APPEAL NO. 000616

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 March 6, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter. The appellant (self-insured) appeals, contending that this determination is against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Reversed and a new decision rendered.

The claimant worked as a food service specialist for the self-insured school district. She testified that she had two injuries, one in _____ and the other on _____, when she slipped and fell. According to the claimant, the two injuries became "combined." Her current claim for SIBs is based on the _____, injury. She reached maximum medical improvement from this injury on June 30, 1998, and was assigned a 24% impairment rating (IR).[1]

Pursuant to Section 408.142, an employee is entitled to SIBs if, on the expiration of the impairment income benefits (IIBs) period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBs; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(b) (Rule 130.102(b)), entitlement to SIBs is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the "qualifying period." Rule 130.101(4) provides that 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 first SIBs quarter was from November 17, 1999, to February 15, 2000, and the qualifying period for this quarter was from August 5 to November 3, 1999.

The claimant testified that she returned to work within a few days of her _____, injury working the same number of hours for the same pay, but with her duties modified to accommodate restrictions of no lifting of more than 10 pounds and infrequent bending and stooping. She said she worked through the end of the current semester and the spring 1998 semester, was presumably off during summer vacation, and returned to work about three or four days before the start of the fall 1998 semester preparing the kitchen. No evidence established the exact date of return, but we assume it was more or less around the beginning of the qualifying period. In any case, the claimant testified that she stopped working because

[1]This IR apparently included both injuries.

her former husband, with whom she still lived and who was then working in Colorado, suffered a heart attack and she was needed to help him in Colorado. She apparently applied for a leave of absence and departed for Colorado. On an unspecified Friday, she said, she called Ms. H, her second-level supervisor, from Colorado to say she would be back to work the following Monday. The claimant said that Ms. H told her, if she were not back that day, she would be terminated. Because it was physically impossible for the claimant to return that soon, she assumed her employment was terminated. Ms. H's account of the conversation was somewhat different. She said the claimant called her on a Thursday and that Ms. H told her she thought her leave of absence would expire the next day. She said she also said she told the claimant that the matter would be referred to another supervisor.

The claimant submitted an Application for Supplemental Income Benefits (TWCC-52) for first quarter SIBs in which she listed some 10 job contacts.[2] According to the claimant these were her only documented job search efforts during the qualifying period. They did not cover each week of the filing period. In an unappealed finding of fact, the hearing officer found that the claimant did not look for employment commensurate with her ability to work during every week of the qualifying period and document such efforts. *See* Rule 130.102(e), then in effect, which provides that one way a claimant can establish that he or she made the required good faith job search is to make a weekly job search and document that search. *See also* Texas Workers' Compensation Commission Appeal No. 992247, decided November 23, 1999.

The claimant testified that her work limitations included a 10-pound lifting restriction and limited bending and stooping. In evidence was a work release from Dr. G, dated April 7, 1998, which limited the claimant to occasional lifting of 10 pounds and no repetitive motion at the wrist or waist. An examination by Dr. S at the request of the carrier, performed on October 28, 1999, placed the claimant in a medium duty work capacity with lifting up to 50 pounds.

On _____, the claimant began working as a telephone solicitor for charitable contributions. She worked at home calling numbers supplied by the charity and was paid on a commission basis. She said the work complied with her 10-pound lifting restriction and enabled her to take the necessary breaks. She said she worked from 32 to 40 plus hours a week, including evenings and weekends when donors were more accessible. She also conceded that it was possible to earn zero commissions in a week if she was unsuccessful in obtaining any contributions.

Another way a claimant may establish entitlement to SIBs is by proving that he or she "has returned to work in a position which is relatively equal to the injured employee's ability to

[2]Interestingly, although the claimant was apparently in Colorado, the employers contacted appear to be in the (city) area. This leads one to question the accuracy of the dating of the contacts.

work." Rule 130.102(d)(1). In Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000, we observed that use of the phrase "relatively equal" permits "some discretion to the fact finder . . . . 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." We also noted in that case that this standard for establishing entitlement to SIBs stands somewhat alone and does not require that a claimant must look for work in each week leading up to the "relatively equal" employment nor is there some minimum part of the qualifying period in which the claimant must perform this work. Thus, in the case we now consider it is not determinative that the claimant did not look for work in all the weeks preceding this employment or that she was not employed in this position for all of the qualifying period. What 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. Whether the employment was "relatively equal" raises a question of fact for the hearing officer to decide. In this case, the hearing officer found the claimant credible in her assertions that she worked more or less full time and that her restrictions were as the claimant and Dr. G described them rather than as described by Dr. S. In its appeal of this determination, the self-insured argues that Dr. S's opinion is more credible because it was rendered in the qualifying period and that Dr. G's restrictions are essentially no longer valid. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. He considered the two sets of work restrictions and found Dr. G's still valid. 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). Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's finding that the claimant's job was "relatively equal" to her ability to work and affirm that determination.

What concerns us and causes us to reverse the hearing officer's decision that the claimant is entitled to first quarter SIBs is his finding that the claimant's underemployment in the qualifying period was direct result of her impairment. The undisputed testimony from the claimant herself was that she returned to work with the self-insured at her preinjury wage and hours within her restrictions and within a few days of the injury. She worked an entire school term and then returned for the new term in August 1999. She further said that the only reason she stopped working was to care for her former husband in Colorado. When asked if she would have continued working for the self-insured but for her former husband's health problems, she replied "sure" or at least she would not have left her employment when she did. She further testified that she fully expected to return to this job when she finished caring for her former husband in Colorado and returned home. Ms. H's testimony was consistent with this in that she said that the claimant's job had always been filled with substitutes and she herself was not sure if the claimant had been terminated or if her leave of absence had simply expired. Despite this evidence and without explanation, the hearing officer found that the claimant's underemployment during the qualifying period was a direct result of her impairment (Finding of Fact No. 17). In its appeal, the self-insured asserts that this finding is against the great weight

and preponderance of the evidence. We agree in light of the claimant's explanation of why she stopped working for the self-insured some eight months after the injury. That explanation in no way suggested that the claimant's impairment from her compensable injury had anything to do with her underemployment.

Under our standard of review, we reverse the hearing officer's finding of direct result and render a decision that the claimant's underemployment was not a direct result of her impairment and that she was not entitled to first quarter SIBs.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge