

## APPEAL NO. 990040

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (City 1), Texas, on September 9, November 4, and December 9, 1998. The filing period for the fifth quarter for supplemental income benefits (SIBS) began on February 27, 1998, and ended on May 28, 1998. The hearing officer found that during that filing period the appellant (claimant) did not make a good faith effort to seek employment commensurate with her ability to work and that her unemployment was a direct result of the impairment from her compensable injury and concluded that the claimant is not entitled to SIBS for the fifth quarter, and that if the claimant was entitled to SIBS for the fifth quarter, the respondent (carrier) would be relieved of liability from May 29, 1998, through June 14, 1998, because of the claimant's failure timely to file the application for SIBS for that quarter. The claimant appealed, stated her disagreement with findings of fact and conclusions of law, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBS for the fifth quarter. The carrier responded, stated that the claimant's request for review does not appear to be timely, urged that the evidence is sufficient to support the appealed determinations of the hearing officer, and requested that her decision be affirmed.

### DECISION

We reverse and remand.

We first address the timeliness of the claimant's appeal. The records of the Texas Workers' Compensation Commission (Commission) reflect that the decision of the hearing officer was distributed on December 15, 1998. The claimant does not state when she received the decision. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) provides that the Commission shall deem the received date to be five days after the date mailed. The fifth day after December 15, 1998, was Sunday, December 20, 1998. The claimant is deemed to have received the hearing officer's decision on Monday, December 21, 1998. Section 410.202 provides that a party that desires to appeal the decision of the hearing officer shall file a written request for review with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the Commission's Division of Hearings. The last day for the claimant to file an appeal was January 5, 1999. The claimant's appeal is not dated; does not have a date indicating when it was served on the carrier; has a stamp indicating that it was received by the office of the ombudsman on January 6, 1999; and was received by the Commission's Chief Clerk of Proceedings on January 8, 1999, in an envelope addressed to the appeals clerk with the return address of the Commission field office where the hearing was held and; with marks indicating that State of Texas postage was applied by the Commission on January 7, 1999. The last day for the claimant to have filed an appeal was January 5, 1999. The claimant resides in another state. For the appeal to have been received by the ombudsman on January 6, 1999, it had to have been mailed no later than January 5, 1999. The Appeals Panel has held that an appeal filed with a Commission field office within the

15-day period for filing an appeal is timely. Texas Workers' Compensation Commission Appeal No. 94321, decided May 3, 1994. The appeal was promptly sent to the Appeals Panel; the mishandling provisions of Texas Workers' Compensation Commission Appeal No. 951375, decided August 16, 1995, do not apply; and the appeal was timely filed.

In a Report of Medical Evaluation (TWCC-69) dated June 24, 1996, the designated doctor stated that the claimant had cervical fusion in August 1995 and assigned a 22% impairment rating, consisting of 11% for specific disorder of the cervical spine, five percent for loss of cervical range of motion, and eight percent for left upper extremity. The designated doctor's report indicates that she returned to work at regular duty in March 1996. Employer's records indicated that she returned to work in March 1995 and that she worked as a security officer until September 16, 1996. At a hearing held on October 13, 1997, another hearing officer determined that the claimant's left shoulder impingement, left elbow ulnar nerve entrapment, left wrist carpal tunnel syndrome (CTS), and left arm brachial plexus problems are a result of her compensable injury sustained on December 7, 1994. The carrier contracted with (Services) Mr. C, a vocational rehabilitation consultant, was assigned to her case and began working on it in March 1998. In a report dated March 17, 1998, Mr. C stated that on February 3, 1998, Dr. J indicated that the claimant could work light duty but that the claimant did not believe that she was capable of returning to work until she had an operation on her left arm. In a report dated February 18, 1998, Dr. P states that the claimant will undergo radiation therapy for carcinoma on her vocal cord and that if that is not successful surgery would be an option. The claimant's cancer is not related to the compensable injury. In a report dated April 1, 1998, Dr. J said that he had approved therapy two or three times a week for four to six weeks and that he was requesting approval for surgical intervention for left ulnar nerve neurolysis and left endoscopic carpal tunnel decompression. A form dated April 21, 1998, indicates that Services approved 12 occupational therapy sessions for CTS from April 27 through May 22, 1998. A form dated May 8, 1998, states that Services approved left ulnar nerve transposition. Other forms from Services dated June 4, 1998, say that surgery was rescheduled for June 30, 1998; that seven days of postoperative visits were approved from July 1 through 7, 1998; and that therapy through August 17, 1998 was approved.

The claimant testified. Some of her testimony concerns job contacts outside the filing period for the fifth quarter. It is difficult to determine the number of contacts that the claimant made during the filing period, but the number did not appear to be large. The claimant reported \$372.00 income from self-employment sales during the filing period. She said that she thought that she saw Dr. J three times during the filing period and that Dr. J told her that therapy was necessary to prepare her for surgery. The claimant stated that she worked with Mr. C in an effort to find a job, that he provided her with job contacts from a newspaper in (City 2), Arizona, and that she reported contacts to him and advised him weekly of her condition. She said that she went back to an employer to check on an application and that she was told that she had a job but that since she had surgery scheduled she should wait to start until after she was released by her doctor. In several reports, Mr. C stated that it would be difficult for the claimant to find a job that met her restrictions in City 2, where she lived.

The claimant said that she called Ms. W, an adjuster, and the Commission in an attempt to obtain a Statement of Employment Status (TWCC-52) so that she could file it. She said that she sent a letter dated June 3, 1998. The letter was received by the carrier on June 15, 1998, and was accepted by the carrier as an application for SIBS. In an affidavit, Ms. W said that it is the carrier's practice to send a TWCC-52 for the upcoming quarter at the same time it denies SIBS for a prior quarter. She said that for example, a TWCC-52 for the fifth quarter was sent to the claimant when the fourth quarter was denied. Ms. W said that the claimant has told her that she is on medication, that sometimes she cannot remember what documents she received, and that she has lost or misplaced documents. Commission entries concerning contacts with the claimant are in the record. A review of them did not reveal a request for a TWCC-52.

We first address the determination that the carrier is relieved of liability for SIBS beginning on May 29, 1998, and ending on June 14, 1998, because the claimant did not file an application for SIBS until June 15, 1998. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. The hearing officer found that the claimant filed the application for SIBS on June 15, 1998, and there is not a finding that she had good cause for not filing the application before that date. The determination that the carrier is relieved of liability for SIBS beginning May 29, 1998, and ending June 14, 1998, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The hearing officer made a finding of fact that the claimant only sought employment in City 2 and that she did not seek employment in (City 3). In her Decision and Order, the hearing officer stated that the claimant traveled to City 3 for medical treatment and did not seek employment there or in other communities. In her appeal, the claimant said that there is no evidence on the distance from City 2 to City 3 and that there is a difference from travel to seek employment and travel to seek reasonable and necessary medical treatment. The Decision and Order of the hearing officer states that no official notice was taken. Mr. C did report that he reviewed the "want ads" in the Sunday paper of City 2; that on April 14, 1998, only two of 44 advertised positions looked promising; and that it would be difficult for the claimant to find employment that met her restrictions in City 2. However, difficulty in finding a job does not excuse one from seeking employment commensurate with the ability to work. There is no evidence on the size or location of City 2. Because of the hearing officer's consideration of matters not in the record and the evidence in the record, including the limited job opportunities in City 2 and that during the filing period surgery was

contemplated and planned; we reverse the findings of fact that during the filing period for the fifth quarter the claimant did not make a good faith effort to seek employment (“commensurate with her ability to work” should have been included in the finding of fact) and that her unemployment (since she had income from self-employment, should have been underemployment) was not a direct result of the impairment from her compensable injury and the conclusion of law that the claimant is not entitled to SIBS for the fifth quarter.

We remand for the hearing officer to make findings of fact and a conclusion of law on entitlement to SIBS for the fifth quarter based on the record and not inconsistent with this decision.

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.

---

Tommy W. Lueders  
Appeals Judge

CONCUR:

---

Stark O. Sanders, Jr.  
Chief Appeals Judge

---

Joe Sebesta  
Appeals Judge