APPEAL NO. 011158
FILED JULY 09, 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 4, 2001. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter and that the appellant (carrier) is to calculate the correct monthly benefit using the SIBs worksheet.

The carrier appeals several of the determinations and challenges some of the hearing officer's statements. The claimant responds, urging affirmance.

DECISION

Affirmed.

First, we agree with the carrier that the listed issue in the hearing officer's decision does not accurately reflect the issue from the benefit review conference which was agreed upon by the parties. The agreed-upon issue should have been "Is Claimant entitled to [SIBs] for the first quarter and, if so, what is the monthly benefit rate?" The omission of the phrase "if so, what is the monthly benefit rate" does not constitute reversible error and, in any event, was answered by the hearing officer's decision.

Next, the carrier challenges the hearing officer's finding that "Claimant's preinjury average weekly wage [AWW] was $618.00" and the claimant's testimony that she was paid $2,500.00 a month. The claimant's testimony and the SIBs calculation worksheet attached to her Application for [SIBs] (TWCC-52) support the claimant's testimony and went unchallenged by the carrier. We reject the carrier's contention of error on this point.

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). 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 AWW 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.

The parties stipulated that the claimant sustained a compensable (right knee and left ankle) injury on _____ (according to medical records, in a motor vehicle accident); that the claimant has a 16% IR; that IIBs have not been commuted; and that the qualifying period for the first quarter was from September 28, 2000, through December 27, 2000.

At issue in this case is whether the claimant met the good faith and direct result requirements of SIBs by returning to work in a position that is relatively equal to the claimant's ability to work. 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." The carrier contends that the hearing officer erred in determining that the job the claimant worked during the qualifying period was "relatively equal" because the claimant's pay was only 20% of her preinjury wage and she returned to work in her husband's dental office where she was working when injured.

The claimant testified that before her injury she had been employed as the office manager for her husband's dental practice earning $30,000.00 a year, or $2,500.00 a month, and that she had worked about 50 hours a week. As a claimant exhibit is a list of some 24 or 25 duties the claimant said she performed before her injury. The claimant testified that after her injury she returned to work in her husband's dental practice and that in conjunction with two other employees that worked in the office and her husband they discussed what duties she could perform and what the fair wage would be. The claimant said that she is currently working on the average of 32 hours a week (the number of hours the office is open) and is paid $507.52 a month. The claimant testified that she can perform only a few of her preinjury duties.

The claimant's treating doctor is Dr. H, who, in a report dated December 7, 2000, stated:

> [Claimant] continues to be restricted particularly in terms of her ability to walk, stoop, climb steps or ladders. She would be able to perform primarily office type work, sedentary activities, with occasional episodes of some in-office walking and activity, but the above noted activities on any regular basis would be significantly limiting and symptom producing for her.

On a form dated February 13, 2000, Dr. H stated that he was familiar with the type of work the claimant was performing, that that work was within his restrictions, that the claimant is unable to work more hours "or do any more strenuous work," and that she is "working at the limits of her capabilities at this time." Dr. H noted that the claimant's work schedule should be 20 to 30 hours weekly. Dr. F, the carrier's doctor, in a report transcribed October 30, 1999, recommended additional surgery and stated that the claimant was "disabled from an occupation that keeps her standing and walking around a lot" but that she could work "where she could sit down a good part of the time."

The carrier contends that the claimant's activities were self-limiting but offers no evidence to rebut Dr. H's reports that the claimant is working 20 to 30 hours a week within the limits of her capabilities. The carrier's opinion is insufficient to rebut Dr. H's reports.

Next, the carrier points out that the claimant has taken an 80% cut in her preinjury wages while in the carrier's opinion the claimant's restrictions "did not result in an 80%

reduction in the claimant's activities" and that the claimant's postinjury pay "is well below the minimum wage." We have previously noted that the focus of the "relatively equal" inquiry in Rule 130.102(d)(1) is not on whether the wages are the same, but rather on what evidence supports the determination that the employment was relatively equal in terms of hours worked and whether the claimant is working within his or her restrictions. Texas Workers' Compensation Commission Appeal No. 000702, decided May 22, 2000; Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000. In this case, the hearing officer's decision is supported by Dr. H's reports and the absence of any countervailing evidence. We have further noted that the question of whether the job a claimant works during the qualifying period is a job which is relatively equal to the injured employee's ability to work is a question of fact for the hearing officer. However, as a cautionary note, we point out that when one purports to work for a family member at substantially less than the minimum wage, that frequently leads to a challenge that there has not been a good faith effort to obtain employment in a position which is relatively equal to the injured employee's ability to work.

In this case, the hearing officer weighed the credibility of the evidence and the hearing officer's determination on the issues 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).

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

CONCURRING OPINION:

I concur. I write separately simply to state that the credibility of the evidence is a matter exclusively for the hearing officer absent evidence of fraud to which we could not turn a blind eye and would have to react. The fact that the claimant has gone back to work for her husband at such a drastically reduced wage, well below the minimum hourly wage, quite naturally raises questions concerning whether the postinjury wage arrangement was contrived to qualify for supplemental income benefits. However, given the unrefuted

evidence of the claimant's physical restrictions, and the absence of evidence of fraud, the decision can be affirmed.

Philip F. O'Neill
Appeals Judge