APPEAL NO. 002624

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 October 20, 2000. With regard to the issues before her, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the second compensable quarter and that the appellant (carrier) is relieved from liability for the period of February 29, 2000, through March 16, 2000, because of late filing of the claimant's Application for Supplemental Income Benefits (TWCC-52). The hearing officer's decision on the late-filing issue has not been appealed and has become final. Section 410.169.

The carrier appeals the entitlement issue, alleging that the claimant's "underemployment was voluntary" and not the direct result of his impairment. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant urges affirmance.

DECISION

Affirmed.

This is an underemployment SIBs case. Eligibility criteria for SIBs entitlement are set forth in Sections 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The parties stipulated that the claimant sustained a compensable (low back) injury on _____; that the claimant has a 16% impairment rating; that impairment income benefits have not been commuted; and that the qualifying period for the second quarter was from November 17, 1999, through February 15, 2000. The SIBs criteria in dispute are whether the claimant attempted in good faith to obtain employment commensurate with his ability to work and whether his underemployment was a direct result of his impairment. Section 408.142(a)(2) and (4) and Rule 130.102(b)(2) and (d)(1). It is not disputed that during the qualifying period the claimant had an ability to work subject to certain restrictions listed in a functional capacity evaluation.

Rule 130.102(d)(1) provides, in part, that the good faith effort to obtain employment commensurate with the employee's ability to work has been met if the employee "has returned to work in a position which is relatively equal to the injured employee's ability to work." The claimant testified that his preinjury employment had been working as a commercial air-conditioning technician, servicing air-conditioning units in new commercial buildings. It is relatively undisputed that the claimant cannot return to his preinjury employment. The claimant's TWCC-52 listed only three job applications during the qualifying period; however, the claimant successfully obtained employment from two of those applications. On November 15, 1999, the claimant obtained employment, apparently at a mall kiosk, selling jewelry. The claimant earned around $7.50 an hour plus commission over a minimum. It is not clear how long that job lasted; however, the claimant then obtained employment as a "bench technician more or less repairing air conditioning units for hotels and motels." The claimant testified that the units would be brought to him

and would be placed on a workbench where he would work on them. The claimant testified that he worked 25 to 40 hours a week and was paid by the unit that he repaired. The parties stipulated that he earned less than 80% of his preinjury average weekly wage.

The carrier appeals, contending that the claimant was working part-time in a limited capacity at minimal wages. The carrier also attempts to impugn the claimant's job search efforts through a surveillance videotape of the claimant's alleged lack of compliance with a mandated community service program prior to the qualifying period at issue here. Those were factors for the hearing officer to consider. Whether the claimant's efforts were in fact a good faith effort to obtain employment commensurate with the ability to work is largely a factual determination for the hearing officer to resolve. We have previously considered and rejected the notion that the focus of the "relatively equal" inquiry is on whether the wages are the same. Rather, what is critical is evidence that supports the determination that the employment was relatively equal in terms of hours worked and the claimant's ability to work. Texas Workers' Compensation Commission Appeal No. 000702, decided May 22, 2000; Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000.

The hearing officer found that the claimant's underemployment was a direct result of his impairment and that the claimant had in good faith obtained employment commensurate with his ability to work. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). We cannot conclude that the hearing officer's decision that the claimant is entitled to SIBs for the second quarter is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge