APPEAL NO. 001500
FILED AUGUST 7, 2000

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 May 18, 2000, in _____, Texas, with _____ presiding as hearing officer. She determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third and fourth quarters. The claimant appealed, expressing his disagreement with these determinations. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____. Sections 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 as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBs depends on whether the employee met the criteria during the qualifying period. The third SIBs quarter was from December 16, 1999, to March 15, 2000, and its qualifying period was from September 2 to December 2, 1999. The fourth SIBs quarter ran from March 16 to June 14, 2000, with a qualifying period of December 3, 1999, to March 2, 2000.

The claimant testified that he had work restrictions of no stooping, crawling, or standing more than two hours and he had a lifting restriction of 30 pounds. Medical evidence placed him in the medium work category. No restrictions were imposed as to the number of hours per day he could work. During each qualifying period he worked as a driver for a data delivery service and made no attempts to find other work. He was classified as an independent contractor and was paid on a commission basis. He further said that he was on-call and was available to work full time. When one delivery was made, he would wait for another call for his services. He did not work every day, or a five-day week, during most of the weeks of the qualifying periods and on some days worked as little as two hours. He was not paid for the time in which he was available to be called to make a delivery.

Rule 130.102(d)(1) provides that an employee has made a good faith effort to obtain employment commensurate with the 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." In Texas Workers' Compensation Commission Appeal No. 001062, decided June 29, 2000, we stated "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." 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.

In the case we now consider, the hearing officer rejected the notion that holding oneself out as being available for work, but not being paid during this time, was the equivalent of actually working. She also noted that there were no restrictions on the claimant as to hours of work per day and that the claimant said he was willing to work full time if the delivery service made the work available to him. From this evidence she concluded that the claimant's part-time employment was not relatively equal to his ability to work. Because he failed to look for work commensurate with this ability, she found he was not entitled to third or fourth quarter SIBs. She also found from this evidence that the claimant did not establish that his underemployment was a direct result of his impairment.

In his appeal of these determinations, the claimant provided additional information about his work that he did not present at the CCH. We will not consider this evidence for the first time on appeal. The claimant also argued that he was really working a 40-hour week because he was available for and willing to do this much work if the employer needed him. Whether the claimant's actual work was commensurate with his ability and whether his underemployment was a direct result of his impairment were questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Section 410.165(a) further provides that the hearing officer is the sole judge of the weight and credibility of the evidence. The claimant conceded he could work full time and argued essentially that waiting for work without being paid was the equivalent of working. The hearing officer rejected this argument. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination that the claimant was not entitled to third or fourth quarter SIBs because he failed to make the required good faith job search and failed to establish that his underemployment was a direct result of his impairment.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge