

APPEAL NO. 980025

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 16, 1997. With regard to the issues at the CCH, she (hearing officer) determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 15th quarter. The appellant (carrier) appeals and seeks a reversal of the decision. It argues that the claimant did not attempt in good faith to obtain employment commensurate with his ability to work during the filing period for the 15th quarter of SIBS (filing period) and that the hearing officer erred in excluding some of the carrier's evidence. The claimant responds and seeks an affirmance of the decision.

DECISION

We reform the decision and order and reverse and remand.

The parties stipulated that the claimant sustained a compensable back injury on _____, that his impairment rating is 15% or more and that the filing period was from June 17 to September 16, 1997. The disputed SIBS criteria are whether the employee, the claimant, during the filing period, had "not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment" and "attempted in good faith to obtain employment commensurate with the employee's ability to work." Sections 408.142(a)(2) and 408.142(a)(4); see *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(a) (Rule 130.104(a)). The hearing officer determined that the claimant satisfied the direct result and good faith criteria. She found that he searched for employment at 21 potential employers during the filing period.

The claimant's treating doctor, (Dr. M), outlined his physical capabilities on September 6, 1996. Dr. M indicated that the claimant could not lift in excess of 30 pounds and needed to limit his bending, squatting and twisting activities.

The claimant attached forms evidencing his job search efforts to his Statement of Employment Status (TWCC-52). He explained that some of the forms were completed by his daughter, based on information she received from telephone conversations with the employers, and some of the forms were completed by the employers themselves. He testified at the CCH that he found job leads in the newspaper and by going door-to-door. He said he looked for any type of work which he thought he could do. He testified, and the forms stated, that he sought employment with a delivery service, an oilfield supply company, an automobile auctioneer, a construction company, a bricklayer, a trucking company, a roofer, a marine parts supplier, a grocer, a meat market, and other employers. The carrier introduced into evidence September 16, and September 19, 1997, letters from its employment specialist, (Ms. M). They listed potential job contacts for the claimant to

follow up on. The carrier argued that since the claimant did not follow up on the job leads, he was not in good faith.

The carrier moved to admit into the CCH record two other exhibits from Ms. M, one consisting of November 14, November 18, November 20, and December 1, 1997, forms and another consisting of a December 8, 1997, report. The claimant objected to their admission, claiming they had not been exchanged with him within 15 days of the benefit review conference (BRC). The carrier responded that it received the forms on December 3, 1997, exchanged them on December 8, 1997, received the report on December 11, 1997, and exchanged it on December 12, 1997. The claimant's attorney denied receipt of the forms and the report. The hearing officer found that the carrier had not shown good cause for its failure to exchange the reports within 15 days of the BRC and sustained the objection. She stated that the documents indicated that the carrier's adjuster received the forms on December 3, 1997, and the report on December 8, 1997, and that the carrier did not show good cause for not exchanging them until December 8 and December 12, 1997, respectively. The carrier argues on appeal that the hearing officer abused her discretion in finding it did not show good cause for failing to timely exchange the documents and that their exclusion was reasonably calculated to cause and probably did cause the rendition of an improper decision. It maintains Ms. M's report revealed that the claimant was offered a job during the filing period and refused the job offer.¹

The parties must exchange documentary evidence not later than 15 days after the BRC and thereafter as it becomes available. Rule 142.13(c). A party wishing to present evidence at the CCH which had not been exchanged per Rule 142.13(c) must show good cause for its failure to exchange per the rule. Our standard of review for determining the efficacy of the hearing officer's good cause finding is also one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. We conclude that the hearing officer did not abuse her discretion in finding that the carrier did not show good cause for its inability to exchange the documents per Rule 142.13(c). If the hearing officer erred, it is not reversible error unless the party raising the point of error shows that the exclusion of the document was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 941533, decided December 30, 1994. Since we conclude the hearing officer did not abuse her discretion, we do not review whether exclusion of evidence that the claimant refused an offer of employment caused an improper decision.

¹The carrier attaches to its appeal United States Postal Service Domestic Return Receipts showing the claimant's attorney's receipt of the forms on December 9, 1997, and his receipt of the report on December 15, 1997. Generally we do not consider on appeal evidence not contained in the CCH record. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993.

The carrier called Ms. M to testify at the CCH and she did testify. However, she is not listed as a witness on the decision and order. Therefore, we reform the decision and order to reflect that Ms. M did in fact testify.

The claimant objected to Ms. M's testimony regarding the information contained in the above-referenced forms and report. The basis of his objection was that he did not timely receive the forms and the report and, therefore, was not prepared for Ms. M to testify as to the matters contained therein. The hearing officer sustained the claimant's objection and prohibited Ms. M from testifying as to any portion of her investigation memorialized in the forms and the report. She specifically stated that the substance of Ms. M's prohibited testimony was relevant and material to the issues at the CCH. A hearing officer may rule on the admissibility of evidence parties seek to introduce into the CCH record. Rule 142.2(8). She may permit the examination of witnesses. Rule 142.2(12). However, she may not abuse her discretion in ruling on the admissibility of a witness' testimony.

We conclude that the hearing officer abused her discretion in limiting Ms. M's testimony to her recollection of events not included in her November 14, November 18, November 20, and December 1, 1997, forms and her December 8, 1997, report. While it would have been appropriate to prohibit Ms. M from using the forms to refresh her recollection of the investigation memorialized in the excluded documents, it was error to prohibit her from testifying as to her personal knowledge of the events memorialized therein. The hearing officer's error in impermissibly excluding Ms. M's testimony is not reversible error unless it was reasonably calculated to cause and probably did cause the rendition of an improper decision. Appeal No. 941533, *supra*. The carrier argues that an improper decision was entered because important testimony as to the reasons for the claimant's unemployment and the quality of his job search was excluded. Specifically, it cites Ms. M's willingness to testify that the claimant turned down a job offer. We have held that an employee's refusal to accept an offer of employment made to him during a SIBS filing period is an important consideration in determining whether his unemployment was a direct result of his impairment or whether it resulted from his own self-limitation and whether he attempted in good faith to obtain employment commensurate with his ability to work. Texas Workers' Compensation Commission Appeal No. 970276, decided March 31, 1997; see Texas Workers' Compensation Commission Appeal No. 970163, decided March 7, 1997.

Since the exclusion of information Ms. M may have testified to could result in a determination that the claimant's underemployment was not a direct result of his impairment and that he did not attempt in good faith to obtain employment commensurate with his ability to work, we conclude that the hearing officer committed reversible error. Accordingly, we reverse the decision and remand the case to the hearing officer to allow the carrier to call Ms. M to testify and allow examination and cross-examination of Ms. M regarding her personal knowledge. We reiterate that Ms. M's November 14, November 18, November 20, and December 1, 1997, forms and her December 8, 1997, report were

properly excluded. However, she may testify as to her investigation, the results of her investigation and her professional opinion based on those results.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge