APPEAL NO. 002223

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 29, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplement income benefits (SIBs) for the first quarter, from May 21, 2000, through August 19, 2000. The claimant appealed the adverse determination on the grounds of sufficiency of the evidence. The appeals file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

The decision and order rendered by the hearing officer contains a summary of the evidence and we will only briefly discuss the relevant portions of the evidence. The claimant sustained a compensable injury to his lower back on _____, and underwent two spinal surgeries, the last in August 1999. The claimant explained that he underwent a functional capacity evaluation (FCE) in January 2000 which increased the pain in his back. He testified that after the evaluation his treating doctor, Dr. D, told him to quit doing whatever he was doing and not to go back to or look for work. Nonetheless, the claimant stated he began looking for light-duty work, looked for work during each week of the qualifying period and contacted the Texas Rehabilitation Commission (TRC) for assistance in job placement. The claimant stated that after the initial contact the TRC was unable to help him due to his poor math skills. He asserted that his effort to find work qualified as a good faith search to obtain employment commensurate with his ability to work.

The claimant testified that he made 13 job contacts, one during each week of the qualifying period and that although his doctor had told him to quit looking for work he "went ahead and looked through this to qualify for this SIBs, for supplemental income." He explained that he made one contact per week "because I was required to by [Dr. G] and the Texas Workmens' Comp to be able to–well, how do you say, get the SIBs."

On January 26, 2000, the claimant was examined by Dr. G whose FCE report reflects that the claimant had a range of work capability from sedentary to medium duty. This document, as well as the progress notes of February 24, 2000, and March 20, 2000, from Dr. C which the hearing officer found did not provide a specific explanation as to how the claimant's injury resulted in a total inability to work, was quoted extensively by the hearing officer. The hearing officer concluded that the claimant's documented attempt to find work was made for the sole purpose of establishing what the claimant perceived was a minimum required number of contacts (one per week) to receive SIBs and that the search was not intended to identify, apply for, or obtain a job commensurate with his ability to work because the claimant was convinced that he had no ability to work.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating 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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides in part that, except as provided in subsection (d)(1), (2), (3) and (4) of Rule 130.102, 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. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

Rule 130.102(d), in relevant part, provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee 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 has provided sufficient documentation as described in subsection (e) of Rule 130.102 to show that he or she has made a good faith effort to obtain employment.

Whether the claimant had no ability to work at all in the qualifying period was a question of fact for the hearing officer to resolve and is subject to reversal only if so contrary to 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer concluded that the claimant had some ability to work during the qualifying period and that the progress notes from Dr. C failed to provide a specific explanation of how the claimant's compensable injury was believed to result in a total inability to work. The hearing officer also found that the FCE of January 26, 2000, was a record that showed that the claimant had some ability to work. In addition, the hearing officer found that the claimant's job contacts were not intended to secure employment, but were made solely for the purpose of obtaining SIBs, and that the claimant did not make a good faith effort to seek employment commensurate with his ability to work. After review of the record and the evidence adduced at the CCH, we conclude that the findings of the hearing officer are not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we affirm his determination that the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work.

The hearing officer did not make a finding that the claimant's unemployment or underemployment was a direct result of his impairment from the compensable injury. However, this omission was not appealed by the claimant. Even if we were to infer a finding based on the evidence adduced at the CCH that the claimant's unemployment

during the qualifying period was a direct result of the impairment from his compensable injury, the claimant would still not be entitled to SIBs for the first quarter as he failed to sustain his burden of proving that he made a good faith effort to obtain employment commensurate with his ability to work.

We affirm the decision and order of the hearing officer.

Kathleen C. Decker
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge