APPEAL NO. 001579

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 June 13, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the second quarter and that the claimant's average weekly earnings during the qualifying period were $270.77. The appellant (carrier) appeals these determinations, asserting both legal and factual insufficiency. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The parties agreed that the claimant was not entitled to first quarter SIBs.

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____. He reached maximum medical improvement on August 11, 1998, and was assigned a 24% impairment rating (IR). Pursuant to Section 408.142, an employee is entitled to SIBs if, on the expiration of the impairment income benefits (IIBs) period, the employee: has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment; has not elected to commute a portion of the IIBs; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBs is determined based on whether the employee meets the criteria during the qualifying period. The second SIBs quarter was from March 29 to June 27, 2000, and the qualifying period was from December 16, 1999, to March 15, 2000. The claimant did not commute his IIBs and the parties stipulated that his preinjury AWW was $692.01.

The claimant's wife testified that she and the claimant are currently living apart and anticipate divorce proceedings. She said she has been the exclusive owner of the (business) for the past one and one-half years and that the claimant helped her as necessary without pay and that up to the second quarter qualifying period they shared what little profits there were. On January 3, 2000, according to her testimony and written statement, she hired the claimant as an assistant manager for a fixed salary of $800.00 per month plus meals, found by the hearing officer to be worth $120.00 per week, and that he typically worked 38 to 40 hours per week doing whatever was necessary from waiting tables to cooking to running the cash register. She also testified that she was unsure if she made a profit during this qualifying period, but her tax return for 1999 in evidence reflected business income of $1,210.00 on gross receipts of $152,862.00. The couple had a joint checking account, but the claimant's wife insisted that they did not mingle personal and business funds. Banking records for the claimant in evidence reflected deposits

substantially higher than the claimant's stated wages,[1] and, according to the claimant's wife, represented wages, workers' compensation benefits, child support from a former husband, and gifts from family members.

The carrier's primary argument on appeal is that the claimant failed to document a job search during each week of the qualifying period. The undisputed evidence was that the claimant began working for wages at the (business) on January 3, 2000, some two weeks into the qualifying period. He did not document any other job search efforts during these first two weeks. Rule 130.102(e) requires that a claimant with some ability to work document a weekly job search. The claimant, however, relies on Rule 130.102(d)(1) to meet the good faith job search requirement. That provision establishes that a claimant who has returned during the qualifying period to a position relatively equal to his ability to work has made the required good faith job search. In Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000, we observed that Rule 130.102 creates various ways to fulfill the good faith job search requirement and that subsection (d)(1) does not require that the claimant must work in this position during each week of the filing period or otherwise document a job search in those weeks the claimant did not work. *See* Texas Workers' Compensation Commission Appeal No. 001536, decided August 9, 2000, for a similar result with regard to Rule 130.102(d)(2). The carrier does not argue that the claimant's job at the (business) was not relatively equal to his ability to work. Because the claimant was in such a position during some portion of the qualifying period, he was not required to search for work during the first two weeks of the qualifying period.

Alternatively, the carrier asserts on appeal the related arguments that (1) the claimant did not prove he failed to earn at least 80% of his preinjury AWW and that (2) his actual wages were appreciably more than he said they were. Both arguments essentially challenge the credibility of the claimant's testimony, the testimony of his wife, and the documentary evidence he submitted.

We observe first that Rule 130.101(9) defines wages as all forms of remuneration for personal services. Not included in this definition is so-called income that is not given in exchange for personal services. *See* Texas Workers' Compensation Commission Appeal No. 001062, decided June 29, 2000. The amount of those wages presented a question of fact for the hearing officer to decide. Specifically, the carrier contends that the claimant under-reported his wages during this time by more than $1,400.00 per month and that any SIBs owed the claimant should be reduced by his correct wages. *See* Rule 130.102(f). In support of its position, the carrier refers to various deposits into the joint checking account that it contends were, in effect, wages for his work at the (business). It also argues that the assertion that the claimant and his wife were estranged is not credible because the wife testified without subpoena on the claimant's behalf and she continues to employ her husband at substantially less than the federal minimum wage. Finally, it contends that given the gross receipts, it is unlikely that these deposits in the checking

[1]The amounts were calculated by the carrier to be $4,378.00 during the filing period.

account were charity from relatives. Clearly, this evidence, both testimonial and documentary, is subject to varying inferences and conclusions about its credibility and another hearing officer may have found that the claimant's evidence was not persuasive on the amount of his wages. Section 410.165(a), however, provides that the hearing officer is the sole judge of the weight and credibility of the evidence. 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 that the testimony of the claimant and his wife, deemed credible by the hearing officer in this case, provided sufficient evidence to support the determination that the claimant's weekly wages during the filing period were $270.77, as asserted by the claimant, and not $456.07 as contended by the carrier.[2]

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

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge

[2]We also point out that even the suggested actual wages of the claimant during the qualifying period are still less than 80% of the preinjury AWW. In addition, given the documentation submitted by the claimant in addition to his and his wife's testimony, we cannot agree that the claimant's only evidence in this case was testimony.