APPEAL NO. 001635

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 26, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 10th compensable quarter as the claimant had not made a good faith effort to seek employment commensurate with his ability to work.

The claimant appeals a number of the hearing officer's determinations, including a finding in his favor on direct result. Basically, the claimant contends that he had made a good faith effort to obtain employment commensurate with his treating doctor's restrictions, that he is registered and working with the Texas Rehabilitation Commission (TRC) and waiting to go to vocational school, that he was self-employed during the qualifying period, and that he had worked for a florist during the qualifying period. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed, as reformed.

The claimant in the past had proceeded on the theory of a total inability to work in any capacity and in this case may have indicated an inability to work; however, the bulk of the claimant's contentions are that he was working within his doctor's restrictions and that his self-employment was relatively equal to his ability to work.

The claimant testified that he had been a heavy equipment operator and the medical evidence indicates that the claimant fell 15 or 20 feet, landing on his feet and sustained cervical and lumbar injuries. The claimant has not had surgery, but may have a herniated lumbar disc, Grade I spondylolisthesis at L5-S1 and some bulging discs. One report merely diagnoses a cervical and lumbar strain. The claimant's testimony of what he can do, as opposed to the doctor's restrictions, is not entirely clear. The parties stipulated that the claimant sustained compensable injuries to his cervical, thoracic, and lumbar spine; that he has a 15% impairment rating (IR); that impairment income benefits (IIBs) were not commuted; and that the qualifying period for the 10th quarter was from November 26, 1999, to "February 24, 1999 [sic, should be 2000]." The claimant correctly points out this apparent typographical error and we reform that finding of fact to read as was actually stipulated, that the ending date was February 24, 2000. The claimant's treating doctor is Dr. M and the carrier's required medical examination doctor is Dr. N.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a

good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The hearing officer's finding that the claimant's unemployment (or perhaps underemployment) during the qualifying period was a direct result of his impairment (Finding of Fact No. 26) was appealed by the claimant, apparently because it did not contain the word underemployment.

The standard of what constitutes a good faith effort to obtain employment was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) and (e) (Rule 130.102(d) and (e)). The requisite good faith effort to obtain employment commensurate with the ability to work can be asserted by meeting the requirements of Rule 130.102(d)(1), (2), and (4) (the version then in effect) which provide that good faith has been met if the employee:

> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period;
>
> * * * *
>
> (4) 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.

Dr. M, in a report dated January 24, 2000 (cited by both parties) stated:

> This letter is to certify that [the claimant] in [sic] medical care. He has a compressive fracture at T12 and L1. He is in severe pain and he is not able to seat [sic] or stand or longer than 10 to 15 minutes at a time. He is not able to do any lifting, carry or pull things. [The claimant] has been referred to [TRC] for retraining but has not yet been seen.
>
> At his time, he is released to a light duty type of job working no more than three hours per day due to his financial need. His condition remains the same.

At the time of the CCH, the claimant had been evaluated by the TRC but that report was apparently not available as it was not offered by either party but is attached to the claimant's appeal. That report, which recommends that the claimant obtain a GED (the claimant testified through an interpreter) does not differ substantially from the testimony at the CCH and does not have a bearing on the qualifying period at issue; hence we find

no need to remand it for the hearing officer's consideration as new evidence. The claimant was also examined by Dr. N, who, in a report dated February 12, 2000, concluded:

> In my opinion the examinee may return to work. I would not recommend he return to heavy manual labor, due to his compression fracture which may or may not be painful, but some are and would possible aggravate him significantly if he returned to manual labor. However, he is of above-average intelligence, in my opinion. He is currently working several hours per day, but can be re-trained for a full eight hour day and is certainly capable of gainful employment.

The claimant testified and asserts that he started self-employment by operating a flea market stall beginning on December 29, 1999. The claimant also asserts that he worked for a florist one or two days in December 1999 and one or two days in February 2000 as a delivery driver showing total earnings for both periods of $135.55. The claimant also offered a one-page handwritten document showing five days sales at the flea market plus the $135.55 earnings from the florist for a total of $707.94 earnings during the qualifying period. The claimant testified that he spent Thursdays and Fridays obtaining merchandise to sell at the flea market and worked Saturdays and Sundays from 7:00 a.m. to noon at the flea market. The hearing officer made the following disputed findings which were supported by the evidence:

FINDINGS OF FACT

14. During the qualifying period, Claimant purchased used merchandise at garage sales and resold it at flea markets in order to earn money.

15. In order to engage in his self-employment of reselling used merchandise, Claimant had to drive, walk, sit, bend, and carry objects in order to transport items from the purchase sites to the sales sites.

16. To display his merchandise at flea markets, Claimant constructed makeshift tables from 10 foot 1" by 12" boards atop sawhorses.

17. During the qualifying period, Claimant's actual abilities exceeded those expressed by [Dr. M] on January 24, 1000.

18. The preponderance of the credible evidence established that Claimant was able to work during the qualifying period.

19. During the qualifying period, Claimant worked three hours per day at his self-employment resale business.

20. Claimant did not otherwise seek work every week of the qualifying period.

The hearing officer, in the Statement of the Evidence, commented:

> The evidence presented by Claimant failed to credibly support his treating doctor's statements that Claimant could not work at all. Furthermore, Claimant's own testimony and the evidence of self-employment was contrary to the opinion of his doctor. Furthermore, the preponderance of the credible evidence established that Claimant could make efforts to seek employment that exceeded his self-employment efforts during the qualifying period. Ultimately, Claimant's efforts fell short of the good faith effort that is required for SIBs entitlement.

The claimant appealed those findings, contending that his self-employment flea market business was both work relatively equal to his ability to work and complied with Dr. M's restrictions. The hearing officer obviously believed otherwise and as the trier of fact is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is given to the evidence. Section 410.165(a).

The claimant also contends that he had been referred to the TRC, that he had been evaluated and that as soon as he obtained his GED he would begin retraining in a vocational rehabilitation program. That may be; however, clearly the claimant did not meet the requirements of Rule 130.102(d)(2) that he has been enrolled in and satisfactorily participated in a full-time vocational rehabilitation program during the qualifying period.

The claimant also asserts in a fashion that he had worked for the florist and that qualified him for SIBs under Rule 130.102(d)(1) and (5). However, the claimant only worked for the florist two days or so in December 1999 and February 2000, and while it seems undisputed that the claimant's work with the florist was highly satisfactory, unresolved is why the claimant did not work there more regularly. The carrier presents some thoughts on that subject based on hearsay from an adjuster who allegedly had spoken with the florist but there is no evidence in the form of testimony or documentary evidence to establish the carrier's theory.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge