APPEAL NO. 000959

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 April 10, 2000. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 15th quarter because the claimant had not in good faith attempted to obtain employment commensurate with his ability to work and that the claimant's underemployment was "a direct result of claimant's decision to start his own business venture [i.e., not as a direct result of his impairment]." The claimant appealed, reciting his testimony regarding his self-employment, and stating that he worked "40 hours plus each week" and that he had received his training through the Texas Rehabilitation Commission (TRC). Claimant contends that because of his impairment he is unable to perform his preinjury job and that his underemployment is a direct result of his impairment. 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.

Claimant had been employed as a "serviceman" (machine operator) by (employer) and apparently had sustained bilateral repetitive trauma injuries. The medical documentation indicates that claimant has had carpal tunnel releases and cubital tunnel releases of both elbows and both wrists. The parties stipulated that claimant sustained a compensable injury on _____; that claimant has a 27% impairment rating (IR); that impairment income benefits (IIBs) have not been commuted; and that the qualifying period for the 15th quarter was from September 19 through December 18, 1999. Claimant's restrictions apparently are to avoid repetitive motion activities. Claimant testified that he completed auctioneer training under TRC auspices in 1996 (but apparently did not pass a licensing examination) and real estate training in 1997 (but has not taken a licensing examination). Claimant, who is 46 years old, testified that he has worked in a number of jobs, including construction, as a roofer, with a pipe company, as a loader, and with the railroad. The parties appear to agree that claimant cannot perform his preinjury job or any of his other prior work now.

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 here are subsections (2) and (4), whether claimant's underemployment was a direct result of his impairment, as opposed to some other cause, and whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

What constitutes good faith has been more specifically defined and addressed in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102).

Claimant attempts to meet the good faith requirement by showing both that he was self-employed full time and, in addition, made some 17 job contacts during the qualifying period. The full-time self-employment was operating a facility known as (the store), where claimant rented out space or cubicles to vendors to market their wares (in essence, rented space to vendors in a flea market operation) and he received 10% of all sales. Claimant testified and presented some evidence that he advertised in the yellow pages, in brochures, in the county weekly newspaper, on the Internet, by word of mouth and various signs. Claimant testified that he used his auctioneer and real estate skills and training in his business. Claimant's Application for Supplemental Income Benefits (TWCC-52) reflected that he earned $585.00 during the qualifying period. Rule 130.101(1)(D) provides that the form TWCC-52 contain the following information:

> [F]or self-employed individuals, copies of all supporting documentation such as, business plans, contacts, sales tax registration, and any other pertinent documentation to document all efforts to establish or maintain a self-employed enterprise during the qualifying period.

The hearing officer found:

FINDINGS OF FACT

15. The claimant failed to produce evidence of "business records" showing expenses associated with advertising, or efforts to solicit and attract business. Claimant's business records were very sketchy and not very specific.

16. Claimant's "self-employed business" did not comply with the requirement to obtain employment as he did not keep good business and tax records, failed to document efforts to attract business and did not provide evidence of good faith efforts to solicit business.

17. Claimant did not attempt in good faith to obtain employment commensurate with his ability to work.

Claimant, in his appeal, contends that he met the requirements of Rule 130.101(1)(D) by his exhibit no. 8. Exhibit no. 8 says that claimant will "present photo's of [the store] with billboards store signs & [brochures]." The exhibit in evidence has a copy of a receipt (presumably from the county newspaper), a copy of the advertisement in the newspaper and a listing in the yellow pages under antique dealers. In addition, claimant, in his appeal, states that he offered "to present a diskette for the hearing officer to view but he declined." Our review of the record indicates that the hearing officer was asking claimant about his store and the claimant said something to the effect–"I can show you a diskette," to which

the hearing officer replied, "Oh, no that's all right." No attempt was made to offer the diskette into evidence, nor was there any representation that the diskette had been exchanged or what was on the diskette. We find no error by the hearing officer with regard to the diskette and we find the hearing officer's findings on self-employment to be supported by the evidence.

Claimant's TWCC-52 also contained a list of 17 job contacts claimant said that he made in October, November and December 1999. In that the job contacts contain no specific dates, we are unable to determine whether they were made during the qualifying period or were made during "every week of the qualifying period." Rule 130.102(e) provides, in pertinent part, that:

> 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.

The rule goes on to list some nine or ten factors to be considered when reviewing the job contacts for good faith, such as the amount of time spent in attempting to find employment, any job search plan, potential barriers to successful employment searches, etc. Claimant testified that he was seeking work outside of his self-employment efforts because he was told that "he needed to reflect job search seeking efforts even though he was already working [in his self-employment endeavor]." As we indicated, claimant's TWCC-52 does not document that a job search was made "every week of the qualifying period."

However, even if claimant had established that he was "underemployed," the hearing officer further found that he failed to prove that this status was the "direct result" of his impairment. The hearing officer specifically found that claimant's underemployment was the direct result of claimant's decision to start his own business venture. While claimant testified that he would have taken any job offered by one of the potential employers, the hearing officer was free to believe or disbelieve any of that testimony (*see* Section 410.165(a)). The hearing officer could believe that claimant's earnings were self-limited by his choice to pursue his self-employment at the the store. *See* Rule 130.102(d)(1). When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight 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).

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:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge