

APPEAL NO. 020370
FILED APRIL 4, 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 was held on January 25, 2002. The hearing officer resolved the disputed issues before him by determining that the respondent/cross-appellant's (claimant) underemployment during the qualifying periods for the 11th and 12th quarters of supplemental income benefits (SIBs) was a direct result of his impairment from the compensable injury; that the claimant's unemployment during the qualifying periods for the 13th and 14th quarters of SIBs was a direct result of his impairment from the compensable injury; and that the claimant is not entitled to SIBs for the 11th, 12th, 13th, and 14th quarters due to his failure to make a good faith effort to seek employment commensurate with his ability to work in the relevant qualifying periods. The appellant/cross-respondent (carrier) appealed the hearing officer's direct result determinations. The claimant responded, urging affirmance of those determinations. The claimant appealed the hearing officer's determination that he is not entitled to SIBs for the 11th, 12th, 13th, and 14th quarters due to his failure to satisfy the good faith requirement. The claimant further asserts error by the hearing officer in admitting the transcript from the hearing regarding entitlement to 10th quarter SIBs. The carrier responded, urging affirmance of the determinations challenged by the claimant.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant testified that he sustained a compensable back injury when he slipped off of a truck. He further testified that he has been fused from L3-S1 with instrumentation as a result of two separate surgeries. The record reflects that the claimant reached maximum medical improvement on November 18, 1996, with a 26% impairment rating. The claimant testified that his treating doctor released him to light-duty work with restrictions in early spring of 1997. The claimant testified that his restrictions included bending, stooping, lifting, reaching, and the ability to sit and stand as needed. The doctor did not specifically impose hour restrictions. The claimant testified that during the qualifying period for all of the 11th quarter, and most of the qualifying period for the 12th quarter, he was employed as a concierge at a large hotel. He testified that he worked just less than 39 hours per week. The claimant acknowledged that he was not employed during the qualifying periods for the 13th and 14th quarters.

Initially, we will consider the carrier's challenge to the hearing officer's determinations that the claimant's underemployment in the qualifying periods for the 11th and 12th quarters and unemployment in the qualifying periods for the 13th and 14th quarters are a direct result of his impairment from the compensable injury. We have frequently noted that a direct result determination is sufficiently supported if the record establishes that the claimant sustained a serious injury with lasting effects such that he or she cannot reasonably perform the job he or she was doing at the time of the compensable injury.

Texas Workers' Compensation Commission Appeal No. 001847, decided September 15, 2000. While the claimant was released to light-duty work with restrictions, nowhere in the record does it indicate that he could return to his job as a truck driver. Consequently, we affirm the hearing officer's direct result determinations.

Next, we consider the issue of whether the claimant made a good faith effort to seek employment commensurate with his ability to work during the qualifying periods in question. Sections 408.142 and 408.143 provide, in part, that an employee continues to be entitled to SIBs after the first compensable quarter if the employee (1) has not returned to work or has earned less than 80 percent of his average weekly wage as a direct result of his impairment, and (2) has in good faith sought employment commensurate with his ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1) (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 preamble to Rule 130.102(d)(1) states, "This standard eliminates arguments regarding the rate of pay for the job because it ties the finding to whether or not the employment is appropriate considering the injured employee's ability to work. A person who has actually been successful in returning to work within his or her ability will not be required to continue additional job search efforts."

The hearing officer erred in determining that the claimant is not entitled to SIBs for the 11th and 12th quarters based upon the determination that the claimant failed to satisfy the good faith requirement by returning to a job relatively equal to his ability to work. The preamble to Rule 130.102(d)(1) eliminates arguments as to the rate of pay of the injured employee's job. Thus, to the extent that the hearing officer's determination that the claimant's job during the qualifying periods for the 11th and 12th quarters was not a job that was relatively equal to his ability to work based upon some belief that the claimant could have been paid a higher wage, he erred in so finding. Indeed, as we have previously noted, 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 whether the employment was relatively equal in terms of hours worked and whether the job is within the claimant's restrictions. Texas Workers' Compensation Commission Appeal No. 000702, decided May 22, 2000; Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000.

