APPEAL NO. 011493
FILED AUGUST 20, 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 June 8, 2001. With regard to the only issue before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the seventh quarter.

The appellant (carrier) appeals on the basis that the claimant did not seek employment each week of the qualifying period, and that the claimant's part-time job was not "relatively equal" to his ability to work. The carrier also appeals "the hearing officer's actions in establishing the claimant's average weekly wage [AWW]." The file does not contain a response from the claimant.

DECISION

Affirmed.

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 (left foot and heel) injury on _____; that the claimant has a 16% IR; that IIBs have not been commuted; and that the qualifying period for the seventh quarter was from November 22, 2000, through February 20, 2001. It is relatively undisputed that the claimant made at least one documented job contact every week until (and including) January 12, 2001.

The claimant testified that he had previously contacted (RS Shop) about a job, and that on January 12, 2001, he again contacted Mr. S, the owner of RS Shop, about a job as a counterperson, and that Mr. S offered him a part-time job at the minimum wage, with a promise of increased hours to full time when the claimant learned to use the computer for inventory and other business functions. The claimant testified that he accepted the job offer on January 12, but when he actually began work is not clear. The claimant said that he thought he began "working shortly thereafter" suggesting a January 18 date. Mr. S initially said that he thought the claimant started as early as January 7 or 9, and then revised his estimate. The claimant's first paycheck from the RS Shop was dated January 30, 2001; therefore, Mr. S said that the claimant would have started work no later than January 23. The claimant testified that in addition to working 20 hours a week, he also put in about 10 hours a week working and

learning the computer on his own time. The claimant testified that he eventually was hired on at full time.

The carrier argues that the claimant did not look for work each week of the qualifying period, pointing to the 11 days between January 12 and January 23, 2001, and citing Rule 130.102(e). Even if that is true, the claimant still met the weekly job search requirement, in that the day of the week that begins each week of the qualifying period is the day of the week that is the first day of the qualifying period. Texas Workers' Compensation Commission Appeal No. 002163-S, decided November 1, 2000. In this case, the claimant looked for work on January 12, 2001, and the last day of that week (the 8th week) was January 17, 2001, with the last day of the 9th week being January 24, 2001, the day after the carrier alleges the claimant started work.

The carrier also argues that the claimant was not working at a job that was relatively equal to his 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 focuses on the "relatively equal" aspect and cites Appeals Panel decisions that say the relatively equal means relatively equal in terms of hours worked and whether the claimant was working within his restrictions. In this case, both the claimant and Mr. S testified that, while the claimant was initially hired as part time, he would be given full-time hours when he learned to use the computer. The hearing officer made the following appealed findings:

> 10. The employment offered to the claimant on January 12, 2001, was to begin on a part-time basis and was to progress to full time employment after the claimant learned to operate his new employer's inventory and sales computer program.
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> 11. After accepting the employment offer, the claimant would work and be paid for 20 hours per week and, after the end of the work day, the claimant would spend several hours per day, four or five days per week, learning to operate his new employer's computer inventory and sales program.
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> 12. The time spent by the claimant in learning to operate his new employer's computer inventory and sales program was time spent seeking full time employment.

The hearing officer, in essence, found that the claimant had returned to work, that the claimant's efforts were in good faith, and that the claimant was attempting to obtain full-time employment by accepting a part-time job with the expectation and promise of a full-time job relatively equal to the claimant's ability when the claimant learned to operate the employer's

computer program. To meet the computer experience requirement, the claimant worked extra hours each day without pay. We hold that the hearing officer did not err in finding that the claimant had satisfied the statutory requirement of making a good faith effort to obtain employment commensurate with the claimant's ability to work.

The carrier also argues that the claimant had failed to establish his preinjury AWW. We note that the claimant testified what his AWW was. The carrier contends that, apparently in a prior case, the claimant had failed to establish his preinjury AWW. That may, or may not be so; however, that case is not before us. The carrier asserts that the hearing officer had become "an advocate for the claimant" by requesting a wage statement and making it a hearing officer exhibit. We disagree, and note that the hearing officer was very even-handed and that he had a duty to fully develop the facts required for the decision. Finally, we note that while the carrier objected to the admission of the wage statement, it did so because "AWW is not an issue," and the attorney further stated that he had no objection if the wage statement was used for the direct-result element.

The hearing officer weighed the credibility of the evidence, and the hearing officer's determination on the issue before him 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:

Robert E. Lang
Appeals Panel
Manager/Judge

Michael B. McShane
Appeals Judge