

APPEAL NO. 001881

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 July 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 14th quarter. In its appeal, the appellant (carrier) asserts error in the hearing officer's determinations that the claimant satisfied the good faith requirement by returning to work in a position relatively equal to her ability to work; that her underemployment during the qualifying period for the 14th quarter was a direct result of her impairment; and that the claimant is entitled to SIBs for the 14th quarter. In her response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement on January 19, 1996, with an impairment rating of 19%; that she did not commute her impairment income benefits; that the 14th quarter of SIBs ran from May 20 to August 18, 2000; that the qualifying period for the 14th quarter ran from February 6 to May 6, 2000; and that the claimant's average weekly wage is \$341.25. The hearing officer's decision and order contains a detailed factual summary that will not be repeated here. Briefly, during the qualifying period, the claimant was self-employed in an aviary business that she owns with her husband. She stated that during the qualifying period she worked approximately 50 hours per week and that her husband works approximately the same number of hours and that he performs the heavy work she is not able to do and takes care of Spanish-speaking customers. The claimant's treating doctor and the doctor who performed a functional capacity evaluation (FCE) on the claimant have both provided opinions that the claimant's self-employment activities are consistent with her restrictions.

The claimant's Application for [SIBs] (TWCC-52) reflects earnings in the qualifying period for the 14th quarter of \$3,194.73¹, which calculates to \$245.75 per week of the 13-week qualifying period. That figure is derived by dividing the profits from the business by two because one-half of the income from the business is attributable to the claimant's husband's efforts.

Initially, we will consider the carrier's assertion that the hearing officer erred in determining that the claimant had satisfied the good faith requirement under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.102(d)(1)) because she had returned to work in a job relatively equal to her ability to work. The question of whether the claimant returned to work in a job which is relatively equal to her ability to work is a

¹In an attachment to her TWCC-52, the claimant listed her earnings during the qualifying period as \$2,053.96, which translates to \$158.00 per week; however, she did not appeal the hearing officer's determination that her earnings were \$3,194.73 in accordance with the information contained on the TWCC-52.

question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000; Texas Workers' Compensation Commission Appeal No. 000616, decided April 26, 2000. The focus of that inquiry is not on whether the wages are the same. Rather, "[w]hat is critical is that the evidence support the determination that the employment was relatively equal in terms of hours worked and the claimant's ability to work." Appeal No. 000608; Appeal No. 000616. In this instance, both the claimant's treating doctor and the doctor who ordered her FCE have opined that the claimant's work activities in the aviary are consistent with her work restrictions. That evidence provides sufficient evidentiary support for the hearing officer's good faith determination and nothing in our review of that determination demonstrates that it is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the hearing officer's 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 asserts error in the hearing officer's determination that the claimant's reduction of earnings was a direct result of her impairment. The carrier maintains that the claimant's reduced earnings are a result of her voluntary decision to be self-employed in a business that is not "viable" because it does not generate earnings for the claimant in an amount equivalent to minimum wage for the hours the claimant worked. We cannot agree that the hearing officer erred as a matter of law in making her direct result determination. To the contrary, the hearing officer found, and there is evidence in the record to support her determination, that the claimant has a plan for continued expansion and profitability of her aviary business. Specifically, the evidence reflects that the claimant's business has become more profitable over time and the evidence further reflects that the claimant is making efforts to build, promote and manage her business. The carrier further argues that it was error for the claimant to divide the earnings equally between herself and her husband. The Appeals Panel considered and rejected the same argument in Texas Workers' Compensation Commission Appeal No. 991972, decided October 13, 1999 (Unpublished), which affirmed the hearing officer's determination that the claimant was entitled to SIBs for the 9th and 10th quarters. We cannot agree that the hearing officer erred as a matter of law in making her direct result determination in this case. In addition, nothing in our review of the record demonstrates that the direct result determination is so against the great weight of the evidence as to compel its reversal on appeal. Pool; Cain.

Finally, the carrier argues that if the good faith and direct result determinations are affirmed, it should be permitted to impute wages to the claimant based on the minimum wage in order to calculate the SIBs benefit rate. The carrier cites no authority for our doing so and we are unaware of any such authority. Accordingly, we affirm the hearing officer's determination that the claimant's SIBs rate should be calculated based upon the earnings reflected on the claimant's TWCC-52, namely the \$3,194.73 which translates to weekly earnings of \$245.75.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Judge/Manager

Tommy W. Lueders
Appeals Judge