The claimant testified that there were no express limits as to the number of hours he could work. Records from the claimant's employer indicate that the claimant was hired as a "full-time" employee. In its answers to written interrogatories, the employer stated that an employee is considered a full-time employee if he or she is scheduled to work 30 hours per week or more; that there was no set schedule for days off; and that when the claimant worked less than 40 hours per week it was due to "business levels." Upon review of the check stubs submitted into evidence by the claimant, it is apparent that he averaged more than 30 hours per week during the qualifying period for the 11th quarter, and the 10 weeks he worked prior to his termination in the qualifying period for the 12th quarter. The pay stubs also demonstrate that there were some weeks in the relevant qualifying periods

where the claimant worked more than 40 hours per week. Under these circumstances, we believe that any determination that the claimant was not employed full time during the qualifying periods for the 11th and 12th quarters is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Our determination in that regard is based upon the facts that the employer considered the claimant to be a full-time employee; that the claimant's schedule was dependent upon "business levels"; that the claimant had no control over the number of hours he was scheduled to work in any given week; that he averaged more than 30 hours per week; and that in some weeks he worked more than 40 hours.

The claimant's termination after the 10th week of the qualifying period for the 12th quarter is of no consequence. In Texas Workers' Compensation Commission Appeal No. 001579, decided August 17, 2000, we specifically rejected the argument that a claimant must work in a relatively equal position during each week of the qualifying period in order to satisfy the good faith requirement of Rule 130.102(d)(1). *See also* Texas Workers' Compensation Commission Appeal No. 011959, decided September 19, 2001. Given our reversal of the hearing officer's good faith determinations with respect to the 11th and 12th quarters, we likewise reverse the determination that the claimant is not entitled to SIBs for the 11th and 12th quarters and render a new decision that the claimant is entitled to those benefits.

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the 13th and 14th quarters because he failed to make a good faith effort to seek employment commensurate with his ability to work during the qualifying periods for those quarters. Nothing in our review of the record indicates that the hearing officer's determinations that the claimant failed to make a good faith job search commensurate with his ability to work during the qualifying periods for the 13th and 14th quarters are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse the good faith determinations, or the determinations that the claimant is not entitled to SIBs for the 13th and 14th quarters, on appeal. Cain, supra; Pool, supra.

Finally, we consider the claimant's assertion that the hearing officer erred in admitting Carrier's Exhibit F, the transcript for the hearing concerning the 10th quarter of SIBs. We have previously recognized that evidence from outside of the qualifying period is admissible and can be considered by the hearing officer. If anything, the fact that the evidence is remote in time from the qualifying period affects the weight and not the admissibility of the evidence. Thus, we find no merit in the assertion that the hearing officer committed reversible error in admitting the challenged exhibit.

The hearing officer's determinations that the claimant's underemployment during the qualifying periods for the 11th and 12th quarters and unemployment during the qualifying periods for the 13th and 14th quarters is a direct result of his impairment from the compensable injury, and that the claimant is not entitled to SIBs for the 13th and 14th

quarters are affirmed. The hearing officer's determinations that the claimant did not satisfy the good faith requirement pursuant to Rule 130.102(d)(1) in the qualifying periods for the 11th and 12th quarters and that he is not entitled to SIBs for the 11th and 12th quarters are reversed and a new decision rendered that the claimant is entitled to SIBs for the 11th and 12th quarters. Accrued and unpaid benefits should be paid in a lump sum with interest.

The true corporate name of the insurance carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**PRENTICE-HALL CORPORATION SYSTEM, INCORPORATED
800 BRAZOS
AUSTIN, TEXAS 78701.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Edward Vilano
Appeals Judge