APPEAL NO. 000794

On March 22, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issue by deciding that appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter. Claimant requests that the hearing officer=s decision be reversed and that a decision be rendered in her favor. Respondent (self-insured) requests that the hearing officer=s decision be affirmed.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102 (Rule 130.102). The new SIBs rules effective January 31, 1999, apply to this case. The parties stipulated that claimant sustained a compensable injury on _____; that she reached maximum medical improvement on August 28, 1997, with an impairment rating of at least 15%; that she did not commute impairment income benefits; that the fifth quarter was from December 20, 1999, to March 19, 2000; and that the qualifying period for the fifth quarter was from September 7, 1999, to December 6, 1999 (the qualifying period). There is no appeal of the hearing officer=s finding that claimant=s unemployment during the qualifying period was a direct result of her impairment. At issue is whether claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period. Rule 130.102(b).

According to medical records, claimant was injured while working as a sales associate for self-insured on _____, when she lifted a toaster oven onto a shelf and she underwent surgery for repair of a torn rotator cuff of her left shoulder in October 1997 and underwent a cervical fusion at C4-5 in April 1998. Dr. S examined claimant at self-insured=s request in June 1999 and reported that claimant can return to work with a restriction of no work on unprotected heights. Dr. R, claimant=s treating doctor, wrote in July 1999 that he disagreed with Dr. S=s opinion regarding claimant=s work ability and noted numerous work restrictions. Dr. R wrote in February 2000 that claimant has neck and shoulder pain, is on medications, and is unable to work. Claimant agreed at the CCH that she was able to work in some capacity during the qualifying period.

Claimant said that on November 29, 1999, she obtained a job babysitting her son=s girlfriend=s children, who she said were her step-grandchildren, for $390.00 a month and that from November 29th to the end of the qualifying period on December 6, 1999, she worked five days at the babysitting job. Claimant said that from December 7th to December 18th she did not work and then she worked three days a week at the babysitting job until January 1, 2000, when she worked at the babysitting job eight hours a day five days a week. In a letter dated

January 5, 2000, the person claimant identified as her son=s girlfriend wrote that as of November 29, 1999, claimant has been babysitting her children and will continue to do that until claimant receives her workers= compensation check, and that she pays claimant $390.00 a month. On her Application for SIBs (TWCC-52) for the 5th quarter, dated December 5, 1999, claimant did not document any information regarding her claimed babysitting job and wrote that she earned no wages during the qualifying period. Claimant testified that she was first paid for her babysitting job on December 15, 1999. On the TWCC-52, claimant listed seven job contacts during the qualifying period, all occurring within the last week of that period, and all for sales/cashier jobs.

Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee=s ability to work if the employee has returned to work in a position which is relatively equal to the injured employee=s ability to work. Rule 130.102(e) provides in pertinent part that, except as provided in subsections (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. Texas Workers= Compensation Commission Appeal No. 000321, decided March 29, 2000, states that 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.

The hearing officer found that claimant had some ability to work during the qualifying period, that claimant did not look for work during each week of the qualifying period, that claimant was unemployed during the qualifying period, and that claimant did not make a good faith effort to obtain employment commensurate with her ability to work during the qualifying period. Claimant contends that she was employed in her babysitting job during the qualifying period and that that constitutes a good faith effort to obtain employment within her restrictions. It is clear from the hearing officer=s discussion of the evidence that she was not persuaded that claimant was actually working for wages during the qualifying period. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. 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 and unjust.

The hearing officer=s decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge