel affirmed a hearing officer's decision that the claimant in that case was not entitled to SIBS for the second and third quarters. The claimant in that case testified that he returned to work working 20 to 24 hours a week and that each week he worked two eight-hour days and one four-hour day. In affirming the hearing officer's decision, the majority opinion stated "we believe that to support the contention that claimant can only work 20 to 24 hours a week requires more than a conclusory statement which appears to fly in the face of common sense and would require some explanation why claimant can work eight hours some days and none on others." In Appeal No. 960480, *supra* the claimant was released to return to work light duty three to six hours a day, obtained a job working about three hours a day earning $6.25 an hour, and testified that during the filing period he looked in a newspaper for work but did not apply for work. The Appeals Panel reversed a determination that the claimant had attempted in good faith to find employment commensurate with his ability to work stating that the hours the claimant worked clearly did not approach the level specified by the most restrictive medical evidence in the record, that the claimant was obligated to continue to attempt in good faith to find employment commensurate with his ability to work, and that his limited effort to find other employment did not meet the good faith criterion.

In Texas Workers' Compensation Commission Appeal No. 980295, decided March 30, 1998 (Unpublished), the Appeals Panel stated:

> We reject carrier's contention that either or both of the cited cases [Appeal No. 961469, *supra,* and Appeal No. 960480, *supra*] have established firm fast rules that medical evidence must affirmatively demonstrate more than a conclusion of the number of hours claimant is able to work (that depends on medical judgment) and that the claimant "must work or look for work to the full extent of the hourly limitations" which remains a consideration for the

> hearing officer in determining a good faith effort to seek employment commensurate with the claimant's ability. We cannot emphasize too strongly that many, if not most, of these cases are very fact specific and caution readers from taking one specific fact situation to establish a firm "rule" to be applied in all cases. We have many times recited the general principles for hearing officers to use in applying the good faith requirements in Section 408.142 and Section 408.143.

In this case, the hearing officer resolved the good faith issue in favor of the claimant, although there was no medical evidence indicating a restriction on the amount of hours the claimant could work. The hearing officer states that the claimant was between jobs for only a brief period of time during the filing period; that she obviously sought employment during that time frame, since she successfully obtained a job at NMC; that she worked to increase the length of her work week from 30 to 40 hours; and that the claimant's employment at less than 40 hours per week does not necessarily have an adverse impact upon her case, since it appears that the claimant would have worked more hours per week had she been able to do so.

The carrier appeals the hearing officer's finding that the claimant's underemployment during the filing period for the fourth quarter was a direct result of her impairment, asserting that there are no physical or mental problems that would have prevented the claimant from returning to any type of work. The hearing officer based her finding on medical evidence regarding the claimant's poor memory testing. While the medical evidence is contradictory as to whether the claimant has permanent brain dysfunction as a result of the compensable injury, the hearing officer's direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing period, she could not reasonably perform the type of work being done at the time of the injury, that of a car salesman. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

Whether the claimant's underemployment was a direct result of her impairment and whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the filing period for the fourth quarter presented the hearing officer with questions of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge