APPEAL NO. 001011

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 11, 2000. The hearing officer determined that respondent (claimant) is entitled to supplemental income benefits (SIBs) for the seventh quarter. The appellant (carrier) appealed both the good faith and direct result determinations. The claimant responded that he met his burden of proof in this case.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant made a good faith effort to search for work commensurate with his ability to work. Carrier asserts that: (1) except for one week during the filing period, claimant looked for work only when he was temporarily laid off from his driving job during part of December and January; (2) claimant should have looked for work to do in addition to his part-time job; (3) working approximately 30 hours per week did not show good faith; and (4) claimant was not in good faith because he did not contact the Texas Rehabilitation Commission (TRC) or the Texas Workforce Commission, and because his job search was unfocused.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1) (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. *See* Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000.

Claimant testified that he sustained a compensable low back and right groin injury in _____ while working for (Employer A). He said his job involved loading trailers and he was injured lifting heavy material. He testified that Dr. L performed surgery in 1997 and removed a disc. Claimant said he can do light work. Claimant said he has been employed by (Employer B) as a driver for about one year and four months. He testified that he works between 28 and 32 hours per week for $6.25 per hour. He said Employer B will not allow him to work 40 hours per week until he has a full-duty release. Claimant said that he has tried to obtain a job working 40 hours per week and that he would attempt to work 40 hours. Claimant said that when he did seek work, he looked in the newspaper, called job lines, talked to friends about which companies are hiring, and contacted employers who had posted help-wanted signs in windows. Claimant said his restrictions include no lifting over 25 pounds and that he believes he can do work within those lifting restrictions. Claimant indicated that Employer B "shut down" from approximately mid-December 1999 through the first week in January 2000, and that he worked there both before and after that time. The qualifying period was from approximately November 1, 1999, to January 29, 2000. Medical records indicate that claimant's back is still symptomatic. In a January 2000 required medical examination report, Dr. G stated that: (1) claimant wants to work; (2) claimant realizes that he cannot do work without limitations; (3) claimant's surgery helped

him only about 20%; (4) claimant works as a driver but he cannot do loading and unloading and will not be able to do this in the future; (5) claimant feels he work 40 hours per week "even though he struggles to do his work"; and (6) claimant may "continue driving as he has been doing." Dr. G did not say that claimant was able to work 40 hours per week.

The hearing officer found that: (1) claimant has restrictions on his lifting and walking; (2) claimant worked with his doctors to see what he could do and was willing to try to work 40 hours per week; (3) Dr. G did not state that claimant was able to work 40 hours per week; (4) claimant found employment that is relatively equal to his limited ability to work; and (5) claimant acted in good faith and is entitled to SIBs.

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 any conflicts in the evidence. Because claimant returned to work in a position which is relatively equal to his ability to work, claimant did not have to show that he looked for work every week of the qualifying period, even during the weeks in December and January when he did not work.[1] Texas Workers' Compensation Commission Appeal No. 000776, decided May 30, 2000. As stated in Appeal No. 000321:

> Under the provisions of the new, 1999 SIBS rules, four methods for complying with the good faith requirement of qualifying for SIBS are provided. A claimant does not have to satisfy all --one will do; for example, if a claimant has returned to work, he does not have to show enrollment and satisfactory participation in a [TRC] program. Similarly, 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." *This point is reinforced by the language of Rule 130.102(e), itself, which excludes cases in which the employee has returned to work; is enrolled in a TRC program; or has shown no ability to do any work of any kind, from the requirement to look for work every week of the qualifying period.*

[Emphasis added.] *See also* Appeal No. 000776, *supra*, where the Appeals Panel affirmed that claimant was in good faith where she had returned to work during the qualifying period, but did not work three weeks of the qualifying period when she went to visit her sick mother. We conclude that the hearing officer did not err in determining that claimant met the good faith SIBs requirement and that he is entitled to SIBs. 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 or manifestly unjust. Cain v. Bain , 709 S.W.2d 175, 176 (Tex. 1986).

[1]We would note that claimant said he did make a job search during the time he was off work during December 1999 and January 2000.

Carrier contends the hearing officer erred in determining that claimant's underemployment during the qualifying period was a direct result of his impairment from his compensable injury. Carrier asserts that the sole reason why claimant was underemployed was because Employer B shut down during part of December 1999 and January 2000. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. The evidence in this case established that the claimant did suffer a serious work-related injury, that he does have lasting effects from this injury, that he has work limitations as a result of this injury, that before his injury he performed loading work, and that he now has lifting restrictions and can stand for no more than four hours per day and no more than one hour at a time. Whether his underemployment was the direct result of his impairment was a question of fact and, to establish a direct result, a claimant need not prove that the impairment is the sole cause of his underemployment. Texas Workers' Compensation Commission Appeal No. 952082, decided January 10, 1996. *See also* Texas Workers' Compensation Commission Appeal No. 990084, decided February 22, 1999. We have reviewed the record and we conclude that the hearing officer's direct result determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge