APPEAL NO. 011112
FILED JUNE 26, 2001

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 May 2, 2001. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 16th compensable quarter.

The appellant (carrier) appealed, arguing that the claimant had not made a good faith effort to seek employment commensurate with his ability during the qualifying period and that the claimant's underemployment was not a direct result of his impairment. The claimant responds, urging affirmance.

DECISION

Affirmed.

We note that we have previously affirmed decisions of three other hearing officers who have found the claimant entitled to SIBs for the 13th quarter (Texas Workers' Compensation Commission Appeal No. 001838, decided September 18, 2000); for the 14th quarter (Texas Workers' Compensation Commission Appeal No. 002426, decided December 1, 2000); and for the 15th quarter (Texas Workers' Compensation Commission Appeal No. 010236, decided March 20, 2001). While eligibility for SIBs for each compensable quarter stands on its own, the background facts remain essentially the same. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102).

The cited Appeals Panel decisions set out how the claimant met the requisite jurisdictional elements, and will not be repeated here. The claimant's injury required a total hip replacement. In evidence is an Injured Employee Status Report from Dr. M, the claimant's treating doctor, showing the claimant can work four hours a day with restrictions with breaks every two hours. As in the past quarters, the claimant was employed as a school bus driver working two hours in the morning and two and one-half hours in the afternoon; he also did some light farm equipment repair as a side business. The claimant estimated that he worked 10 or 11 hours a month in his repair business. The parties stipulated that the qualifying period was from September 6, 2000, to December 5, 2000.

The only thing different in this case from the prior cases is that the claimant underwent a functional capacity evaluation (FCE) on December 21, 2000 (two weeks after the qualifying period), which found that the claimant qualifies for the medium-work category, with restrictions on bending, climbing, crouching, and stooping. Dr. L, the carrier's required medical examination doctor, on a Work Status Report (TWCC-73), states that the claimant can work with restrictions, doing some functions eight hours a day and other functions only four hours a day. The carrier argues "that there is a difference in this case versus the other quarters . . . . The difference is [the claimant] can work eight hours

a day. We have evidence of that now." Basically, the carrier argues that since its doctor and the FCE seem to say that the claimant can work eight hours a day, "the Claimant must work commensurate with that ability."

Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with his 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." As we noted in Appeal No. 010236, *supra*, and Appeal No. 001838, *supra*:

> In any event, whether the claimant had returned to a position which was relatively equal to his ability to work and whether the claimant's underemployment was a direct result of his impairment are largely factual determinations within the province of the hearing officer to resolve. After reviewing the record, we conclude that the hearing officer's determinations 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).

We also hold that the hearing officer's determination that the claimant's underemployment was a direct result of the compensable injury is supported by sufficient evidence.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge