APPEAL NO. 020303
FILED MARCH 25, 2002

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 December 14, 2001. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 16th quarter because the claimant did not make a good faith effort to obtain employment commensurate with her ability to work; because her underemployment was not a direct result of her compensable injury; and because "the position [claimant] held was not relatively equal to the Claimant's ability to work."

The claimant appeals, giving a history of her injury and challenging the opinion of Dr. S on the basis of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110(e) (Rule 130.110(e)). The claimant also challenges the sufficiency of the evidence that her job search efforts were not in good faith. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Section 408.142(a) and Rule 130.102 set out the statutory and regulatory requirements for SIBs. At issue in this case is whether the claimant had the ability to work a full-time, 40-hour week or only a part-time, 20-hour week and whether the claimant's underemployment the last two weeks of the qualifying period constituted a return to work in a position which was relatively equal to her ability to work. Rule 130.102(d)(1). The claimant has had two cervical surgeries and bilateral carpal tunnel releases and a cubital tunnel release. The parties stipulated that the applicable qualifying period was from March 3, 2001, through June 1, 2001. We agree with the claimant that this is not a total inability to work case.

The claimant asserts that she has raised the matter of Rule 130.110(e) in all of her benefit review conferences and CCHs but that her contentions about this rule have never been addressed. We note that in Texas Workers' Compensation Commission Appeal No. 010713, decided May 10, 2001 (regarding the 13th and 14th quarters of SIBs), the Appeals Panel noted that Rule 130.110(e) had been raised for the first time on appeal and therefore declined to consider it. In Texas Workers' Compensation Commission Appeal No. 011827, decided September 11, 2001 (for the 15th quarter of SIBs), the Appeals Panel affirmed the Hearing Officer's decision on a separate ground that the claimant had not complied with Rule 130.102(e).

Rule 130.110 is entitled "**Return to Work Disputes During [SIBs]; Designated Doctor**." Rule 130.110(a) states:

> (a) This section only applies to disputes regarding whether an injured employee whose medical condition prevented the injured employee from returning to work in the prior year has improved sufficiently to allow the injured employee to return to work on or after the second anniversary of the injured employee's initial entitlement to SIBs. Upon request by the injured employee or insurance carrier, or upon its own motion, the [Texas Workers' Compensation Commission (Commission)] shall appoint a designated doctor to resolve the dispute. The report of the designated doctor shall have presumptive weight unless the great weight of the other medical evidence is to the contrary. The presumptive weight afforded the designated doctor's report shall begin the date the report is received by the Commission . . . .

We read this as saying that after the second anniversary of entitlement to SIBs, where the return to work is at issue, the parties or the Commission may request a designated doctor whose opinion has presumptive weight unless the great weight of the other medical evidence is to the contrary. Rule 130.110(e) states:

> (e) If a designated doctor has been appointed to resolve a prior dispute regarding maximum medical improvement [MMI] and/or impairment rating [IR], that doctor may not be appointed to resolve the dispute(s) regarding whether the injured employee's medical condition has improved sufficiently to allow the injured employee to return to work.

The uncontroverted testimony was that Dr. S was the designated doctor who resolved the MMI/IR dispute, however his status in this SIBs case is unclear (much of the time he is referred to as an RME doctor). A designated doctor may either be agreed upon by the parties (not the case here) or selected by the Commission. The hearing officer comments that Dr. S "was a proper Commission [RME] doctor" but there is scant or no evidence of that fact. In any event, we read Rule 130.110(e) in conjunction with Rule 130.110(a) in saying that the designated doctor for MMI/IR may not also be the designated doctor, whose opinion has presumptive weight, to resolve the dispute regarding whether the injured employee's medical condition has improved sufficiently to allow the injured employee to return to work. As previously noted, this is not a total inability to work case, and the claimant agrees that she has an ability to work but asserts she is only limited to 20 hours a week, part-time work, which appears to be supported by reports from her treating doctor. Under circumstances not entirely clear, Dr. S was asked for his opinion and in a report with an accompanying Work Status Report (TWCC-73) dated November 15, 2000, Dr. S said the claimant could return to work with certain restrictions. The report and TWCC-73 are unclear whether the release to return to work (based on a functional capacity evaluation (FCE)) is for full-time or part-time work. A Commission benefit review officer, sometime in 2001, wrote Dr. S asking for clarification on this point and Dr. S replied by letter dated August 23, 2001, stating that he meant the claimant was "able to work eight hours per day" using proper posture and body mechanics. Neither the carrier nor the hearing officer

comment that Dr. S's reports should be given presumptive weight. The claimant seeks to exclude Dr. S's report altogether based on Rule 130.110(e). The carrier and the hearing officer contend that the claimant "waived disputing that [Dr. S] was a Commission [RME]" because the claimant "did not raise her dispute until after the examination." This contention is akin to the "laid behind the log" equitable estoppel doctrine and we need not apply it here. We hold that there was insufficient evidence to establish that Dr. S was a designated doctor within the meaning of Rule 130.110 and, in any event, since this is not a total inability to work case and Dr. S's opinion was not given presumptive weight, but rather was weighed along with the treating doctor's report, and other reports, we hold that Rule 130.110(e) is not applicable in this case for the reasons stated. Dr. S's reports may, however, be considered as evidence regarding the claimant's ability to work and restrictions.

The claimant made some 59 job contacts during the first 11 weeks of the qualifying period. All the contacts were made by facsimile (fax) transmission and most of the contacts did not have a telephone number or company name (the claimant had obtained the fax number through the newspaper wants ads). The claimant would fax her resumes once a week (on Sunday). On May 1, 2001, the claimant's husband, a securities and investment branch office manager, received a suggestion from his supervisor that he hire an administrative assistant (there was no indication in the letter whether this was a full-time or part-time position or what the pay was to be). The claimant's husband offered the claimant a part-time, 20 hour a week position, as the office administrative assistant at $6.00 an hour. The claimant began work on May 28, 2001.

The hearing officer found that the claimant had limited her job search and that the direct result of the claimant's "underemployment was not because of her impairment but because of the limitations Claimant placed on her job search." The hearing officer further found that "the position [claimant] held [in the securities and investment office] was not relatively equal to Claimant's ability to work." *See* Rule 130.102(d)(1). The evidence on those factors was subject to differing interpretation, however, it is the hearing officer who is the sole judge of the weight and credibility of the evidence. (Section 410.165(a)). Our review of the record indicates that the hearing officer's decision 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.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

WILLIAM PARNELL
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.

Thomas A. Knapp
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Susan M. Kelley
Appeals Judge