APPEAL NO. 950143

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held in (city), Texas, on December 5, 1994, the hearing officer, (hearing officer), resolved the sole disputed issue by concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first compensable quarter, September 14 through December 13, 1994. Claimant's appeal asserts error in the hearing officer's admitting the testimony of a witness called by the respondent (carrier), (Mr. CS), error in concluding that claimant did not make a good faith effort to seek employment commensurate with his ability to work, error in violating the "due process" clauses of the constitutions of Texas and the United States, error in depriving claimant of his right to be represented by his attorney when the hearing officer refused to allow time for claimant's son to translate his father's Spanish in addition to the translation being provided by the Texas Workers' Compensation Commission (Commission) translator, and error in the Commission's failure to provide claimant with a copy of the tape-recorded record of the hearing before the appeal deadline thus depriving him of the right to the effective use of the hearing record to prepare his appeal.

The carrier contends that "assuming arguendo" the hearing officer did err in admitting the testimony of Mr. CS, such error was harmless since there was sufficient evidence aside from such testimony to support the decision and because such testimony was only "peripherally addressed" in the hearing officer's findings of fact. The carrier further responds that the evidence is sufficient to support the decision, that claimant failed to specify any particular translation errors much less establish how any such errors resulted in an improper decision, and that claimant's inability to obtain a copy of the hearing record before filing his appeal does not appear to have hampered his "ability to file a comprehensive appeal."

DECISION

Reversed and a new decision rendered that claimant is entitled to SIBS for the first compensable quarter.

Section 408.142(a) provides that an employee is entitled to SIBS if upon the expiration of the impairment income benefits (IIBS) period the employee had an impairment rating (IR) of 15% or more, has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment, has not elected to commute a portion of the IIBS, and "has attempted in good faith to obtain employment commensurate with the employee's ability to work." *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.103(a) (Rule 130.103(a)). Only the last of these requirements was in dispute. It was not disputed that on March 19, 1992, claimant sustained a compensable injury when he slipped and fell from some height while working for (Employer A), that his IR was 22%, that during the qualifying period for his first quarter of IIBS, which was stipulated to be from June 15

through September 13, 1994, claimant did not work, and that no portion of his IIBS were commuted. The focal point of the parties' dispute at the hearing was whether during the qualifying period claimant made a good faith attempt to obtain employment commensurate with his ability to work.

Claimant testified through a Spanish language translator that he had worked for Employer A for nearly 22 years as a lumber "marker." There was no evidence adduced to explain the exact nature of claimant's job and his injuries but the job was apparently a manual labor type job. Claimant said his last work was for Employer A, that no light duty work within his doctor's restrictions was offered, that he worked for Employer A for one week after the accident but was not released by his doctor and has not since worked, that Employer A told him they had no light duty, that he cannot work and is disabled, that he received "checks" (apparently IIBS) until September 12th or 13th, and that he sought work not only with Employer A but also with three other potential employers, namely, (Employer B), (Employer C) and (Employer D), where he was told there were no jobs for him. Claimant was unable to state the exact dates he visited these employers during the qualifying period though he appeared to surmise it was sometime in September. When asked why he had waited until September to look for work he replied that he had been told by a Commission employee that he had to apply for a job between June and September. He did not indicate when he received this advice.

Claimant's Statement of Employment Status (TWCC-52) was signed and filed with the Commission on September 15, 1994, two days after the qualifying period. In addition to stating that claimant had not returned to work and had in good faith attempted to obtain employment in line with his ability to work, the TWCC-52 reflected that during the preceding 90 days he had contacted Employers A, B and C for "any" position and was not offered "the position." Claimant also introduced letters from Employer A dated August 30, 1994, from Employer B dated September 15, 1994, and from Employer C dated September 13, 1994, all stating that no work was available within the permanent restrictions assigned to claimant by (Dr. A). Claimant indicated he had sought work with these employers, as well as with Employer D, at sometime prior to the dates of those letters.

Though claimant did not take the position that he could do no work at all, he introduced a December 1, 1993, report of Dr. A to the carrier stating, in part, that claimant remained depressed and unable to gain any further function, that claimant "is particularly concerned that the place that he has worked does not have a limited activity decreased from full-time gainful employment," and that Dr. A's impression is that claimant "will be disabled permanently to the same degree" Dr. A had stated in previous reports. Dr. A's January 11, 1994, report to the carrier specified claimant's restrictions in performing any kind of duties to include marked limitation of walking, standing or stooping, that any job that requires even a limited degree of these activities is almost prohibited because of his back and lower extremities, that bending is not a possibility, but that claimant can sit for no

more than four hours and can lift no more than 15 to 20 pounds while sitting. Dr. A cited examples of permissible light duty such as sitting and monitoring a computer, answering telephones, and doing paper work or some other kind of manual or desk work. Claimant's evidence indicated he could neither speak nor write English, that he had a fourth grade education, that he had had no particular occupational training, and that he had never performed work other than factory and manual labor jobs. Also in evidence was Dr. A's August 29, 1994, "Essential Job Functions Evaluation" which limited claimant to only two hours of sitting and no standing or walking; which stated that claimant was felt capable of sedentary work lifting 10 pounds maximum, with occasional lifting or carrying of small items, and some walking or standing if done less than one-third of the time; which further stated that such work restrictions were permanent; and which finally commented that claimant "at least wants to try."

Though not mentioned in the hearing officer's decision and order, claimant's son, (Mr. R), appeared and testified. He stated that claimant had been unable to work since his fall, that he helped claimant in his quest for employment, that claimant had looked for work both before and after the IIBS expired, that he could not remember the exact dates but sometime in August, before the employers' letters were written, he drove claimant to Employers A, B, C and D and assisted him with his applications, that his father was turned down by these employers as there were no jobs for him, that they later returned to the employers for the letters, and that in November, prompted by either the carrier or the Commission he took claimant to register with the Texas Employment Commission (TEC) and to the Texas Rehabilitation Commission (TRC).

Similarly unmentioned in the hearing officer's decision and order, claimant called the carrier's representative, (Mr. TS), as a witness. Mr. TS testified that the carrier felt that claimant had not made a good faith effort to obtain employment commensurate with his ability to work because one of the three employers' letters was not dated within the qualifying period, because Employer C had the same kind of work he had done for Employer A, and because he felt claimant could go to work for (Employer E). He acknowledged not having knowledge of claimant's job seeking efforts with the employers prior to the dates of their letters. He also acknowledged he knew of no employers with work available for claimant that claimant was also aware of, that he knew of no employment offer that claimant had turned down, and that he had no knowledge of claimant's ever having stated that he did not want to work.

Claimant was asked on cross-examination about efforts of Mr. CS to interview him and did not object to that line of questioning. Claimant testified that Mr. CS had twice come to his house but that they did not converse because there was no one present to interpret. Claimant said his son told him Mr. CS wanted to inquire about his English language abilities. Claimant denied having stated at the Benefit Review Conference (BRC) that he did not want to cooperate with Mr. BS but rather that there was no reason for the latter to come to his house. When the carrier called Mr. CS for testimony in its

case in chief, claimant objected on the grounds that the carrier had not previously identified Mr. CS as a potential witness under the applicable discovery statute and rules. *See* Sections 410.160 and 410.161, and Rule 142.13. The carrier conceded it had not provided claimant with information on Mr. CS timely under the discovery rules. When asked by the hearing officer for a showing of good cause for its untimely exchange of the information regarding Mr. CS, the carrier stated it had none and merely pointed out that it had not raised a similar objection to the testimony of Mr. R. Notwithstanding this concession by carrier that it had no good cause for its noncompliance, the hearing officer stated that she "deems" the carrier to have good cause and permitted the testimony.

Mr. CS testified that he was a vocational rehabilitation specialist whose company had been employed by carrier to do a vocational assessment on claimant and assist him with placement in the work force, that after obtaining a file on claimant on September 27th he twice went to claimant's house in unsuccessful efforts to interview him, and that no one was present to translate. He also stated that Employer E has a program that helps individuals reenter the work force and that Employer E was interested in "interviewing" claimant. He regarded claimant as capable of doing a job as a "spotter" in a laundry. He indicated that job came to mind as he listened to claimant testify. Mr. CS further testified that he regarded himself as an "expert witness" for insurance carriers in workers' compensation cases.

Section 410.160(4) requires the parties within the time prescribed by Commission rule to exchange the identity and location of any witness known to have knowledge of relevant facts. Section 410.161 provides that a party who fails to disclose such information may not introduce the evidence at any subsequent proceeding unless good cause is shown for not having disclosed the information as required. Rule 142.13(c)(1)(D) required the carrier to exchange the information about Mr. CS with claimant no later than 15 days after the BRC which was held on October 12, 1994. We find that the hearing officer erred in admitting the testimony of Mr. CS. The carrier was asked outright by the hearing officer and explicitly conceded it could not make a good cause showing for not having timely exchanged the information with claimant on Mr. CS. Without any urging by the carrier the hearing officer then announced that she "deemed" the carrier to have good cause because Mr. CS's name had already been mentioned (in carrier's cross-examination) and because neither party had "received the BRO's report on time." The BRC was held on October 12th and the BRC report was sent to the parties under the Commission's cover letter of November 14, 1994.

We do not regard the error in admitting Mr. CS's testimony to be mere harmless error as the carrier suggests. The two factual findings in support of the hearing officer's conclusion that claimant did not make a good faith effort to seek employment commensurate with his ability to work are as follows:

FINDINGS OF FACT

9.Claimant applied for employment during the qualifying period for which he was clearly not qualified; he purposely failed to attempt to re-assess his capability for retraining.

10.Claimant did not register with the [TRC] until outside the qualifying period.

In her statement of the evidence the hearing officer, while not mentioning the testimony of Mr. R, recounts the testimony of Mr. CS as follows:

Carrier presented testimony from a field specialist in securing employment for injured workers who testified that attempts to interview Claimant and assess his capabilities were not met with cooperation on Claimant's part. He asserted that there are possible jobs in the economy for which Claimant may be qualified or retrainable for, but he has not been able to interview him. Claimant offered that he did not meet with the field specialist at the time because he did not have an interpreter with him. Claimant notes he went to make the applications he did because he was instructed to do so by the Commission recently.

In her discussion the hearing officer stated:

Claimant does not meet the fourth requirement above. The evidence shows he did not seek employment commensurate with his ability to work. Claimant make [sic] application at factories for general employment where he would not be capable of performing. He likewise avoided contact with an individual who sought to assess his capabilities and assist with placement where possible. Claimant's actions were more likely out of lack of information/knowledge on just what his responsibilities were in reference to qualifying for [SIBS], and may as a result be better informed on a later application. However, his evidence did not reflect a good faith effort at seeking employment. [Emphasis added.]

The Texas Supreme Court in Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394, 396 (Tex. 1989) has provided the following guidance for appellate bodies in reviewing for error the admission or exclusion of evidence.

To obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, the following must be shown: (1) that the trial court did in fact commit error, and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. [Citation omitted.] This court will ordinarily not find reversible error for erroneous rulings on admissibility of evidence where the evidence in question is

> cumulative and not controlling on a material issue dispositive of the case. [Citations omitted.] Thus, we must review the entire record to determine whether the judgement was controlled by the testimony that should have been excluded.

Applying that standard we are satisfied that the admission of the testimony of Mr. CS, which was clearly not cumulative, probably caused the rendition of an improper decision. It is apparent in reviewing Finding of Fact No. 9 and the hearing officer's discussion that based on Mr. CS's testimony, which was objected to, the hearing officer regarded claimant as having been purposefully uncooperative with Mr. CS's efforts to interview him and that this perception of claimant counted in the hearing officer's determination that claimant had not made a good faith effort to obtain employment. Another problem with this evidence is that Mr. CS's efforts to interview claimant and in fact all of his involvement in the claim occurred after the September 13th close of the qualifying period.

Having determined that the admission of the objectionable testimony of Mr. CS constituted reversible error, we examine the factual findings to determine whether there is sufficient support for the two dispositive conclusions of law, namely, that claimant did not make a good faith effort to seek employment commensurate with his ability to work and that he is not entitled to SIBS for the first compensable quarter from September 14 through December 13, 1994. Since the focus of the inquiry must obviously be claimant's efforts during the qualifying period, Finding of Fact No. 10 provides no support for the conclusions. It is apparent from her discussion that the hearing officer was influenced by the evidence that claimant did not register with TEC and TRC until sometime in November. The hearing officer cites no authority for the proposition that claimant was required to register with the TEC and TRC during the qualifying period. The second part of Finding of Fact No. 9 must be disregarded since it is based on the inadmissible testimony of Mr. CS.

The sole factual finding remaining in support of the decision is the statement in Finding of Fact No. 9 that claimant applied for employment during the qualifying period for which he was clearly not qualified. We find that finding, and consequently the two dispositive legal conclusions dependent upon it, to be against the great weight and preponderance of the evidence. Claimant's evidence established that during the qualifying period he sought employment with Employers A, B, C and D in "any" position, as stated in his TWCC-52 and that those employers advised that they had no jobs available within his medical restrictions. This evidence was not controverted. Claimant was restricted to a sedentary job with light lifting for a limited period of time and he presented evidence that four employers stated they had no jobs available within his restrictions during the qualifying period. There was also uncontroverted evidence that he had only a fourth grade education, that he neither spoke nor wrote English, and that he had had no occupational training or job experience other than factory or manual labor. We are satisfied that the hearing officer's decision is so against the great weight and

preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 632, 244 S.W.2d 660 (1951).

We now turn to the remaining appealed issues. The Appeals Panel has held that, as an administrative body, it does not decide questions of constitutionality. *See* Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992. Having listened to the tape-recorded record we find no merit in the complaint about the hearing officer's handling of claimant's request for time for his son to provide certain translations for him. The hearing officer basically accommodated the requests made of her. Rule 142.17(b) provides that a party may request a duplicate of the hearing audiotape at the party's expense. Claimant asserts the Commission failed to provide a duplicate before the appeal deadline. Given the disposition of the appeal, however, we need not decide the merits of the complaint.

The decision and order of the hearing officer are reversed and a new decision is rendered that claimant is entitled to the first quarter of SIBS.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge