APPEAL NO. 032857
FILED DECEMBER 22, 2003

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 October 2, 2003. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the fifth quarter.

The claimant appeals on the basis that he had shown a good faith effort to obtain employment commensurate with his ability to work by obtaining employment as a substitute school bus driver; had in fact worked a portion of the qualifying period; had been hospitalized for a portion of the qualifying period; and had in fact looked for work during the qualifying period. The respondent (carrier) responds to the claimant's contentions and urges affirmance.

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). The hearing officer's determination that the claimant's underemployment was a direct result of the impairment from the compensable injury has not been appealed. At issue is the good faith effort to obtain employment requirement of Section 408.142(a)(4) and Rule 130.102(b)(2). Rule 130.102(d)(1) provides that a good faith effort has been made if the employee "has returned to work in a position which is relatively equal to the injured employee's ability to work."

The claimant's preinjury employment was as a "class A trailer builder," and required lifting and moving heavy objects. It is undisputed that the claimant was unable to return to his preinjury employment. The claimant testified, and is supported by medical evidence, that he was restricted to working two hours a day, with a 15-pound lifting restriction (as well as other restrictions on kneeling, bending, climbing, and reaching). The only Work Status Report (TWCC-73) in evidence (which includes the referenced restrictions) is undated with a follow-up evaluation dated September 9, 2003. The TWCC-73 purports to take the claimant off work from "11-2000" through "9. 2004." A "To Whom It May Concern" note dated September 9, 2003, from the treating doctor only states that the claimant is "unable to perform his pre-injury job," and is "limited to at most a sedentary job which requires no lifting greater than 15 pounds." That report imposes no limitation on the number of hours a day the claimant can do sedentary work. The hearing officer could find that a TWCC-73 that takes the claimant off work for almost four years, with a conflicting report that the claimant can do sedentary work, not to be very credible.

At some time prior to the January 31 through May 1, 2003, qualifying period, the claimant obtained employment as a substitute school bus driver on an on-call basis. The records appear to indicate that he worked 15 hours prior to the qualifying period and 19 hours for some period ending on February 14, 2003. What the claimant's job duties as a substitute school bus driver were and how many hours a day he worked was not developed. The claimant testified that he believes he is still employed as a school bus driver but that he has not been called since February 2003. The claimant was hospitalized on February 19 through March 14, 2003. The cause of the hospitalization is in dispute. The claimant contends it was due to renal failure caused by prescription medication; the carrier asserts it was due to a drug overdose. Before, during, and after his hospitalization, the claimant made telephone calls to some 13 businesses and personally contacted two businesses for any/or sedentary jobs.

The hearing officer characterized the claimant's efforts to obtain employment as "minimal" and concluded that "the bus-driving position cannot [better language would be does not] qualify as a position 'relatively equal' to his abilities." The hearing officer also commented that the claimant's job search efforts were "minimal." By so commenting the hearing officer was implicitly finding that the claimant did not meet the requirements of Rule 130.102(d)(1) or Rule 130.102(d)(5) and (e).

Whether the claimant's efforts amounted to the required good faith effort to obtain employment commensurate with his ability is largely a factual determination for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts the evidence had established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer was acting within his province as the fact finder in resolving the conflicts and inconsistencies in the evidence against the claimant. Nothing in our review of the record reveals that the challenged determinations are 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). Accordingly, no sound basis exists for us to disturb those determinations on appeal.

The hearing officer's decision and order are affirmed.

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

CLAY M. WHITE
SAMMONS & PARKER
218 NORTH COLLEGE
TYLER, TEXAS 75702.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Edward Vilano
Appeals Judge