APPEAL NO. 002034

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 August 3, 2000. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) preinjury average weekly wage (AWW) is $1,022.34 and that the claimant is entitled to supplemental income benefits (SIBs) for the fourth and fifth quarters. In its appeal, the appellant (carrier) argues that the claimant failed to meet her burden to prove the amount of wages she earned during the qualifying periods and that her underemployment is a result of the compensable injury. Specifically, the carrier contends that the claimant did not produce adequate documentation to establish her earnings and expenses in the qualifying periods for the fourth and fifth quarters of SIBs and that the claimant's underemployment is "a result of the type of work she chose to perform, not because of her injury." The carrier also appealed the hearing officer's fact finding that during the qualifying periods for the fourth and fifth quarters, the claimant was working in a position relatively equal to her ability to work but it made no argument on this point in its brief. In her response to the carrier's appeal, the claimant urges affirmance. Neither party appealed the hearing officer's determination that the claimant's AWW is $1,022.34 and that determination has, therefore, become final pursuant to Section 410.169.

DECISION

Affirmed.

We will only briefly summarize the facts most relevant to the issues before us on appeal. The parties stipulated that the claimant sustained a compensable injury on _____; that she was assigned an impairment rating of 15% or greater; that she did not commute her impairment income benefits; that the fourth quarter of SIBs ran from January 20 to April 19, 2000; and that the fifth quarter of SIBs ran from April 20 to July 18, 2000. The parties did not stipulate the dates of the relevant qualifying periods; however, those periods are identified on the Application for [SIBs] (TWCC-52) forms as October 7, 1999, to January 5, 2000, and January 6 to April 6, 2000, respectively. During the relevant qualifying periods the claimant worked as an independent contractor sales agent for an insurance company, where her husband is a district manager.

On February 16, 2000, Dr. O stated that the claimant "can be employed with the reservation that she cannot do any heavy lifting with her left upper extremity greater than three pounds nor repetitive motion without frequent breaks of ten minutes every hour." In a February 15, 2000, report, Dr. B stated that the claimant "is unable to work a full eight hour a day job" and further opined that there is not any treatment available to the claimant that would permit her to return to driving trucks for (employer), which is the job she held at the time of her compensable injury, because of the "100 pound or more lifting requirements."

The claimant contended that she had earnings in the form of advances against future commissions of $8,150.90 and expenses in the amount of $2,654.93, for a net of $5,495.97. The claimant introduced pay stubs to document the amount of her advance earnings. She submitted a letter from Mr. G, a regional director with the company with whom the claimant contracts to sell life insurance, stating that as an agent, the claimant is required to carry "Errors & Omissions coverage" and that it is available through the company for a monthly $30.00 premium. The claimant also introduced invoices for her pager and telephone expenses and a receipt and a ledger of her mileage. The claimant submitted similar records for the fifth quarter qualifying period which reflect that she had earnings of $5,809.93 and expenses of $2,573.74, for a net of $3,236.19.

The hearing officer determined that the claimant had satisfied the SIBs 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 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. Dr. O limited the claimant to no lifting over three pounds and no repetitive motion without frequent breaks of ten minutes every hour and Dr. B stated that the claimant could not work a full eight-hour day. 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 contends that the hearing officer erred in determining that the claimant earned less than 80% of her AWW during the relevant qualifying periods because she did not sufficiently document her earnings and expenses. The carrier primarily focuses on the hearing officer's statement that "the claimant conceded that there were two items which could have been provided that would be relevant to the question of her actual earnings: the contract between herself and the marketing firm she works for, and the reports of each sale she makes that are sent to 'headquarters.'" We cannot agree with the carrier's assertion that because there were additional documents that could have provided relevant information on the issue of the claimant's earnings during the qualifying periods, it follows that the documentation she submitted was insufficient as a matter of law. The claimant submitted copies of her pay stubs along with invoices and receipts of her expenses. The hearing officer determined that those records constituted sufficient documentation of the claimant's earnings in the qualifying periods for the fourth and fifth quarters. Nothing in our review of the record reveals that that determination is so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool; Cain. Given

our affirmance of the hearing officer's determination that the claimant submitted sufficient documentation to prove her earnings during the qualifying periods for the fourth and fifth quarters, we likewise affirm the hearing officer's determinations that the claimant had net earnings of $5,495.97 in the qualifying period for the fourth quarter and net earnings of $3,236.19 in the qualifying period for the fifth quarter, and that her monthly SIBs rate for both quarters, based on her AWW of $1,022.34, is the maximum monthly rate of $1,460.99.

Finally, we briefly consider the carrier's contention that the claimant's underemployment is a direct result of her choice of the type of work she chose to perform, insurance sales, which resulted in a delay before she will receive her residuals such that her current wages are "barely above minimum wage." Rule 130.102(c) states that the direct result requirement will be satisfied "if the impairment from the compensable injury is a cause of the reduced earnings." Dr. B opined that no treatment was available to permit the claimant to return to her work as a driver because of the lifting requirements of that position. That evidence provides sufficient support for the hearing officer's direct result determination and our review does not demonstrate that the hearing officer's direct result determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. As such, we will not disturb that determination.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Gary L. Kilgore
Appeals Judge