

APPEAL NO. 040853
FILED MAY 24, 2004

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 March 26, 2004. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter. The claimant appeals, contending that she met the good faith criterion for SIBs entitlement for the third quarter and that she is entitled to SIBs for that quarter. The respondent (carrier) asserts that sufficient evidence supports the hearing officer's decision.

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 only SIBs criterion in dispute is whether the claimant made a good faith effort to obtain employment commensurate with the claimant's ability to work during the qualifying period for the third quarter. The claimant asserts that she made a good faith job search and that she returned to work in a position relatively equal to her ability to work during the qualifying period for the third quarter. It is undisputed that the claimant had some ability to work during the qualifying period for the third quarter. The parties stipulated that the qualifying period for the third quarter was from June 26 through September 24, 2003.

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 relatively equal to the injured employee's ability to work. Rule 130.102(d)(5) 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 provided sufficient documentation as described in subsection (e) of Rule 130.102 to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. Rule 130.102(e) lists information to be considered in determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(5).

In the instant case, the claimant's treating doctor released the claimant to return to work beginning in April 2002 with restrictions of not lifting or carrying over 60 pounds for more than 8 hours per day, and a restriction of "30 frequent/60 occasionally," which

the treating doctor later clarified meant functional limits of “30 pounds frequent/60 pounds occasional lifting as of 4-29-02.” In January 2004, the treating doctor noted that the claimant was also restricted from repetitive activities required of a cement truck driver (the job she did when injured) and that she is able to do a retail clerk job. The evidence reflects that on September 15, 2003, which was 10 days prior to the end of the relevant qualifying period, the claimant obtained a part-time job as a sales clerk. A pay record in evidence reflects that the claimant worked 11 hours from September 15 through September 20, 2003. There is some evidence that sometime after the end of the qualifying period for the third quarter, the claimant’s sales clerk job may have become a full-time position. In Texas Workers’ Compensation Commission Appeal No. 001500, decided August 7, 2000, we noted that in evaluating whether a position is relatively equal to an employee’s ability to work, the primary consideration is not whether the wages are comparable, but whether the work is consistent with the claimant’s work restrictions and any applicable hour limitations. The hearing officer noted that the claimant’s work restrictions did not limit her to part-time work during the qualifying period and determined that the part-time position the claimant worked during the qualifying period was not relatively equal to the claimant’s ability to work.

With regard to the claimant’s search for employment, the hearing officer noted that the claimant did not document a job search from July 17 through July 23, 2003, which was the fourth week of the qualifying period. The claimant contends that the hearing officer should have used calendar weeks in reviewing the job-search efforts, and if he had done so, the evidence would reflect that she made a job search in each week of the qualifying period. In Texas Workers’ Compensation Commission Appeal No. 002163-s, decided November 1, 2000, we determined that the first week of the 13-week qualifying period begins on the first day of the qualifying period. Thus, the first day of each of the 13 weeks of the qualifying period is the day of the week of the first day of the qualifying period. Texas Workers’ Compensation Commission Appeal No. 030279, decided March 14, 2003. See also Texas Workers’ Compensation Commission Appeal No. 031308, decided July 14, 2003, which affirmed a determination that a claimant was not entitled to SIBs where the claimant did not document a job search within every consecutive seven-day period from the beginning of the qualifying period. It appears that in the instant case the hearing officer properly identified the fourth week of the qualifying period and the evidence reflects that the claimant did not document any job search effort during that week.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer found that the claimant did not attempt in good faith to obtain employment commensurate with her ability to work during the qualifying period for the third quarter and concluded that the claimant is not entitled to SIBs for the third quarter. We conclude that the hearing officer’s decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

**CT CORPORATION
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Edward Vilano
Appeals Judge