APPEAL NO. 000321

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 24, 2000, a hearing was held. The hearing officer determined that respondent (claimant) was not entitled to supplemental income benefits (SIBS) for the first compensable quarter but was for the second quarter. Appellant (carrier) asserts that the case should be reversed because claimant did not "make a good faith job search during the qualifying period" in regard to the second quarter. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (company) on _____. The parties stipulated that claimant sustained a compensable injury on that date; has not commuted any benefits; has a 30% impairment rating; earned less than 80% of his average weekly wage during the qualifying period of the second quarter; and that the beginning dates of the two qualifying periods were March 5, 1999, and June 4, 1999, respectively. The new, January 1999 rules apply to all periods in issue in this case. There has been no appeal of the determination that claimant is not entitled to SIBS for the first quarter, which was based on an ability to work but no attempt in good faith to find work.

The hearing officer found that claimant began work for a different employer on August 1, 1999; has continued thereafter; and that this work is consistent with the restrictions set forth by a functional capacity evaluation (FCE) and claimant's treating doctor. Neither finding of fact was appealed. Carrier does refer in the appeal to the difficulty in verifying the number of hours worked since claimant is being paid by the trip as a courier. Claimant did testify that he works 30 to 40 hours a week and is paid by the trip; he said that the company he works for, which is owned by a friend, is growing. Claimant also provided his records of pay received beginning in August, two months after the beginning of the qualifying period for the second quarter. Carrier's main point in this appeal was that claimant did not make a good faith search throughout the qualifying period, but merely spoke to a friend prior to the beginning of the qualifying period of the second quarter and then chose to wait to begin work until August. Claimant testified that he began work when his doctor released him to work. (While claimant's doctor had not released him to work during the qualifying period of the first quarter, the hearing officer correctly found that an FCE showed that claimant could work during that period; *see* Tex W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3).) (Rule 130.102(d)(3)).

Under the provisions of the new, 1999 SIBS rules, four methods for complying with the good faith requirement of qualifying for SIBS are provided. A claimant does not have to satisfy all--one will do; for example, if a claimant has returned to work, he does not have to show enrollment and satisfactory participation in a Texas Rehabilitation Commission (TRC) program. Similarly, if a claimant "has returned to work in a position which is relatively equal

to the injured employee's ability to work," he does not have to show that he looked for work "every week of the qualifying period." This point is reinforced by the language of Rule 130.102(e), itself, which excludes cases in which the employee has returned to work; is enrolled in a TRC program; or has shown no ability to do any work of any kind, from the requirement to look for work every week of the qualifying period. We also note that within Rule 130.102, subsection (e) does set time period requirements more specific than the qualifying period itself--the need to look for employment every week of the qualifying period--had the Texas Workers' Compensation Commission wished to set a minimum period of work within the qualifying period in order to meet the "returned to work" criterion for payment of SIBS, subsection (e) is evidence that such limitation could have been imposed. It was not.

We note that Rule 130.102(d)(1) says that the work returned to should be "relatively equal"; that allows some discretion to the fact finder and, as stated, findings of fact applicable to whether claimant's work reflects his restrictions were not appealed. Carrier does not assert on appeal that claimant's hours of work were insufficient. This is not to say that a claimant's job does not have to be "relatively equal" to applicable restrictions imposed, including number of hours of work allowed per day or week.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

CONCUR IN RESULT:

I concur in the decision in this case. The holding in this case is that if an injured worker actually returns to "relatively equal" work during the filing period, that claimant is in good faith no matter what manner of job search that claimant made before he or she became employed. Rule 130.102 is ambiguous regarding whether a claimant who becomes employed during the filing period must have also made a weekly job search during the period before the claimant found a job. The preamble discusses whether a claimant must "continue" to look for work in such an instance, but it is not clear to me how

the rule should be interpreted. It is possible that the Texas Workers' Compensation Commission meant that good faith should be found where a claimant does actually return to work that is "relatively equal" to the former job. I would note that in deciding whether a job is "relatively equal," the hearing officer is to look at the nature of the work, the work restrictions, and the hours worked, not whether the wages paid are equal. *See* Texas Workers' Compensation Commission Appeal No. 992762, decided January 28, 2000.

_____

Judy L. Stephens
Appeals Judge