APPEAL NO. 971626

At a contested case hearing (CCH) held on May 13, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer presiding, added a disputed issue, over the appellant's (carrier) objection, concerning whether the carrier waived its right to dispute the respondent's (claimant) entitlement to supplemental income benefits (SIBS) for the 15th compensable quarter, and the hearing was continued at the request of the carrier. On July 23, 1997, the hearing reconvened with (hearing officer) presiding. The hearing officer resolved the two disputed issues by determining that claimant failed to make a good faith effort to obtain employment commensurate with his ability to work during the filing period for the 15th compensable quarter and thus was not entitled to SIBS for that quarter, and that the carrier waived its right to dispute claimant's entitlement to SIBS by failing to request a benefit review conference (BRC) within 10 days after receiving claimant's Statement of Employment Status (TWCC-52). The carrier has appealed, urging errors in adding the waiver issue and its resolution against the carrier. In his response to the carrier's appeal, claimant urges affirmance on the carrier wavier issue and purports to appeal findings that he had some ability to work during the filing period and that he did not make a good faith attempt to obtain employment commensurate with his ability to work. The carrier filed a response, urging the untimeliness of claimant's response as an appeal.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury with a 15% impairment rating and did not commute impairment income benefits; that the 15th compensable quarter began on February 8 and ended on May 9, 1997; that the filing period for that quarter began on November 9, 1996, and ended on February 7, 1997; and that claimant earned no wages during the filing period.

Section 410.151(b), which pertains to CCHs, provides in part that an issue that was not raised at a BRC may not be considered unless the parties consent or if the issue was not raised, the Texas Workers' Compensation Commission (Commission) determines that good cause exists for not raising the issue at the BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(a) (Rule 142.7(a)) provides in part that a dispute not expressly included in the written statement of disputes will not be considered by the hearing officer. Rule 142.7(b) provides that the statement of disputes includes the benefit review officer's (BRO) report; the parties' responses, if any; additional disputes by unanimous consent; and additional disputes presented by a party if the hearing officer determines that the party has good cause. Rule 142.7(e) provides that a party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the BRO's report and that the hearing officer will allow the amendment only on a determination of good cause.

At the May 13th hearing, claimant's attorney stated that immediately following the BRC held on March 21, 1997, he looked through his file and realized there were two TWCC-52s in the file for the 15th quarter and that the carrier had not requested a BRC within 10 days of receiving the first TWCC-52. The attorney stated that when he received a TWCC-52 from the claimant, he did not know it was a copy and that claimant had sent the original to the carrier; that he noticed that claimant had not listed on the form the names of the places where he sought employment; that he completed that information and sent the form to the carrier; and that while the carrier did request a BRC to dispute entitlement to SIBS within 10 days of receiving the second form, it had not done so after receiving the first form. In evidence is a letter from claimant's attorney to the Commission, dated March 21, 1997, the same date as the BRC, stating that he attended the BRC that morning; that there is an additional issue which was not discussed; that the carrier received the TWCC-52 on January 24, 1997; that the carrier denied benefits and requested a BRC on February 13, 1997, more than 10 days after receiving the TWCC-52; and that the issue that was not discussed was whether the carrier waived the right to contest entitlement to SIBS for the 15th quarter. The carrier did not raise an issue as to the adequacy of this letter in terms of stating a reason for adding a disputed issue. *See* Rule 142.7(e)(1)(c). It was undisputed that the carrier did not request a BRC within 10 days of receiving the first TWCC-52, but did so for the second. Rule 130.108(c) provides in part that a carrier waives the right to contest continuing entitlement to SIBS for that compensable quarter "if the carrier fails to request a [BRC] within 10 days after receipt of the employee's Statement of Employment Status."

In evidence is claimant's TWCC-52 dated "1/17/97" which in block 8 did not list any employers contacted during the past 90 days. A date stamp reflects receipt by the carrier on January 24, 1997, and the completed notice of nonentitlement at the bottom is signed by a claims representative and is dated "2/13/97." The notice of nonentitlement states that claimant is not entitled to SIBS because he failed to make a good faith attempt to obtain employment commensurate with his ability to work and because he has not established that his unemployment was the direct result of his impairment. Another copy of the TWCC-52 in evidence had block 8 completed, together with an addendum containing additional names of employers contacted, and stated only one ground for nonentitlement, namely, claimant's failing to establish the "direct result" criterion. It bore the signature of the same claims representative and the date "2/13/97." The carrier did not contend that claimant's first TWCC-21 was fraudulent (*see* Texas Workers' Compensation Commission Appeal No. 941629, decided January 20, 1995) and the Appeals Panel has allowed supplementation of the information stated on a TWCC-52. *See* Texas Workers' Compensation Commission Appeal No. 951629, decided November 16, 1995. The carrier apparently regarded the first TWCC-52 as containing sufficient information to respond to since its grounds for dispute were broader on that form than on the later TWCC-52. In Texas Workers' Compensation Commission Appeal No. 970435, decided April 24, 1997, the Appeals Panel noted that the Commission's rules do not set out any sanction for filing an incomplete TWCC-52, noted that Appeal No. 941629, *supra*, concerned an intentional omission from the TWCC-52 of information on wages earned, and cautioned against wholesale application of the remedy in that case to situations where the TWCC-52 is timely filed but is incomplete.

Claimant contended that these circumstances established good cause to add the

issue of carrier waiver. The carrier argued that claimant's attorney's simply not knowing about claimant's having sent the first TWCC-52 to the carrier cannot amount to good cause to add the carrier waiver issue since to decide otherwise would permit any claimant or carrier to plead ignorance or forgetfulness and obtain a favorable ruling on good cause to add an issue.

There was no dispute over claimant's having timely requested the addition of the issue within 15 days of the BRC. The hearing officer stated that the matter came down to the degree of perfection to be required of parties in complying with the rule and noted that claimant's having brought the waiver issue to the attention of the Commission shortly after the BRC on the same day and before the BRC report was issued would have provided the Commission the opportunity to arrange for another BRC to consider the waiver issue. The hearing officer ruled that under these circumstances, he found good cause to add the issue and granted the carrier's request for a continuance in order to prepare to address the waiver issue.

We review the hearing officer's finding of good cause to add the waiver issue for abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92054, decided March 2, 1992. In Landry v. Travelers Insurance Company, 458 S.W.2d 649, 651 (Tex. no writ.), a case involving the issue of abuse of discretion by the trial court in excluding evidence, the Texas Supreme Court stated that in exercising such discretion, the trial court should have the power and the duty to consider all pertinent factors in deciding whether to admit or exclude the evidence. In Morrow v. H.E.B, Inc., 714 S.W. 2d 297 (Tex. 1986), another case involving the issue of abuse of discretion by the trial court in excluding evidence, the Texas Supreme Court stated that "[d]etermination of good cause is within the sound discretion of the trial court . . . and can only be set aside if that discretion was abused." The court went on to state that to determine if there is an abuse of discretion, it must look to see if the trial court acted without reference to any guiding principles and it found such guiding principles in the Texas Rules of Civil Procedure and in Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985) wherein the court stated that the party offering the evidence has the burden of showing good cause to the trial court. Similarly, in the case we consider, the hearing officer could consider the provisions of Section 410.151(b) and Rule 142.7 as providing the guiding principles and, of course, claimant had the burden to show the existence of good cause. In Texas Workers' Compensation Commission Appeal No. 91117, decided February 3, 1992, the Appeals Panel stated that "[a]buse of discretion has been found when one of the following occurs: (1) the decision omits from consideration a factor the legislature wanted the agency to consider in the situation; (2) the decision included in its consideration an irrelevant factor; or (3) the decision reached a completely unreasonable result based on weighing only relevant factors. [Citation omitted.]"

Mindful of the above-stated principles of review for abuse of discretion, we do not find that the hearing officer abused his discretion in finding good cause under the particular circumstances of this case. Apparently following the BRC, claimant's attorney discovered in his file the first TWCC-52 sent to the carrier by claimant and that same day requested the Commission to add the waiver issue to the statement of disputes before the BRC report

was issued. The carrier at that point could have requested the reopening of the BRC to consider the waiver issue. We do not share the carrier's apprehension that our support of the hearing officer's finding of good cause will provide a license for parties to assert good cause to add issues by claiming oversight or forgetfulness. The evidence in such matters tends to be quite fact specific.

Because we do not find error in the hearing officer's having added the carrier waiver issue and because we find the evidence sufficient to support the determination that the carrier waived its right to dispute claimant's entitlement to SIBS for the 15th quarter, we affirm the hearing officer's decision and order.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge