

APPEAL NO. 032875
FILED DECEMBER 10, 2003

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 October 2, 2003. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 17th quarter. The claimant appealed the hearing officer's determination based on sufficiency of the evidence grounds, and asserted that the hearing officer erred in not allowing her treating doctor, Dr. E, to testify. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed, as reformed.

We reform the Decision paragraph to read seventeenth vice seventh.

The claimant asserts that the hearing officer erred in excluding Dr. E from testifying at the CCH because the identity of that witness was not exchanged with the carrier as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(D) (Rule 142.13(c)(1)(D)). Rule 142.13(c)(1)(D) requires in part that no later than 15 days after the benefit review conference (BRC), parties shall exchange with one another the identity and location of any witness known to have knowledge of relevant facts. The claimant asserted that the carrier was verbally notified that Dr. E would testify at the BRC on August 5, 2003, and that the carrier received notice by fax of the identity of Dr. E four days prior to the CCH. The carrier objected to testimony from Dr. E and argued that the claimant had not exchanged the identity of the witness within 15 days after the BRC. The hearing officer determined that the identity of the claimant's witness was not timely exchanged and sustained the carrier's objection.

Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986). Given the determination that the identity of the claimant's witness was not timely exchanged, we do not find the hearing officer's evidentiary ruling

to be an abuse of discretion, as she acted with reference to guiding rules and principles. Nor did the claimant establish that the exclusion of this evidence probably caused the rendition of an improper judgment. We perceive no error.

The claimant had the burden to prove her entitlement to SIBs. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Rule 130.102. The SIBs criterion in issue was whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the 17th quarter. It is undisputed that the claimant did not work or look for work during the relevant qualifying period. The claimant contended that she had no ability to work during the relevant qualifying period. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

Conflicting evidence was presented on the matter of the claimant's ability to work during the relevant qualifying period. The hearing officer concluded that the claimant is not entitled to SIBs for the 17th quarter. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision that the claimant is not entitled to SIBs for the 17th quarter is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the decision and order of the hearing officer, as reformed.

The true corporate name of the insurance carrier is **FARMINGTON CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Margaret L. Turner
Appeals Judge

Edward Vilano
Appeals Judge