

APPEAL NO. 991553

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 June 29, 1999. With respect to the sole issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first compensable quarter. In its appeal, the appellant (self-insured) argues that the hearing officer's determinations that the claimant's underemployment during the filing period was a direct result of his impairment, that he made a good faith effort to look for work commensurate with his abilities, and that he is entitled to SIBS for the first quarter are not supported by any evidence or, alternatively, are against the great weight and preponderance of the evidence. In addition, the self-insured challenges two of the hearing officer's evidentiary rulings. In his response, the claimant urges affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the self-insured accepted liability for the claimant's \_\_\_\_\_, injury; that the claimant was assigned an impairment rating of 15% or greater for his compensable injury; that the claimant did not elect to commute his impairment income benefits; and that the first quarter of SIBS ran from February 5 to May 6, 1999. The filing period for the first quarter was identified as the period from November 6, 1998, to February 4, 1999. The claimant testified that he injured his left shoulder on \_\_\_\_\_, in the course and scope of his employment as a commercial baker. He stated that he was reaching overhead to get a 50-pound box of raisins from a shelf and the box slipped, jerking his left arm backwards and causing him to fall to the floor. On September 16, 1996, the claimant had an MRI of his left shoulder, which revealed that he had supraspinatus tendinitis and evidence of impingement. On October 31, 1996, the claimant had surgery on his left shoulder that was performed by Dr. R, the claimant's treating doctor. Specifically, Dr. R performed an arthroscopy on the claimant's left glenohumeral joint, arthroscopic debridement of the left internal rotator cuff tear and the anterior capsule, subacromial debridement, and debridement of the undersurface of the left AC joint. The claimant's postoperative diagnosis was "subacromial impingement syndrome, left shoulder"; "left AC joint arthrosis"; and "internal rotator cuff tear, left shoulder."

Dr. R released the claimant to return to work regular duty in a specific position on February 23, 1998. The claimant testified that Dr. R provided the release at the claimant's request because he needed to work out of financial necessity. The claimant took the position that Dr. R released him to return to work as a cashier. The self-insured argued that Dr. R released the claimant to work regular duty as a cook in the February 23rd release. The copy of the release in evidence is illegible and, thus, it is unclear for what position Dr. R released the claimant. The claimant testified that shortly after he was released to work by Dr. R, he began working with Mr. JA. The claimant testified that he performs odd jobs for Mr. JA at his business and that he also assists Mr. JA in restoring

houses. The claimant stated that Mr. JA accommodates the problems he has with his shoulder, does not ask the claimant to do more than he is physically able to do, and permits him to take frequent breaks or not to work at all if he is unable to do so. He testified that he generally works six to seven hours each day, five days per week and is paid \$150.00 a week. Finally, the claimant testified that the physical demands of his job with Mr. JA are much different than the requirements of his prior job as a baker, in that he is not required to do heavy lifting, he is not required to be on his feet all day, and the work does not have the deadline pressure that his job as a baker had, thus, he can rest as necessary. On cross-examination, the claimant testified that the current condition of his shoulder is the same as it was during the filing period.

The claimant introduced a functional capacity evaluation (FCE) dated March 30, 1999, nearly two months after the end of the filing period, which states that the claimant could perform in a sedentary physical demand category. The report provides that the claimant could lift 10 pounds occasionally and negligible pounds frequently or continuously. That report also provides:

[Claimant] does not meet the physical demand level of his current job which has a light PDC. He functions best with activities that do not require use of the left [upper extremity] UE. He has the most difficulty with tasks which require elevation of the left arm overhead or lifting with the left UE. He demonstrates evidence of submaximal effort.

At the hearing the self-insured offered an investigator's report and two surveillance videotapes. The claimant objected to the admission of both exhibits, arguing that they had not been timely exchanged and that they should be excluded because the self-insured answered "no" to an interrogatory asking if it had conducted surveillance of the claimant. The claimant's attorney represented that she received the answers to the interrogatories on or about June 17, 1999, and that the video purports to record the claimant's activities on June 9, 10, and 11, 1999. The claimant did not object to the exhibits on relevance grounds. In response to the claimant's attorney's objections, the self-insured's attorney stated that when he answered the interrogatories, he was unaware that the surveillance had been completed and that he forwarded the report and the videotapes to both the claimant's attorney and the Texas Workers' Compensation Commission (Commission) shortly after he received them. The hearing officer stated that there was "probably good cause" for the failure to exchange the report and the videotapes because the self-insured did not have them within 15 days following the benefit review conference. In addition, the hearing officer appeared to discount the fact that the self-insured indicated in the interrogatory answer that it had not conducted surveillance of the claimant, noting that he "assumed" that the third-party administrator had probably authorized the taping and not advised the attorney about it. Nonetheless, the hearing officer excluded the report and the videotapes on relevance grounds, even though the claimant had not asserted a relevance objection. The hearing officer stated that the tapes were "far too late" in that they were taken "at least six months after the qualifying period." He further stated that the exhibits were "irrelevant" in the absence of evidence from a doctor that the claimant's condition had remained substantially the same from the filing period to the time that the videotapes were taken. After the close

of the testimony, where the claimant had stated that his condition was unchanged, the self-insured reoffered the exhibits and the hearing officer again excluded them. The self-insured asked the hearing officer to clarify his ruling and he responded that the investigator's report and the surveillance videotapes were excluded on relevance grounds. As a result, it can be inferred that the hearing officer found good cause for the failure to timely exchange the report and the videotapes and for the failure to disclose the existence of the videotapes in its answers to the claimant's interrogatories, despite his not having explicitly so stated either at the hearing or in his decision. The claimant did not timely appeal the hearing officer's good cause determination and, as a result, it is not subject to review.

The self-insured argues that the hearing officer erred in excluding the report and the surveillance videotapes on relevance grounds because they depicted the claimant's activities on June 9-11, 1999, dates outside the filing period of November 6, 1998, to February 4, 1999. Evidentiary rulings are reviewed under an abuse of discretion standard. In order to obtain a reversal for the exclusion of evidence, the self-insured must demonstrate that the evidence was actually erroneously excluded and that "the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ).

We have generally stated that evidence outside the filing period can be considered by the hearing officer in evaluating the claimant's abilities for purposes of determining SIBS entitlement. Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996; Texas Workers' Compensation Commission Appeal No. 941649, decided January 26, 1995. In Texas Workers' Compensation Commission Appeal No. 990480, decided April 22, 1999 (Unpublished), we upheld a hearing officer's exclusion of a surveillance videotape of the claimant taken after the filing period due to the carrier's failure to timely exchange the tape. However, Appeal No. 990480 emphasized that the hearing officer had not excluded the tape because it was taken outside the filing period, indicating that that would have been an improper basis for excluding the evidence. The timing of the surveillance and the state of the evidence concerning the comparison of the claimant's physical condition in the filing period to his condition at the time of the taping are factors that go to the weight to be given the evidence rather than its admissibility. In this instance, the videotapes depict the claimant performing various tasks in the restoration of a house. Those activities included painting, sweeping, bending, hammering, climbing, and other similar activities over a three-day period. A depiction of the claimant's activities, even one that is outside the filing period, is relevant to the question of the claimant's physical abilities. In that regard, we note that the claimant submitted an FCE taken some two months after the end of the filing period, which concluded that the claimant was only capable of performing at a sedentary demand level. The videotapes are subject to an interpretation that is at odds with both the claimant's testimony of his abilities and with the FCE results. As such, we cannot conclude that the erroneous exclusion of the investigator's report and the surveillance videotapes was harmless because our review of that evidence suggests that it has the potential to influence the decision, depending upon the weight it is given by the hearing officer, the sole judge of the weight and credibility of the evidence under

Section 410.165(a). Under the particular circumstances of this case, the hearing officer abused his discretion in excluding Self-insured's Exhibits F and G. Therefore, his decision is reversed and the case is remanded for the hearing officer to review and consider those exhibits, along with the other evidence in the record, to assign whatever weight he deems appropriate to all of the evidence, and to reconsider and resolve the issue of the claimant's entitlement to SIBS for the first quarter.

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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Philip F. O'Neill  
Appeals Judge