

APPEAL NO. 000608

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 February 28, 2000. With respect to the issues before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 11th and 12th quarters. In its appeal, the appellant (carrier) argues that those determinations are against the great weight of the evidence. In addition, the carrier asserts that the hearing officer abused his discretion in denying a subpoena request. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the carrier accepted liability for an _____, injury; that the claimant's impairment rating for his compensable injury was 15% or greater; that the claimant did not commute his impairment income benefits; that the 11th quarter of SIBs ran from August 5 to November 3, 1999; and that the 12th quarter of SIBs ran from November 4, 1999, to February 2, 2000. The qualifying periods for the 11th and 12th quarters were identified as the periods from April 22 to July 23, 1999, and July 24 to October 21, 1999, respectively. The claimant testified that in the qualifying periods for the 11th and 12th quarters, he ran a restaurant that he owns; that he handles the day-to-day operations of the restaurant, which includes purchasing food, working with the customers, operating the cash register, cooking, or whatever else needs to be done; that his work at the restaurant is within his restrictions; that he paid himself \$350.00 per week in wages; that he is trying to sell the restaurant because it is losing money; and that he looked for other jobs in the qualifying periods. He stated that he has focused his job search efforts in the hospitality industry or with assisted-living facilities because he worked off and on in the hospitality industry for 20 years, reaching the level of general manager and regional manager. The claimant also acknowledged that he has a degree in food and restaurant management from a community college and that he is a certified hotel administrator.

In its appeal, the carrier asserts that it should be relieved of liability for the 11th quarter of SIBs because the claimant either did not file an Application for Supplemental Income Benefits (TWCC-52) for that quarter of SIBs or that he should be determined to have not filed because his application was incomplete. The issue of whether the carrier is relieved of liability under Section 408.143(c) is a separate issue from the issue of the claimant's entitlement to SIBs. No such issue was before the hearing officer and it is likewise not before us on appeal. Thus, the issue will not be discussed further in this decision.

The carrier also argues that the hearing officer erred in denying its subpoena request for business records. We review the hearing officer's denial of the subpoena request under an abuse of discretion standard. It is well-settled that an abuse of discretion occurs when the

hearing officer acts without reference to guiding rules and principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In his order denying the subpoena, the hearing officer noted that the carrier had not shown that the "information is unavailable by other means." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 142.12(d) (Rule 142.12(d)) provides that a hearing officer can deny a subpoena request based upon a determination that the information may be adequately obtained from another source. Accordingly, the hearing officer properly considered the carrier's failure to demonstrate that the requested information was not available from another source in denying the request and we find no merit in the assertion that he abused his discretion in making his ruling.

The hearing officer determined that the claimant had satisfied the good faith requirement in the qualifying periods for the 11th and 12th quarters in accordance with Rule 130.102(d)(1) because he had "returned to work in a position that was relatively equal to Claimant's ability to work." We have previously recognized that the question of whether the employment is "relatively equal" is a question of fact for the hearing officer to decide and that the focus of the inquiry is not on whether the wages are the same. Rather, "[w]hat is critical is that the evidence support the determination that the employment was relatively equal in terms of hours worked and the claimant's ability to work." Texas Workers' Compensation Commission Appeal No. 000616, decided April 26, 2000. The carrier argues that the claimant was required to look for work in each week of the qualifying periods in addition to working. However, we have specifically rejected that argument, by determining that the weekly job search requirement of Rule 130.102(e) is not applicable in cases where, as here, the claimant satisfies the good faith requirement under Rule 130.102(d)(1) by working in a job relatively equal to his ability to work in the qualifying period. *Id.*; see also, Texas Workers' Compensation Commission Appeal No. 000470, decided April 10, 2000. The record contains sufficient evidentiary support for the hearing officer's determinations that the claimant returned to work in a position that was "relatively equal" to his ability to work in the qualifying periods for the 11th and 12th quarters and that he, therefore, satisfied the good faith requirement under Rule 130.102(d)(1). Nothing in our review of the record demonstrates that those determinations are so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse the hearing officer's good faith determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Finally, the carrier argues that the hearing officer erred in determining that the claimant's impairment from the compensable injury was a cause of his reduced earnings during the qualifying periods for the 11th and 12th quarters. The carrier argues that the claimant did not satisfy his burden of proof on direct result because he did not produce evidence of his average weekly wage (AWW) or sufficient evidence of his earnings during the qualifying period. We find no merit in this assertion. An attachment to the claimant's TWCC-52 for the 12th quarter states that the claimant's AWW is \$884.00; however, it also seems that by this late stage in the claim, the AWW is established. Thus, the starting point of the direct result analysis, 80% of the AWW, is likewise established and the claimant was not required to

produce independent proof of that figure. Rather, in order to establish direct result in a particular qualifying period, the claimant must demonstrate that his earnings were less than the 80% figure as a result of his impairment. In this instance, the claimant presented evidence that he was paid \$350.00 each week for his work in the restaurant and that that figure was set by the financial condition of the restaurant. The claimant specifically testified that \$350.00 was all that he could afford to pay himself. The hearing officer was acting within his province as the fact finder in deciding to credit that testimony and in further determining that the claimant's weekly earnings in the qualifying periods were \$350.00 based upon the claimant's testimony that the restaurant was losing money and did not produce any additional earnings for him. We cannot agree that the hearing officer's direct result determination is so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool; Cain.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge