APPEAL NO. 010153

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 January 3, 2001. The hearing officer resolved the sole disputed issue by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second quarter. The appellant (carrier) appeals, asserting that the finding that the claimant's underemployment during the qualifying period is a direct result of his impairment from the compensable injury is against the great weight of the evidence because the claimant voluntarily limited himself to a lower paying job. The claimant's response urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, and reached maximum medical improvement on May 10, 1999, with an impairment rating (IR) of 20%; that the qualifying period for the second quarter was from June 22 through September 19, 2000; and that during the qualifying period the claimant earned less than 80% of his preinjury average weekly wage (AWW).

The claimant testified that at the time of his injury he was employed as an electrical construction foreman by (employer 1), a position which only occasionally required heavy lifting; that on _____, he was injured when a piece of pipe fell on his hard hat, injuring his head, neck and shoulder; and that he continued working with certain restrictions until that construction job was completed and he was laid off. The claimant's testimony indicated that it was customary in his occupation to be hired for a project and to be laid off upon completion of the project. He further stated that he underwent cervical spine surgery in February 1999 and lost about one and one-half years of work because of his injury; that sometime in 1999 his treating doctor, Dr. L, released him to return to work with restrictions against repetitive heavy lifting; that he called employer 1's crafts placement job line but employer 1 had no supervisory position open then; that he then called the job lines of other companies and on March 8, 2000, obtained a job as a maintenance electrician with (employer 2) where he has worked full time ever since. He said that his current job does not require heavy lifting. The claimant further stated that his weekly pay from employer 1 was $1,329.00 while his pay from employer 2 runs from $900.00 to $1,000.00 per week. The carrier introduced the affidavit of the adjuster, Mr. W, which stated that he understands that the claimant is asserting that he called employer 1 in early March 2000 to inquire about a supervisory position and that assertion is inconsistent with statement the claimant had made to him to the effect that he did not want to return to work for employer 1 because he does not want to risk reinjury to neck and shoulder. The claimant agreed he had stated he did not want to reinjure his neck but denied having said he did not want to return to work for employer 1. He said that employment by employer 1 as a supervisor may be a future possibility.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits 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 AWW 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. The only statutory element disputed by the carrier is the "direct result" criterion. The carrier contended below and continues to maintain on appeal that the claimant's underemployment with employer 2 is not a direct result of his impairment from the compensable injury but, rather, his voluntary choice to work for lesser wages for employer 2 and that this contention is supported by the evidence that the claimant has not tried to obtain another supervisory position with employer 1.

Whether the claimant's underemployment was a direct result of his impairment is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950490, decided May 15, 1995. The Appeals Panel has frequently stated that a finding of direct result may be affirmed based on evidence of a serious injury with lasting effects and of an inability to reasonably perform the type of work being done at the time of the injury. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995. The carrier relies on the majority decision in Texas Workers' Compensation Commission Appeal No. 971445, decided September 8, 1997, which reversed the hearing officer's determination that the employee's underemployment was a direct result of his impairment. The majority were persuaded in that case that the employee's underemployment resulted from his preference to work at the low paying convenience store job full-time while also trying to earn commissions from selling replacement roofs in connection with insurance settlements. The dissenting opinion stated that the majority's decision was actually another assessment of the "good faith attempt" criterion. In any event, the facts in that case are altogether different and we do not regard it as binding precedent for our decision in the case we now consider.

The hearing officer found that the claimant had a serious injury which resulted in surgery; that he continues to use medication on occasion to help with pain from the compensable injury; and that the limitations and impairment sustained narrows his job fields because, even as a supervisor, lifting is sometimes required; and that the claimant's underemployment during the qualifying period was a direct result of the compensable injury. The hearing officer could conclude that the claimant necessarily had to find other employment after being released to return to work with the restriction and being advised that employer 1 had no supervisory position available, that the claimant could not take a job which exceeded his lifting restrictions, and, therefore, that the claimant's underemployment with employer 2 is indeed a direct result of his impairment from the compensable injury. We are satisfied that the challenged factual determination of the hearing officer is 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 is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge