APPEAL NO. 001947

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 August 2, 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 seventh compensable quarter.

The appellant (self-insured) appealed, contending that the claimant could not have been working full time as claimed because he would have been earning "illegally low wages," that although working full time, the claimant was still required to comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) and that the claimant "could not prove that his underemployment was a direct result of his injury." The self-insured requested 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.

This is an underemployment case. The claimant had been employed as an auditor by a state agency. The parties stipulated that the claimant sustained a compensable (left leg, ankle, hip, and back) injury on _____; that the claimant has an impairment rating (IR) of 15% or greater; that impairment income benefits (IIBs) have not been commuted; and that the qualifying period for the seventh quarter was from January 29 through April 28, 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 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.

The self-insured challenges the findings on both direct result and good faith effort to obtain employment commensurate with the claimant's ability to work. The applicable rule is Rule 130.102(d)(1) 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's restrictions are set out in a report dated June 6, 2000, from Dr. D, the claimant's treating doctor, who commented that the claimant is able to perform full-time sedentary employment subject to the following job restrictions:

1. No walking, standing, or sitting for periods exceeding 20 to 30 minutes.
2. No stooping or bending.
3. No stairs, inclines, declines or uneven terrain.
4. No carrying objects exceeding 12 to 15 pounds.
5. No driving for periods exceeding 30 minutes.

During the qualifying period at issue the claimant testified, and presented documentation, that he was employed full time as a teacher's assistant by the (school district) at a wage of $607.53 per month. The claimant testified that his hours were from 7:15 a.m. until about 3:30 or 3:45 p.m. (the regular school day) five days a week. The claimant also testified that he had previously (apparently in a prior quarter) been employed part time as a substitute teacher, that he had applied for two full-time teaching positions during the qualifying period and that he had been hired as a special education teacher by the school district during the next qualifying period and would then be earning more than 80% of his preinjury wages to begin after the end of the seventh quarter.

The self-insured, both at the CCH and on appeal, argues that the $607.53 monthly pay amounts to only $3.80 an hour, that either the claimant was not working full time or that he was being paid "under the table" because $3.80 an hour is a "sub-minimum wage rate" and an "illegally low wage" being less than the "federally mandated minimum wage." The self-insured's arguments go more to the low salary for teaching assistants than to the claimant's full-time employment commensurate with his ability. (The claimant testified that the school did not have steps and therefore accommodated his restrictions.)

The hearing officer made findings that the claimant's underemployment was a direct result of his impairment, that the claimant "was working in a position relatively equal to his ability to work" and that the claimant had made a good faith effort to secure employment commensurate with his ability to work. Those findings are all supported by the evidence and are affirmed. Unfortunately, the hearing officer made comments in his discussion that the claimant's job search was "minimal" (if the claimant met the requirements of Rule 130.102(d)(1), the claimant had no duty to make a further job search), that the "claimant did not follow the proper 'procedure' in his efforts to obtain employment (no example is given and that statement is not supported by the evidence) and that the claimant's "explanations were not particularly persuasive."

Both the hearing officer and the self-insured appear to be under the impression that even though a claimant has returned to work in a position relatively equal to his ability to work (Rule 13.102(d)(1)) the "Claimant was obligated to seek further employment whether he was working part time or was working full time for absurdly low wages." We reject that

contention as being incorrect as a matter of law. The carrier cites Rule 130.102(e) in support of its proposition; however, we note that Rule 130.102(e) states:

> (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 work in . . . . [Emphasis added.]

In this case, the claimant has met the requirement of subsection (d)(1), being Rule 130.102(d)(1), and he has returned to work. Therefore, Rule 130.102(e) is inapplicable in this case.

Regarding the direct result requirement, the Appeals Panel has held that a finding that a claimant's underemployment is a direct result of the impairment is "sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury." In this case, the claimant had been an auditor, which required him to travel throughout the state. The claimant's restrictions on use of stairs and no driving for periods exceeding 30 minutes would appear to preclude returning to his preinjury position. In any event, that was a factual determination within the province of the hearing officer to resolve. He did so in the claimant's favor and we are satisfied that finding is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge