

## APPEAL NO. 001004

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 April 19, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 11th compensable quarter, beginning February 27 and ending May 28, 2000. The appellant (carrier) appeals, urging that the claimant failed to meet the good faith and direct result requirements for entitlement to SIBs. The claimant replies that sufficient evidence supports the hearing officer's decision and it should be affirmed.

### DECISION

Affirmed.

The claimant sustained a compensable cervical injury on \_\_\_\_\_. As a result of the injury, the claimant had a cervical laminectomy at C5-6 on February 8, 1995, and a two-level anterior cervical discectomy and fusion with cervical plating on September 22, 1998. During the qualifying period at issue, November 14, 1999, through February 12, 2000, the claimant was released to work with restrictions, no lifting in excess of 15 to 20 pounds, no squatting, no prolonged standing, squatting or bending.

The claimant testified that she sought employment at all of the places listed on her Application for Supplemental Income Benefits (TWCC-52) and during the qualifying period obtained employment working in a school cafeteria. The claimant said that when she was hired she knew the job required lifting beyond her 15-pound limitation, but had been told that help would be available. The claimant testified that the work was beyond her physical capabilities and she had to quit after working nine days. The claimant sought jobs during the qualifying period as a respite provider, health care provider, stocker, order filler and food service industry. The claimant testified that she sought jobs which met her physical restrictions and those she was qualified to perform, warehouse work, assembly-line work and cafeteria work.

The carrier argues that the claimant voluntarily restricted her positions to jobs near her home; that most of the jobs that the claimant applied for were beyond her physical capacity; and that the claimant failed to apply for clerical and administrative jobs. The carrier relies on a vocational services report dated May 19, 1997, which states "since [the claimant] appears to have the skills required for acceptable performance in many clerical and administrative support positions, such placement is preferable." The claimant testified that she did not apply for any clerical or administrative positions because she does not have any experience or training in this area. It is noted that the vocational services report relied on by the carrier states that "while [the claimant] could benefit from computer literacy and keyboard training, test results suggest that she is not likely to excel in this area; any such training should be provided in support of other primary responsibilities."

Section 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)), the version then in effect, 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 provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment." Subsection (e) further provides that the injured worker who "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." There follows a list of information that may be provided by the injured worker and considered on the question of a good faith job search.

The claimant had the burden to prove that she made a good faith effort to seek employment commensurate with her ability to work during the qualifying period. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In order to determine whether the evidence was sufficient to meet the criteria of Rule 130.102(d)(4), the hearing officer had to judge the credibility of the evidence before her. The hearing officer considered all of the evidence and found that the claimant applied for jobs, most of which the claimant believed were within her restrictions, and that the claimant made a good faith effort to seek employment during the qualifying period.

The carrier asserts that the claimant's underemployment was not a direct result of her impairment because she did not present any evidence concerning her preinjury wages, the wages she claimed on her TWCC-52 were not documented, and the claimant's testimony was insufficient to prove preinjury wages. Whether the claimant earned less than 80% of her AWW was not litigated at the CCH and probably could have been resolved by stipulation. The claimant testified that she earned a total of \$323.41 during the nine days she worked and her wages are stated on the TWCC-52. The hearing officer could believe the claimant's testimony concerning her post-injury wages. Although the claimant did not establish her AWW at the CCH, the carrier certainly has this information, because it has paid income benefits. Review of the record indicates sufficient evidence, based on the claimant's post-injury earnings, to establish that the claimant earned less than 80% of her AWW.

As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant made a good faith effort to seek

employment; that the claimant's underemployment is a direct result of her impairment; and that the claimant is entitled to SIBs for the 11th quarter.

The decision and order of the hearing officer are affirmed.

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Dorian E. Ramirez  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge