APPEAL NO. 001062

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 24, 2000. With respect to the single issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 11th quarter, beginning November 29, 1999, and ending February 27, 2000. In its appeal, the appellant (carrier) argues that the hearing officer's determinations that the claimant made a good faith effort to look for work commensurate with his ability to work, that he was underemployed as a direct result of his impairment, and that he is entitled to SIBs for the 11th quarter are "against the great weight and preponderance of the evidence" and "incorrect as a matter of law." In his response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable lumbar spine injury on _____, and that he has qualified for and received SIBs in prior quarters. The parties stipulated that the claimant's average weekly wage (AWW) is $1,032.57 and that the qualifying period for the 11th quarter of SIBs ran from August 17 to November 15, 1999. The claimant testified that in June 1993, prior to his injury, he and his wife purchased a 120-acre farm in Arkansas. The claimant acknowledged the house on the farm has been his primary residence since 1993. He further testified that in June 1993, his wife entered into a contract with Tyson Foods to raise broiler chickens. He stated that Tyson provides the baby chicks and the feed, his wife raises the chickens for seven weeks, and then Tyson picks up the chickens, paying for them by the pound.

In a report dated August 11, 1997, Dr. G, the claimant's treating doctor, stated that the claimant's functional capacity evaluation (FCE) had demonstrated that he could work in a medium physical demand level category. In treatment notes of January 17, 2000, Dr. G noted that the claimant's lumbar fusion is solid and that his chronic back pain is "managed with work restrictions, therapeutic exercises and over the counter medications." Dr. G also stated that he was "recommending that [the claimant] continue work restrictions and continue his full work as a farmer," that someone was requesting a repeat FCE, and that he agreed with the FCE request. A January 20, 2000, FCE also demonstrated that the claimant could work at a medium physical demand level. In a February 4, 2000, report, Dr. G stated that he had reviewed the findings of the January 20th FCE and determined that the claimant continued to be "disabled from his previous vocational obligations" as a pipe fitter.

The claimant testified that during the qualifying period, he worked as a general farm laborer for his brother and sister-in-law at their farms. He stated that he works 40 hours per week; that he is paid $300.00 per week; and that he feeds cows and chickens, keeps up the feed and livestock inventories, hauls livestock to and from sales, and does minor

maintenance and repair work. The claimant further testified that he does not perform any personal services for his wife in relation to her chicken and cattle businesses. He stated that at times, he does general maintenance on his farm, including the equipment in the barn, two hay balers and a tractor; however, he maintained that that equipment was not used in the chicken-raising business. On cross-examination, the claimant acknowledged that the money his wife receives from her chicken and cattle businesses are placed in her personal checking account and that their joint living expenses are paid out of the account.

Initially, we will consider the carrier's assertion that the hearing officer erred in determining that the claimant had satisfied the good faith requirement. 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 look for work commensurate with his 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." The carrier contends that the claimant did not return to work in a job that is "relatively equal" to his ability because he chose to work on his relative's farm at $7.50 per hour rather than participating in the business operated on his farm which "generated income many times $300 per week." The carrier argues that the claimant is "self-limiting his work to a low paying job when much more lucrative opportunities are available at home. This is contrary to a good faith attempt to return to work at the highest earning level." We have previously considered and rejected the notion that the focus of the "relatively equal" inquiry is on whether the wages are the same. Rather, "[w]hat is critical is that evidence supports the determination that the employment was relatively equal in terms of the hours worked and the claimant's ability to work." That is, the primary consideration is not whether the wages are comparable but whether the work is consistent with the claimant's work restrictions and any applicable hour limitations. Texas Workers' Compensation Commission Appeal No. 000702, decided May 22, 2000; Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000; Texas Workers' Compensation Commission Appeal No. 000616, decided April 26, 2000. Accordingly, we find no merit in the carrier's assertion that the hearing officer erred as a matter of law in finding that the claimant had satisfied the good faith requirement in this instance. Our review of the record demonstrates that the hearing officer's good faith determination is supported by sufficient evidence, particularly Dr. G's January 17, 2000, progress report, in which he recommended that the claimant continue working as a farmer in accordance with his medium physical demand level capabilities, and is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to disturb the good faith determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier also contends that the hearing officer erred in determining that the claimant was underemployed as a direct result of his impairment. In that regard, the carrier argues that the evidence shows that the claimant is a significant investor or owner of the chicken-raising and cattle businesses operated on his farm, in that the principal asset of those businesses are the land and the improvements on the land, which the claimant owns jointly with his wife. Specifically, the carrier argues:

> The evidence also shows that the claimant realizes considerable income from those businesses as the profits go into a personal account and [are] used for living expenses of the claimant and his wife. All the incomes of the claimant and his wife are commingled with no formal separate accounting for the chicken and cattle businesses.
>
> The assertions that this income is the wife's separate income [is] an artifice and ignore[s] the claimant's investment in the assets of the businesses and the commingling of the profits. The chicken and cattle businesses must be considered a family business in which the claimant is self-employed. Accordingly, the profits of those businesses should be attributed to the claimant as post-injury income.

The carrier's argument is without merit. Rule 130.101(8) defines "wages" for purposes of SIBs as "[a]ll forms of remuneration payable for personal services rendered during the qualifying period as defined in Texas Labor Code § 401.011(43) . . . ." Thus, by definition, the money to be considered in determining whether a claimant is underemployed, that is whether he earned less than 80% of his AWW, as a direct result of his impairment is "remuneration payable for personal services rendered during the qualifying period" and not income that results from the claimant's investments. Accordingly, we cannot agree that the hearing officer erred in not attributing the profits from the chicken and cattle businesses to the claimant in determining whether he was underemployed within the meaning of the 1989 Act because he did not perform personal services for those businesses in the qualifying period. As noted above, the claimant earned $300.00 per week in his job on his relative's farm and his AWW is $1,032.57. As such, the hearing officer properly determined that the claimant was underemployed in the qualifying period as a direct result of his impairment.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge