APPEAL NO. 990410

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 February 10, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the second quarter; that the respondent (self-insured) would be relieved from liability for SIBS for the period from October 22 to November 9, 1998, because of the claimant's delayed filing of his Statement of Employment Status (TWCC-52); and that the claimant earned no wages during the filing period for the second quarter. In his appeal, the claimant challenges the determinations that the claimant had some ability to work in the filing period, that he did not make a good faith search for employment commensurate with his ability to work, that his unemployment was not a direct result of his impairment, and that the self-insured would be relieved from liability for SIBS for period from October 22 to November 9, 1998, due to the claimant's late filing of his TWCC-52. In its response, the self-insured urges affirmance. The self-insured did not appeal the hearing officer's determination that the claimant did not have any earnings in the filing period from the operation of his chicken farm.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he was assigned a 21% impairment rating for his injury; that he did not commute his impairment income benefits; and that the second quarter of SIBS ran from October 22, 1998, to January 20, 1999, with a corresponding filing period of July 23 to October 21, 1998. The claimant testified that he was unable to work in the filing period; that he has not been released to return to work by his doctors, Dr. G and Dr. M; that he had surgery to remove the hardware from his back on November 19, 1998, which was performed by Dr. G; that he takes pain medication and muscle relaxers every day because of his injury; and that he also wears a back brace and walks with a crutch. Dr. G performed surgery on the claimant in November 1996, namely laminectomies and fusions from L2 to L5. In a letter of January 11, 1999, from Dr. G to the claimant, Dr. G stated, "I believe you are totally, completely and permanently disabled and unable to return to work based on the limitations you have in walking and based on the limitations you carry as a result of your injury." The claimant also testified, and documentation submitted by the self-insured confirms, that the claimant, who is 62 years old, is receiving social security disability benefits.

The claimant acknowledged that he owns a chicken farm. He stated that prior to his injury he took care of it by himself and that after his injury, his wife began working on the farm because he was no longer able to do the work himself. He stated that prior to the November 1998 surgery he went to the chicken house, picked up and disposed of the dead chickens, checked the temperature of the chicken house, and winched the curtains

at the windows. In addition, the claimant acknowledged that as the surveillance videotape the self-insured offered in evidence demonstrates, he was able to drive his truck, operate a riding lawn mower, and operate a large tractor. As the hearing officer noted, the videotape also shows the claimant bending, stooping and walking "with no noticeable difficulty." The claimant maintained that he was able to do those things "off and on" and that he is not able to do them all the time. In addition, the self-insured offered an opinion from Dr. S , who conducted a records review, that "[t]otal disability would not result from factors related directly and solely to the injury of _____, but from all cumulative health and age conditions."

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is firmly on the claimant and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be judged against employment generally, not just the previous job where the injury occurred. In addition, we have stated that an assertion of no ability to work must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact decides the weight to assign to the evidence before him and resolves conflicts and inconsistencies in the testimony and evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work in the filing period at issue. It was the hearing officer's responsibility as the fact finder to consider the evidence before him and to determine whether that evidence was sufficient to satisfy the claimant's burden of proving inability to work. In this case, the hearing officer simply was not persuaded that the medical evidence presented by the claimant was sufficient to prove that he was totally unable to work, particularly in light of the claimant's activities depicted on the surveillance videotape. He was acting within his province as the sole judge of the weight and credibility of the evidence in so finding. The claimant did not present any evidence that he had engaged in a job search in the filing period. Our review of the record does not demonstrate that the hearing officer's determinations that the claimant had some ability to work in the filing period, that he did not make a good faith job search commensurate with that ability, and, therefore, that he is not entitled to SIBS for the second quarter are so against the great weight and preponderance of the evidence as to be clearly wrong or

manifestly unjust. Therefore, no sound basis exists for us to reverse the hearing officer's decision on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant also asserts error in the hearing officer's direct result determination. After carefully reviewing the record in this case, we cannot agree that that determination is so against the great weight of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra*.

Finally, we consider the hearing officer's determination that the self-insured would be relieved from liability for second quarter SIBS for the period of October 22 to November 9, 1998, because of the claimant's late filing of his TWCC-52, if it were required to pay those benefits. The claimant argues that he had good cause for his late filing because he had to seek legal advice about what information, if any, he had to include on his TWCC-52 relating to earnings from his chicken farm. The hearing officer determined that, under the circumstance of this case, seeking advice from an attorney did not rise to the level of good cause sufficient to excuse the late filing of the TWCC-52. The claimant noted that it was a letter from the self-insured of September 29, 1998, which prompted him to seek legal advice before filing his TWCC-52. The hearing officer stated that the claimant's testimony "failed to establish adequately the reasons for the delay of some 40-plus days in addressing that concern prior to making his SIBS filings." The hearing officer was troubled by passage of time before the claimant sought legal advice and we cannot agree that he abused his discretion in making his good cause finding. Accordingly, the hearing officer did not err in finding that the self-insured would be relieved from liability for the period of October 22 to November 9, 1998, if it were required to pay SIBS for the second quarter due to the late filing of the SIBS application.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge