APPEAL NO. 010782

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 March 22, 2001. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter. The claimant appealed. No response was received from the carrier.

DECISION

The hearing officer's decision is affirmed.

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the fourth quarter. Eligibility criteria for SIBs are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted any impairment income benefits (IIBs), is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(4) 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. 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.

The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant has an IR of 15% or greater; that the claimant did not commute IIBs; and that the qualifying period for the fourth quarter was from September 2 through December 1, 2000.

The claimant testified that he was unable to work during the qualifying period; that his treating doctor, Dr. J, had not released him to return to work during the qualifying period; and that he did not work nor look for work during the qualifying period. The claimant did not document any job searches on his Application for SIBs (TWCC-52) for the fourth quarter and indicated on it that he was not enrolled in a full-time vocational rehabilitation program and that his doctor had documented that he was unable to work. There is conflicting evidence regarding the claimant's ability to work during the qualifying period. Dr. J reported before, during, and after the qualifying period that the claimant is not able to work in any capacity. Dr. K examined the claimant at the carrier's request in August 2000 and reported that the claimant is able to return to work as of September 2, 2000,

without restrictions. The claimant underwent a functional capacity evaluation (FCE) on September 20, 2000, and the physical therapist concluded that the claimant is functioning at a medium physical demand level.

The claimant appeals the hearing officer's findings that during the qualifying period for the fourth quarter the claimant was capable of performing at least medium-level work and that the claimant did not attempt in good faith to obtain employment commensurate with his ability to work. The hearing officer concluded that the claimant is not entitled to SIBs for the fourth quarter. The claimant testified at the CCH that he did not receive Dr. K's report or the FCE report until after the qualifying period had ended and asserts the same thing in his appeal. In adopting the SIBs no-ability-to-work provision (formerly numbered as Rule 130.102(d)(3)), the Texas Workers' Compensation Commission (Commission) considered a comment that inquired whether an injured employee's obligation to look for work should only begin when the injured employee has notice of a release to return to work, and in response to that comment the Commission noted, among other things, that nothing in the proposed rules addresses notice to an injured employee regarding a release to return to work, that the ability to work is something that can exist with or without medical records and is ultimately a decision of the finder of fact in the event of a dispute, and that the provision "is tied to the ability to work and not any 'notice' requirement." 24 Tex. Reg. 406 (1999). The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge