

## APPEAL NO. 990141

Following a contested case hearing (CCH) held on December 29, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the eighth and ninth compensable quarters. Claimant's appeal comments on all findings of fact and the two dispositive conclusions of law. In essence, she challenges the sufficiency of the evidence to support the hearing officer's adverse findings and conclusions. Claimant also asserts error in the exclusion of one of her exhibits, error in the admission of the respondent's (self-insured) exhibits, and errors in the summary of the evidence. The self-insured first contends that claimant's appeal is untimely and, in the alternative, that the evidence is sufficient to support the substantive findings and that claimant's other assertions of error are without merit.

### DECISION

Affirmed.

Concerning the timeliness of claimant's appeal, Texas Workers' Compensation Commission (Commission) records reflect that the hearing officer's decision was distributed to the parties on January 5, 1999. Although claimant would be deemed to have received the decision and order five days later pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), because the fifth day fell on January 10, 1999, a Sunday, claimant is deemed to have received the decision on Monday, January 11, 1999. See Rule 102.3(a)(3). Since claimant had 15 days to file her request for review after receiving it (Section 410.202(a)), and since she is deemed to have received it on Monday, January 11, 1999, her deadline to file her appeal was 15 days later, namely, January 26, 1999. Claimant's appeal was received by the Commission by electronic document transfer on January 22, 1999, and thus was timely filed.

Claimant subsequently sent two addenda to her appeal to the Commission by electronic document transfer on January 25, 1999, attaching various documents, many of which were not offered into evidence at the hearing below. Since these addenda were received prior to the expiration of claimant's deadline to appeal, they were timely filed and are considered a part of her appeal. However, the documents she forwarded which were not offered at the hearing below or which were excluded do not warrant a remand for their consideration by the hearing officer and will not be considered for the first time on appeal. See Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. Those documents are the December 7, 1998, letter of Dr. J which was excluded for failure to timely exchange, an August 14, 1997, work status record of Dr. M, two reports of Dr. S, two reports of Dr. B, a Report of Medical Evaluation (TWCC-69) of Dr. P, and a handwritten note of December 8, 1998, advising claimant to stop sending "faxes" to the benefit review officer. Following her receipt of the carrier's response to her appeal, claimant filed a response to the carrier's response. Since there is no provision for filing such a response

and since it was not received in time to be considered part of claimant's appeal, it will not be considered.

Though not stipulated, the parties agreed after some discussion that the dates for the eighth and ninth compensable quarters were, respectively, August 29 through November 27, 1998, and November 28, 1998, through February 26, 1999, as stated in the benefit review conference report. Thus, claimant's assertions of error concerning these dates are without merit. The filing periods were the periods of at least 90 days preceding the starting dates of these quarters. Rule 130.101.

According to the February 28, 1997, report of Dr. W, who evaluated claimant on April 19, 1996, as the designated doctor, claimant reached maximum medical improvement on December 28, 1995, and Dr. W assigned an impairment rating (IR) of 13% consisting of six percent (whole person) for the left shoulder, five percent for the diagnosis-based lumbar spine impairment, and two percent for loss of lumbar spinal range of motion. On February 28, 1997, upon being advised that fibromyalgia was being accepted as part of the injury, Dr. W added an additional four percent for diagnosis-based cervical spine impairment which combined to a total whole person IR of 16%.

A May 9, 1997, report of a functional capacity evaluation (FCE) stated that claimant's physical demand level is in the light category.

In a follow-up report of June 22, 1998, Dr. D stated the impression as cervical disc disease which was stable, fibromyalgia with mild to moderate pain, insomnia which seemed well treated, and history of thoracic outlet syndrome which seemed stable. He recommended that claimant continue with her medications and return in six months. At the hearing, claimant sought the admission of a December 7, 1998, "to whom it may concern" report from Dr. D which stated, among other things, that claimant's fibromyalgia was "severe" and which recommended that she continue her employment but not to exceed 30 hours per week. The hearing officer sustained the self-insured's objection to the admission of this document on the ground that the document had not been timely exchanged in that it was first provided to the self-insured on the day of the hearing. Noting that claimant had the document since December 7th and had not attempted any earlier exchange, the hearing officer sustained the carrier's objection. We find no abuse of discretion in this ruling. See Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992, and authorities cited therein.

According to the August 27, 1998, FCE report, claimant "is able to work at the sedentary physical demand level "for an 8 hour day" and her testing was felt to be valid notwithstanding that she exhibited symptom exaggeration and inappropriate illness behavior. The report further stated that claimant's current job as a bus driver rates at the sedentary physical demand level and that claimant reported that her bus has an automatic transmission, automatic door opener, and automatic brake release. Claimant testified that her condition is worse, that she has chronic pain, and that she takes medications for pain, muscle relaxation, depression, and sleep disturbance.

Claimant also testified that during the 8th quarter filing period, her attempt to find employment consisted of calling, on or about June 6, 1998 (her Statement of Employment Status (TWCC-52) reflected the date of the contact as "5-98"), two home health care agencies to reactivate job applications ("sitter" with patients) which were already on file. She said the first agency was not hiring and the second had gone out of business. Claimant said she also received a call from a person at "an institute" about the possibility of her going to work in the health care field and that, after advising that person of her physical restrictions, she was not called back. She could recall no further details about that contact.

With regard to the ninth quarter filing period (August 29 through November 27, 1998), claimant testified that she returned to her job as a school bus driver for a school district on August 13, 1998, working approximately 25 to 30 hours per week. She indicated that she had held this job since August 11, 1997, that she did not drive the bus during the summer months, and that she did not seek any other employment during the ninth quarter filing period. She indicated on cross-examination that she was paid monthly, and she acknowledged that, during two approximately one-month pay periods in the ninth quarter filing period, she worked 95 hours and 90 hours, respectively, which converted to not more than 25 hours per week. Claimant introduced an October 9, 1998, letter from Loraine Modgling (Ms. M), the school district's payroll coordinator, which stated that claimant "is a full time worker in the transportation." Incidentally, claimant also noted that Rule 128.3(a), which provides for the calculation of average weekly wage (AWW) for full-time employees and for temporary income benefits (TIBS) for all employees, states in part that "[a] full-time employee is one who regularly works at least 30 hours per week and that schedule is comparable to other employees of that company and/or other employees in the same business or vicinity who are considered full-time." The self-insured contended that this rule is merely guidance for the calculation of AWW and TIBS and did not establish that claimant was working full-time. In Texas Workers' Compensation Commission Appeal No. 972017, decided November 24, 1997, where this rule was raised in a SIBS case, the Appeals Panel held that the question of whether the claimant worked full-time was a question of fact for the hearing officer.

Dr. M, whom claimant identified as her treating doctor, wrote on October 2, 1998, that claimant was currently working 25 hours per week, and sometimes 30 hours, driving a school bus; that she has a "good level of employment that [sic] which she is able to perform," and that because she works for the school system she is seasonal and is felt to be a full-time employee by the school district.

The hearing officer found that the medical records established that claimant had the ability to work full-time, with restrictions, during the two filing periods at issue; that she applied for one position during the eighth quarter filing period but that employer had no openings; that she worked for approximately one week as a school bus driver during the eighth quarter filing period; that she worked part-time during the ninth quarter filing period; that she did not make a good faith effort to seek employment during either of the filing periods; and that neither her unemployment during the majority of the eighth quarter filing period nor her underemployment during the ninth quarter filing period were the direct result

of the impairment from her compensable injury. Based on these findings, the hearing officer concluded that claimant was not entitled to SIBS for the eighth and ninth compensable quarters.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's AWW as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence and determine what facts have been proven (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer could consider that other than working for the last week of the eighth quarter filing period, claimant merely called to reactivate a previously filed application at one home health care agency and that a second agency where she also had an application on file had gone out of business. As for the ninth quarter filing period, the hearing officer could consider the evidence indicating that claimant drove a school bus for 25 or fewer hours per week, the content of the two FCE reports, particularly the later one, and Dr. D's June 1998 follow-up report simply stating that claimant should continue on her medications and return in six months, and conclude that claimant had the capacity to work 40 hours a week but made no effort to obtain additional employment. Based on this evidence, the hearing officer could determine that claimant did not make a good faith attempt to obtain employment during the two filing periods in issue and that her unemployment and underemployment in those quarters were not a direct result of her impairment from the compensable injury. We do not view the appealed findings as being against the great weight of the evidence. In Texas Workers' Compensation Commission Appeal No. 960480, decided April 24, 1996, the Appeals Panel reversed and rendered a new decision that the employee was not entitled to SIBS because he did not make a good

faith effort to obtain employment commensurate with his ability to work. The evidence indicated that during the filing period, the employee drove a school bus on the average of 13.57 hours per week and the conflicting medical evidence of his ability to work ranged from three to six hours per day to eight hours per day. The Appeals Panel decision stated that "[w]ith claimant's hours clearly not approaching the level specified by the most restrictive medical evidence of record, the claimant was obligated to attempt in good faith to find employment commensurate with his ability to work" and that "with claimant's present job clearly not rising to the level that was medically specified, the question of good faith should have been considered in terms of the attempt thereafter to find other employment." In Texas Workers' Compensation Commission Appeal No. 961649, decided October 4, 1996, where the evidence indicated that the employee worked fewer hours than he was medically capable of, the majority decision, which reversed and remanded for further development of the evidence, stated as follows: "We do not believe that the 1989 Act contemplates that part-time work, limited essentially by the initiative of the claimant and not his or her physical condition as a result of the compensable injury, can in itself excuse the job search effort." *Accord* Texas Workers' Compensation Commission Appeal No. 981684, decided September 8, 1998, and Texas Workers' Compensation Commission Appeal No. 982665, decided December 23, 1998. See *also* Texas Workers' Compensation Commission Appeal No. 980730, decided May 22, 1998.

The claimant's apparent challenge to the admissibility of the self-insured's exhibits is raised for the first time on appeal and thus we do not consider it. As for the hearing officer's summary of the evidence, the Appeals Panel has observed that, while the 1989 Act does not require a hearing officer to summarize the evidence, a hearing officer who chooses to do so need not recite all the evidence but should provide "a reasonably fair summary of the material." Texas Workers' Compensation Commission Appeal No. 93955, decided December 8, 1993. We do not find reversible error in the hearing officer's summary of the evidence, in the appealed evidentiary rulings, or in other matters raised in claimant's appeal.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Alan C. Ernst  
Appeals Judge