APPEAL NO. 000324

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 January 27, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the eighth quarter. The appellant (carrier) appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed. Another issue regarding the amount of weekly earnings was resolved by agreement of the parties.

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____, as a result of which she underwent surgery and had a spinal cord stimulator implanted. She reached maximum medical improvement on January 23, 1997, and was assigned a 19% impairment rating. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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 "qualifying period." Under Rule 130.101(4), the "qualifying period" ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The eighth SIBS quarter was from November 26, 1999, to February 24, 2000, and the qualifying period was from August 14 to November 12, 1999.

The claimant worked part time during the qualifying period. She said she was scheduled to work from 8:00 a.m. to 4:15 p.m. for three days a week and 8:00 a.m. to 12:30 p.m. on Friday. She testified that her treating doctor, Dr. C, agreed that she could work 20 to 30 hours per week. No medical records of Dr. C were admitted into evidence. In evidence from the claimant was a pay history, which reflected bi-weekly hours worked. These generally ranged from the low 20s to mid 20s and, in a few cases, exceeded 30 per week. The carrier introduced into evidence the pay sheets from which the wages were calculated. These reflect that the claimant was generally given 45 minutes for lunch without pay, was on vacation during the last five days of the qualifying period, and was absent without explanation for another five days. This evidence also reflects working from low to mid 20 hours per week. The carrier introduced two medical reports of Dr. W, who twice examined the claimant. In his report of June 2, 1998, he concluded she could work light duty full time. In his report of May 7, 1999, he commented that Dr. C on January 8, 1999, limited her work to 20 to 30 hours per week.

We have held that a claimant working less than full time, that is, underemployed, must still seek employment commensurate with the ability to work, both in terms of the physical restrictions and number of hours allowed. Texas Workers' Compensation Commission Appeal No. 972352, decided December 31, 1997. A claimant who self-limits to fewer hours for personal reasons unrelated to the injury or impairment has not made the required good faith job search. Texas Workers' Compensation Commission Appeal No. 961649, decided October 4, 1996. There was no dispute that the claimant had physical limitations on her ability to work. What was at issue was whether she could work more than the number of hours she actually did during the filing period. There was evidence from Dr. W that could support a finding that the claimant was not limited in the number of hours she could work, and evidence that Dr. C said that she could only work 20 to 30 hours per week. The actual number of hours per week the claimant could work presented a question of fact for the hearing officer to decide. He found her restrictions to be those indicated by Dr. C. 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). Under this standard of review, we find the evidence sufficient to support this determination. Thus, whether the claimant worked 21 hours or 29 hours per week, she was within the restrictions of Dr. C.

There remains the question, given this range in the number of hours she could work, whether she limited herself to the lower end of the range for personal reasons. The hearing officer commented in his decision and order that the claimant was "scheduled to work an average of 29.25 hours each week" and that "sick time, personal time off without pay, and vacation are a fact of life for most of the work force" and he was "not of the opinion that such time off should be deducted in determining whether Claimant is employed in a job which is commensurate with her ability to work." The hearing officer found that the claimant "was employed in a light duty position which provided an average of 29.25 scheduled hours per week," Finding of Fact No. 2, and that the claimant's "employment during the qualifying period was commensurate with her ability to work." Finding of Fact No. 3. The carrier argues that the hearing officer has impermissibly based his finding of a good faith job search commensurate with the ability to work on the hours scheduled not the hours worked. We agree that such a reading of these two findings is not unreasonable, especially in light of other comments in his decision and order, but we do not consider this to be the only possible reading. Rather, we view them as separate findings, that is, that the employer made available to the claimant 29.25 hours each week to work, but the claimant availed herself of an average of only 21 hours and these 21 hours essentially were commensurate with her ability to work. The reason for the difference then becomes important. The claimant said she was unable to work on some days because of the pain in her legs. Her other time off was for personal reasons, not otherwise explained, and for unpaid lunch. We can agree that some time off from work during the qualifying period does not necessarily jeopardize one's entitlement to SIBS. It becomes a question of the reasonableness of the amount of time off. In this case, it was of significant importance that the claimant was given a range of hours she was permitted by her treating doctor to work. She consistently stayed within that range. While another hearing officer may have found

otherwise, we are unwilling to say that the amount of time off taken by this claimant under the facts of this case was so unreasonable and without proper justification as to make the determination of a good faith effort reversible under our standard of review. This affirmance should not be construed as blanket approval of an approach in the good faith or direct result analysis that would identify hours scheduled with hours worked or that would give no significance to the reasons why a claimant did not work the scheduled hours.

We also affirm the direct result finding based on evidence of a serious injury with lasting effects and the inability to return to the prior employment. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge