APPEAL NO. 001838

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 July 6, 2000. With regard to the only issue before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 13th compensable quarter and that the claimant had made a good faith effort to obtain employment commensurate with his ability to work.

The appellant (carrier) appealed, contending both that the claimant had not made a good faith effort to find employment and that the claimant's underemployment is not a direct result of his compensable impairment. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The background facts are not much in dispute. The claimant had been a maintenance mechanic who fell backwards over a curb and suffered a broken hip. The claimant had hip surgery. The parties stipulated that the claimant sustained a compensable injury on _________; that the claimant has an impairment rating (IR) of 15% or more (28%); that impairment income benefits (IIBs) were not commuted; and that the qualifying period for the 13th quarter was from December 8, 1999, to March 7, 2000.

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 (AWW) 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.

Neither party, nor the hearing officer, make reference to the applicable rule which is Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), which provides:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work[.]

The claimant testified, and the only medical evidence supports, that the claimant's restrictions are working for four hours a day with no climbing and only one hour continuous standing, walking, bending, stooping, or kneeling. It is "OK to sit and stand, short breaks every 2 hrs." At some point early on, the claimant obtained employment with a school district as a bus driver, working two hours in the morning and two hours or so in the afternoon driving a school bus. The claimant testified that in addition to driving the school bus, he had "a little repair [business] on the side." Whether the claimant had the repair business prior to his injury (concurrent employment) or not is unclear. In any event, apparently through the first nine quarters, the claimant drew SIBs; drove the school bus; and had his side repair business. In the summer of 1999, the claimant apparently obtained a lucrative contract for his repair business doing make-ready repairs on old equipment which was then auctioned off. The claimant did not file for SIBs during the 10th and 11th quarters because the repair business provided him with more than 80% of his preinjury AWW and he quit his bus-driving job. Eventually, after a few months, all of the equipment had been sold and the claimant's repair business went into a decline. In January of 2000, after the Christmas break, the claimant applied for and was hired back as a school bus driver by the school district and during two months of the qualifying period the claimant was driving a school bus and engaging in his part-time repair business during the hours he was not driving the school bus.

The hearing officer found that because of his restrictions, there was "more than sufficient evidence" that the claimant's underemployment was a direct result of his impairment. The carrier complains that the claimant is working more than four hours a day and that this somehow disqualifies him from being entitled to SIBs. The carrier also states that the "Claimant testified that he could easily find some other job that would pay him more than his bus driving job but would not give him the flexibility to work on his self employment business." We believe that to be a mischaracterization of the testimony and that the claimant only testified that the bus-driving job gave him "flexibility to be able to work on [his] self-employment business."

In any event, whether the claimant had returned to a position which was relatively equal to his ability to work and whether the claimant's underemployment was a direct result of his impairment are largely factual determinations within the province of the hearing officer to resolve. After reviewing the record, we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Kathleen C. Decker
Appeals Judge

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Judy L. Stephens
Appeals Judge