APPEAL NO. 001885

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 28, 2000. The issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBs) for her first quarter of eligibility.

The hearing officer found that the claimant had made a good faith search for employment consistent with the requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(d)(1) (Rule 130.102(d)(1)), in that during the qualifying period the claimant had returned to work in a position relatively equal to her ability to work. He further found that the claimant was underemployed in this position as a direct result of her impairment.

The appellant (carrier) appeals and takes issue with the interpretation of Rule 130.102 that would relieve an injured worker who has returned to work from searching every week for employment. The carrier argues that the claimant did not have an impairment due to her back so that any problems with the back in this case that limit her ability to work cannot be considered to "directly result" in her underemployment. There is no response from the claimant.

DECISION

Affirmed in accordance with our standard of review.

The claimant was employed as a staff nurse for (employer). She said that she tripped and fell forward on a sidewalk on November 23, 1997. The claimant said that she twisted her body as she fell. However, the stipulated injury and the only extent of injury for which she was assigned an impairment rating (IR) was for her cervical area and her shoulder. There was no issue from the benefit review conference (BRC) that the claimant's compensable injury extended to other regions of the body than those for which she was assigned an IR. The qualifying period for SIBs ran from January 12 through April 11, 2000.

The claimant's primary treating doctor was Dr. S. While some of his earlier records were tendered as claimant exhibits, all but two were excluded for the failure to exchange within 15 days after the BRC. The report of the designated doctor for a June 18, 1999, examination set out the history of the claimant's treatment and noted that Dr. S diagnosed the claimant with cervical sprain, right rotator cuff syndrome, and lumbago in January 1998. The claimant had cervical decompression surgery on May 12, 1998. The claimant was also noted to have had an acromioplasty on December 3, 1998. No treatment to the claimant's low back in the history of her injury was noted.

The designated doctor noted that the claimant had normal gait and full movements. The claimant's 17% IR consisted of 15% for her cervical region and two percent for her shoulder.

The claimant testified that she returned to full-time work for her employer in the summer of 1999 but said that it became too much for her when her husband became ill. She then took some vacation time. The claimant apparently continued to work thereafter for some period of time, because she testified as to having worked on Christmas night. She said that she felt so bad that she sought restrictions from Dr. S in January 2000. He took her off work for two weeks in this time period but released her back to work February 11, 2000. The claimant said that although Dr. S referred in his statements to treating the claimant for her low back, he was actually treating her for very tight muscles in the neck and shoulder.

The claimant said that lifting heavy objects and reaching overhead have always been "an issue" and part of her restrictions. Dr. S's restrictions (in three different documents) that were relevant to the qualifying period were:

> Maximum of 2 days a week work; no bending, reaching, or lifting over 20 pounds; No repetitive lifting over five pounds; frequent change in position.

In addition, Dr. S stated in an April 17, 2000, letter that the claimant was suffering from low back pain due to the aggravation of her November 1997 injury by going back to work for too many days. He further stated that she had no ability to work from January 3 through February 11, 2000. The claimant testified that during this period she could also not perform activities of daily living without assistance.

Finally, the claimant was examined for the carrier by Dr. C on December 9, 1999, and Dr. C stated that the claimant could work at the moderate level. However, this was refuted by a functional capacity evaluation done on April 6, 2000, which stated that the claimant could work only light duty within the restricted work plane, and sedentary duty within the unrestricted work plane.

When the claimant was released by Dr. S, which was effective February 11, 2000, she returned to work for her previous employer and worked 16 hours a week within her restrictions. On her Application for [SIBs] (TWCC-52) she disclosed her wages and listed contacts with two other prospective employers.

An applicant for SIBs must make a good faith search for employment commensurate with the ability to work. Section 408.143(a)(3). Rule 130.102(d) defines good faith as follows:

> (d) 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;

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;

(3) has during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;

(4) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; or

(5) 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.

Rule 130.102(e) reads:

(e) Job Search Efforts and Evaluation of Good Faith Effort. **Except as provided in subsection (d)(1), (2), (3), and (4) of this section**, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. [Emphasis added.]

The Appeals Panel has held that the first sentence of Rule 130.102(e) makes clear that the need to search every week for employment applies only when the cited provisions of Section 130.102(d) are not met. Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000. All provisions of Rule 130.102(d) need not be met; it is enough to satisfy only one in order to be found to have made a good faith search for employment. Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000. The carrier's arguments about what could happen in hypothetical situations are of the nature that are typically addressed to governmental bodies in the rule-making process. We are not at liberty to read exceptions into an unambiguous rule where none are provided. Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). Consequently, we agree with the hearing officer's application of the rule in holding that the claimant made a good faith search for employment.

The "direct result" provision of SIBs entitlement is more problematic in this case. For purposes of this CCH, with no issue to broaden the extent of injury, the lumbar injury could not be considered part of the compensable injury and it was plainly not part of the

claimant's IR. However sincere the claimant is in her assertion that her back was also hurt in her fall, it was incumbent upon her to activate this contention well before entitlement to SIBs was being considered. (We would further note that Dr. S's letter implies that there may have been a subsequent injury from which lumbar problems resulted.)

It is clear from reading the discussion of the hearing officer that he was mindful that the lumbar problems were not part of the compensable injury, but that he also believed that the claimant's restrictions under which she returned to work were the result also of the continuing effects of her cervical and shoulder injuries. He found that her employment was within these restrictions and relatively equal to her ability to work. As the hearing officer noted, the impairment need not be the "sole cause" of unemployment or under-employment. Texas Workers' Compensation Commission Appeal No. 952082, decided January 10, 1996.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Kathleen C. Decker
Appeals Judge