APPEAL NO. 050667
FILED MAY 6, 2005

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 March 11, 2005. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the fifth quarter.

The appellant (carrier) appealed, contending that the claimant had failed to make a good faith effort to look for work and had failed to prove that his underemployment was a direct result of his compensable injury. The file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

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 carrier appeals both the direct result criteria of Section 408.142(a) and Rule 130.102(c) and the good faith requirement of Section 408.142(a)(4) and Rule 130.102(b)(2). It is undisputed that the claimant sustained a compensable neck injury on _____. The parties stipulated that the claimant had an impairment rating (IR) of 15% or more; that the impairment income benefits were not commuted; and that the qualifying period for the fifth quarter was from October 14, 2004, to January 12, 2005. The medical reports indicate that the claimant had a cervical discectomy and fusion on August 5, 2002. In a letter dated September 17, 2002, the employer offered the claimant a light-duty position and the claimant's testimony was that he "briefly" returned to work for the employer but then "quit that job" because the employer did not accommodate his restrictions. It is undisputed that the claimant cannot return to his preinjury job. The designated doctor, in a May 5, 2003, report assigned the claimant a lifting restriction of 25 pounds. The claimant's treating doctor in a report of a visit on December 6, 2004 (during the qualifying period) stated that the claimant "has been able to return to work" and established the claimant's "current restrictions include 25 pound maximum lifting and no over head work." Neither of the doctors indicate the number of hours a day or week which the claimant would be limited in working.

At some time the claimant began working for employer T, an auto repair shop, giving customers a ride to work and bringing the car back. The payroll records show that during the qualifying period the minimum the claimant worked was four hours a week in two weeks and the maximum the claimant worked was 31.5 hours in one week. The average hours a week that the claimant worked during the qualifying period was 12.35 hours a week. The claimant testified that he was unable to work more because "when your arms go numb and your hands you can't really hold a tool or broom." The claimant testified that he can drive and that he goes to work at "about 8:30 in the

morning unless there's a customer that needs to drop a car off . . . at 7:30 in the morning, and I'll go in early so that I can give them a ride to work. . . ." Although there was some testimony that at sometime the claimant had tried to start his own small business the hearing officer made no findings on self employment and the hearing officer found that the "Claimant did not seek additional employment."

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 Appeals Panel has previously noted that 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.

Although the employment with employer T may have met the claimant's physical lifting restrictions, there were no restrictions placed on the claimant with regard to the number of hours a day or a week that the claimant could work. We hold that working as few as four hours a week, when there were no restrictions on the number of hours a day or a week the claimant could work, does not constitute a return to work in a position relatively equal to the ability to work. The claimant's work was self limited in that he would work when he felt like he could. *See* Texas Workers' Compensation Commission Appeal No. 031146, decided June 26, 2003, and Texas Workers' Compensation Commission Appeal No. 023244, decided February 12, 2003.

We reverse the hearing officer's determination that the claimant worked at employment that was commensurate with his limitations and restrictions arising from his compensable neck injury (there being no restrictions on the number of hours a week the claimant could work) as being against the great weight and preponderance of the evidence. We render a new decision that the claimant is not entitled to SIBs for the fifth quarter as not having met the requirements of Section 408.142(a) and Rule 130.102.

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

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge