APPEAL NO. 990217

Following a contested case hearing held on January 8, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by finding that the appellant (claimant) did not attempt in good faith to obtain employment commensurate with his ability to work and concluded that he is not entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. Claimant has appealed, contending that the evidence established his good faith attempt to obtain employment and that the hearing officer erred in admitting the respondent's (carrier) exhibits because they were not timely exchanged with claimant. The carrier has responded, asking that we disregard evidence attached to the appeal and urging both the sufficiency of the evidence to support the hearing officer's determination of the substantive issue and the absence of reversible error in the appealed evidentiary rulings.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury to his right shoulder; that he reached maximum medical improvement on March 1, 1996, with an impairment rating (IR) of 15%; that he did not elect to commute any portion of his impairment income benefits (IIBS); and that the filing period for the eighth compensable quarter began on July 11 and ended on October 9, 1998 (all dates are in 1998 unless otherwise stated).

According to the March 1, 1996, report of Dr. E, the designated doctor, claimant, who was 49 years of age at the time of Dr. E's evaluation, injured his neck and right shoulder at work when he picked up a heavy pipe and placed it onto his right shoulder. Dr. E's 15% IR consisted of nine percent for the shoulder and seven percent for the cervical spine. Claimant testified through a Spanish language interpreter that during the filing period, he felt he could not lift more than 10 pounds and that he limited his job search accordingly by seeking jobs as a "clean up man." He indicated that he underwent right shoulder surgery in October 1995 by his treating doctor, Dr. P; that he has pain in his neck, arm and shoulder; and that the pain is reduced by pain medication which does not make him drowsy. Claimant further testified that during the filing period, he looked for jobs as a "clean up man" because that was all he could do since he could not lift more than 10 pounds, had only a fourth grade education in (country), and had previously performed heavy work as a laborer and field hand. He did indicate that he was open to other kinds of jobs, at whatever they paid, and that he would try to perform a job were he to obtained one.

Claimant further stated that he learned of potential employment both by reading a Spanish language newspaper, the name of which he could not recall, and by "going by" and inquiring at businesses displaying signs indicating they were hiring. He listed the names of 27 businesses on his Statement of Employment Status (TWCC-52) for the filing period and

said he completed applications at many of the businesses and made approximately two job contacts per week over the course of the filing period. Claimant indicated that when not out seeking employment, he stays home and does nothing and he conceded not having contacted either the Texas Workforce Commission (TWC) or the Texas Rehabilitation Commission (TRC) during the filing period.

Claimant's TWCC-52 reflects the names and addresses of 27 businesses, most in City 1, with a few in City 2, contacted between June 20th and September 22nd. Seven contacts reflected dates preceding the filing period starting date of July 11th. Of the remaining 21 businesses contacted, six were contacted in July, eight in August, and seven in September and no more than one contact was made on any one day. The job title for each employer contacted was stated as "open," notwithstanding that claimant stated he was responding to newspaper ads and hiring signs.

Dr. N, who examined claimant for the carrier on September 17th, reported that claimant stated that he currently cuts yards and hunts deer and that he had a considerable amount of grime on his palms with calluses, all of which indicated to Dr. N that claimant was probably pursuing his normal life style. Dr. N stated that he found no abnormality which would limit claimant's returning to work and that he could return to his former position with no restrictions. Claimant stated that Dr. N was "lying" for giving the impression that claimant gave a history of cutting grass at any location other than at his residence and that he routinely went deer hunting.

Dr. P's January 6, 1999, report states that claimant underwent shoulder surgery but continues to complain of shoulder pain; that claimant has a chronic condition which is aggravated with excessive activities; that a functional capacity evaluation (FCE) of November 19th demonstrated that claimant can perform light-level work with frequent lifting of 10 pounds or less and infrequent lifting of 20 pounds; and that it is not recommended that claimant return to his previous employment with a construction company which involved heavy work.

The carrier introduced an earlier FCE report of October 13th, accomplished at another facility, which stated that claimant did not give maximum effort and tested positive for five of the Wadells' signs and which concluded that he can perform modified duty. The carrier also introduced an Intracorps report of job interview follow-ups accomplished during the period December 30th to January 6, 1999, stating the results of contacts with the 27 businesses listed on the TWCC-52.

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 average weekly wage 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, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it 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). In Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995, we noted that "[e]vidence bearing upon whether a claimant has demonstrated good faith can encompass the manner in which a job search is undertaken with respect to timing, forethought, and diligence" and that the extent to which these are demonstrated involves questions of fact for the hearing officer. The hearing officer could consider that claimant never contacted more than one business on any one day, averaged only two contacts per week, restricted his search to what were, apparently, two small towns, and did not contact either the TWC or the TRC.

Concerning the hearing officer's evidentiary ruling admitting the carrier's nine exhibits, the claimant objected to their admission stating that the benefit review conference (BRC) was held on November 16th, that the carrier's exhibits were not received by claimant until December 7th, and that based on the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1) (Rule 142.13(c)(1)), they were seven days late being exchanged. We disregard the exhibits attached to claimant's appeal since they are offered for the first time on appeal and do not meet the criteria for consideration as newly discovered evidence. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. Claimant's representative indicated that claimant's representative at the BRC participated by telephone. The carrier's representative, who was not present at the BRC, stated that it appeared that the carrier's exhibits, at least the medical records, were previously exchanged by the carrier at the BRC and that there was no duty to reexchange them. The hearing officer stated that she found good cause to admit the exhibits, apparently based on her belief that the documents were previously exchanged. During closing argument, claimant's representative mentioned that Carrier's Exhibit No. 9, the job interview follow-ups report, was not received until the morning of the hearing. We do not find that the hearing officer abused her discretion in finding good cause for the admission of the carrier's exhibits. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). She could infer from the assertions of the parties that, with the exception of Carrier's Exhibit No. 9, the exhibits had been previously exchanged by the carrier. As for Carrier's Exhibit

No. 9, the hearing officer could consider that the period that the report was being prepared was from December 30 to January 6, 1999. Even if it were error to admit Carrier's Exhibit No. 9, we are satisfied that such error probably did not cause the rendition of an improper decision in this case. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). As the carrier points out, the report is not even mentioned by the hearing officer in her discussion of the evidence.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge