APPEAL NO. 000888

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 30, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) had not returned to work in a position equal to claimant's ability to work and, therefore, had not made a good faith effort to obtain employment commensurate with his ability to work and was not entitled to supplemental income benefits (SIBs) for the 11th or 12th quarter. The claimant appealed, contending that he had returned to work in a position "relatively equal" to his ability to work working both "a full time and part time job commensurate with [his] ability to work." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

First, we briefly address a procedural matter raised by carrier's response. In its response, carrier alleges that since claimant had not specifically disputed each of the hearing officer's 36 findings of fact, the "Appeals Panel should assume that the Claimant is in agreement" with those findings which were not specifically appealed. In this case, the pro se claimant specifically appealed the ultimate findings of nonentitlement and we decline to assume that claimant is in agreement with any finding that supports the ultimate conclusion that claimant is not entitled to SIBs.

On the merits of the case, claimant had been employed in a heavy-work job as a floor hand (presumably on a drilling rig). The parties stipulated that claimant sustained a compensable low back injury on July 13, 1994 (claimant's uncontradicted testimony was that he had spinal surgery in March 1995); that claimant had a 15% impairment rating (IR); that impairment income benefits (IIBs) were not commuted; and that the qualifying period for the 11th quarter was from July 3 through October 1, 1999, with the qualifying period for the 12th quarter being from October 2 through December 31, 1999. Claimant testified regarding continuing back pain and intermittent treatment. Dr. C, carrier's required medical examination doctor, in a report dated March 8, 1999, commented that claimant's "condition is compatible with a release to work at a moderate duty level with no repetitive lifting greater than 40-50 lbs." That assessment is compatible with a functional capacity evaluation performed on March 9, 1999. The hearing officer also made findings that claimant was unable to return to his preinjury job during the qualifying periods.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At

issue in this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

Claimant testified that during the qualifying periods he had two jobs. One of those alleged jobs was providing child care for his four-year-old son while his wife was working. Claimant conceded that he did not really consider this as employment but, rather, a parental obligation, but that carrier had imputed income to claimant in the ninth and tenth quarters reducing claimant's SIBs by $200.00 per week. Claimant argued that if carrier was going to impute income to him for child care, then he should be able to argue that the child care was full-time, 40-hour a week employment in a position which is relatively equal to his ability to work. Carrier, in its closing argument, concedes that its position in the prior quarters "was a mistake." The hearing officer, in her Statement of the Evidence, comments that claimant's argument "did not factor into the determination of his entitlement to any significant degree" and that for claimant to work evenings and provide child care during the day was claimant's "lifestyle choice." We do not disagree with the hearing officer's approach but only caution that carrier should not benefit by imputing income to claimant for child care in quarters that suit carrier but then argue that does not constitute employment in subsequent quarters. In any event, this was thoroughly discussed at the CCH and we hold that the hearing officer's approach on the child care "job" was not error.

In addition to the child care matter, claimant also had a permanent part-time job as a "doorman" at a bar and billiard parlor. Claimant describes his duties as "[s]ecurity, bouncer. Check proper IDs, make sure minors don't drink, be sure minors are tagged." Claimant has been working this job apparently since 1997 or 1998. Claimant said he has had to break up a fight only twice and that the bar was "a family establishment." Claimant testified that he worked 9:30 p.m. to 2:00 a.m., Tuesdays through Saturdays, or about 18 to 25 hours a week.

The standard of what constitutes a good faith effort to obtain employment in SIBs cases was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 103.102). Rule 130.102(d)(1) provides, in pertinent part, that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:

> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work[.]

The hearing officer determined that the evidence established that claimant had the "ability to perform moderate duty work on a full-time basis (8 hours per day, 40 hours per week)" and that claimant's part-time job of 18 to 25 hours a week "was not relatively equal to his ability[.]" The hearing officer made findings that "a reasonable inference" from Dr. C's report was that claimant could work 40 hours a week. The hearing officer also referenced and made findings that carrier had engaged a vocational rehabilitation service to assist claimant in seeking employment and that claimant "did not utilize these leads to seek

employment." Claimant was not enrolled in a full-time rehabilitation program with the Texas Rehabilitation Commission. Also in evidence is a videotape taken in March 1999 showing claimant engaged in rather dexterous activities in doing mechanical work on a pickup truck.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge