APPEAL NO. 010121

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on October 4, 2000, with the record closing on December 22, 2000. The hearing officer resolved the disputed issues by determining that the respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter but is entitled to SIBs for the sixth and seventh quarters, and that the claimant has not permanently lost entitlement to SIBs. The case was remanded for reconstruction of the hearing record because the audiotape was blank. However, the recorded audiotape of the hearing was located on remand and the hearing officer did not hold a hearing on remand but rather adopted his original Decision and Order, adding only a formal finding of a compensable injury. Although the appellant (carrier) specifically challenges certain of the findings of fact and conclusions of law relating to both the sixth and seventh quarters, the carrier focuses it's appeal on the sixth quarter determination, asking that we reverse on that quarter and then find that the claimant has permanently lost entitlement to SIBs. The claimant responds that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

The claimant testified that on _____, while working for (employer 1), her right hand was crushed and burned in a garment presser; that she was right-hand dominant; that the top of her right hand is scarred and she cannot bend or flex that hand; that she cannot lift much weight with that hand; and that her doctor gave her a 10-pound lifting restriction for that hand. The claimant's impairment rating (IR) is 30%. With regard to the sixth and seventh quarters, the parties stipulated that the respective qualifying periods were from January 22 through April 21, 2000, and from April 22 through July 21, 2000. After describing the 40 some job search contacts she made during the fifth quarter qualifying period, as reflected on her Employee's Request to Change Treating Doctors (TWCC-53) for that quarter, the claimant stated that on or about February 1, 2000, she obtained employment with (employer 2), a business which distributed books, records, and CDs, and that she had to quit the job on February 27, 2000, because that employer added a task she could not perform with her right hand. She said that in early March 2000 she obtained a job working in a (employer 3) restaurant wiping tables and getting drinks, but not cooking, and that she continues to have that employment. The claimant further stated that she has no telephone or car and that she takes medication for pain which makes her drowsy. She indicated that she worked fewer hours (10 to 30 per week) and for a lower hourly rate ($5.25) for employer 2 than for employer 1 where she worked 40-hour weeks at $9.00 an hour, and that she is now paid $5.55 per hour by employer 3 and works fewer hours (25 to 30 hours per week) because that employer wants to keep the hours down to reduce labor costs. The claimant's treating doctor, Dr. V, wrote on August 13, 1998, that the claimant's hand was severely burned and required plastic surgery; that she has an excessive buildup of scar tissue which "has rendered [her] hand useless"; and that it has

also caused radiculitis in her right arm which makes it difficult for her to use her arm. Dr. V wrote on September 28, 2000, that it is his opinion that the claimant "is unable to work greater than 30 hours per week."

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 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.102(d)(1)) 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 returned to work in a position which is relatively equal to the injured employee's ability to work. If the injured employee has returned to work in a position which is relatively equal to the employee's ability to work, the employee does not have to show that he or she looked for work every week of the qualifying period. *See* Texas Workers' Compensation Commission Appeal No. 001011, decided June 14, 2000, and cases cited therein.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the challenged findings and conclusions are not so against 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge