APPEAL NO. 002426

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 September 26, 2000. The issue at the CCH was whether the respondent who is the claimant, was entitled to supplemental income benefits (SIBs) for his 14th quarter of eligibility. The hearing officer held that he was underemployed as the direct result of his impairment, and that he fulfilled the good faith job search requirement.

The carrier appeals and argues that the claimant was not in fact limited to part-time work and thus was required to continue his job search rather than rely on his bus driving and welding business to fulfill the good faith requirement. The carrier argues that underemployment did not directly result from impairment but from the fact that claimant's private business demand fluctuated. There is no response from the claimant.

DECISION

Affirmed.

The claimant fell on his hip on _____, which resulted in a total hip replacement. The qualifying period for the quarter under review ran from March 8 through June 6, 2000. During that time, claimant said he drove a school bus for two hours in the morning, two and one-half hours in the afternoon, and also worked at his private welding business. This entailed working about an hour a day on repair work on farm and construction equipment.

The claimant attached to his Statement of Employment Status (TWCC-52) copies of his bus driving pay stubs, and invoices from his private business. The welding business had generated enough income in the 10th and 11th quarters that the claimant had not submitted a TWCC-52. He said that he worked on about 30 pieces of equipment in a large job. At that time, he worked five hours a day and was not driving a bus. He became employed driving a school bus after Christmas break and said that this job was within his restrictions because he did not have to get on and off the bus. The claimant testified that he had no other physical condition or injury which would result in restrictions. He testified as to the efforts he made to build up his welding business. Although most of his customers were existing customers, he said that his promotional efforts did attract a new customer. The claimant said that he had no control over the customers who would seek his services, and less demand would not mean during a particular period that his business was in "decline." He said that Texas Rehabilitation Commission had declined to send him through training, telling him that at his age it would be difficult to find someone to hire him.

The claimant said he had always been a mechanic, working on heavy equipment. He had been working ever since he had been released by his doctor. He said he had contacted his old employer about employment, but stated that the reality, which he indicated would also be known to the carrier, was that applications indicating a prior workers' compensation injury would go into the garbage.

The claimant's treating doctor was Dr. M, who the claimant said had stated that the claimant could only work four hours a day. The carrier countered that Dr. M's restrictions only restricted certain activities to that amount of time. Dr. M's work release form rates various activities as to the continuous amount of time that the claimant may engage in such actions, and the "total" amount of time. There are five functions for which the total time is rated at four hours, with the duration of continuous activity in a category not exceeding one hour. The top of this category in the preprinted form states; "In an 8-hour work day employee may:" Dr. M also wrote on the form that the claimant could sit and stand, with short breaks every two hours.

We note that no objection was made to questions posed to the claimant about the 10th and 11th quarters. When the carrier started asking about the 12th quarter, the hearing officer questioned the relevance; however, he said that he would permit a few more questions to be developed when the carrier argued that this went to good faith. The carrier was not, as it argues on its appeal, prevented from asking questions.

28 TEX. ADMIN. CODE § 130.102(d)(Rule 130.102(d)) defines good faith effort for evaluating this criterion of SIBs entitlement:

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.

Our review of the record indicates sufficient support for the hearing officer's decision that the claimant had met the requirements of Rule 130.102(d)(1). (In fact, the carrier asserts in its appeal that claimant's welding business is "the same type of job" that he was doing prior to his injury). Dr. M's restrictions are somewhat ambiguous when listed on a preprinted form that asks him to rate activities within an eight-hour day, but no one function exceeds four hours duration total time. We believe that Dr. M's work release form may reasonably be interpreted as a restriction to a four-hour day; when the continuous duration for any of these activities is only an hour, and the "total" time only four hours, it appears plain that Dr. M intended to express the four hours as the total combined time such activity could be undertaken in a workday in combination with the other activities.

Likewise, we agree that there is support for the "direct result" finding of the hearing officer. An injured worker is required to search for work commensurate with his ability; when such work is found, he need not be found wanting of good faith because that job is not the highest paying job he can perform. *See* Texas Workers' Compensation Commission Appeal No. 951624, decided November 15, 1995. The claimant's private welding business was, as he stated, cyclical in terms of demand which he could not control. That fact alone does not break the connection between the impairment and his underemployment for the qualifying period under review.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge