

APPEAL NO. 990439

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held January 21, 1999. The record was held open until January 25, 1999, for the appellant (claimant) to submit additional medical reports and one week from that date for the respondent (carrier) to respond to any medical reports submitted. It is undisputed that the claimant sustained a serious inhalation injury on _____; that on March 26, 1998, Dr. S, the designated doctor, certified that the claimant's impairment rating (IR) is 60%; that the first quarter for supplemental income benefits (SIBS) began on February 7, 1997, and ended on May 8, 1997; that the seventh quarter for SIBS began on August 7, 1998, and ended on November 5, 1998; and that the eighth quarter for SIBS began on November 6, 1998, and ended on February 4, 1999. In a letter dated June 24, 1998, the Texas Workers' Compensation Commission (Commission) field office handling the claim advised the claimant that he is not entitled to SIBS for the first quarter. In September 1998, a hearing officer determined that the claimant is entitled to SIBS for the first quarter. In the case before us, the hearing officer determined that during the filing periods for the second through the eighth quarters, the claimant had no ability to work and his unemployment was a direct result of his impairment from the compensable injury; and that the claimant is entitled to SIBS for the second through the eighth quarters. Those determinations have not been appealed and have become final. The hearing officer also determined that the Statement of Employment Status (TWCC-52) forms for the second through sixth quarters were signed by the claimant on October 14, 1998, but were not received by the carrier until November 9, 1998; that the claimant did not file those TWCC-52s until more than three months after the Commission's initial determination concerning entitlement to SIBS; that the claimant did not establish good cause for the late filing; that the claimant signed the TWCC-52s for the seventh and eighth quarters on November 3, 1998; that those TWCC-52s were received by the carrier on November 9, 1998; that the claimant did not file a TWCC-52 for the seventh quarter until after the seventh quarter had concluded; that the claimant filed the TWCC-52 for the eighth quarter on November 9, 1998, three days after the beginning of the eighth quarter on November 6, 1998; that the carrier is relieved of liability for SIBS for the second through the seventh quarters because of the claimant's failure timely to file TWCC-52s; and that benefits for the eighth quarter began to accrue on November 9, 1998, when the TWCC-52 for that quarter was received by the carrier. The claimant appealed. He urged that the Commission failed to make an initial determination on entitlement to SIBS prior to the end of the impairment income benefits (IIBS) period; that the first determination concerning entitlement to SIBS for the first quarter was the decision and order of the hearing officer dated October 6, 1998; that good cause existed for not filing the TWCC-52s earlier because medical evidence on the ability of the claimant to work was not available earlier and the TWCC-52s were mailed within 30 days of receipt of the medical reports; and that at the time the appointment with Dr. N was set, the carrier stated that it would pay SIBS if Dr. N agreed that the claimant was unable to work and the carrier is estopped from using a late filing defense. The claimant requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the Commission failed to make an initial determination of entitlement to SIBS prior to the end of the IIBS

period; that that failure excused any late filing by him; that the Commission's initial determination concerning entitlement to SIBS was made on October 6, 1998; that his time for filing for subsequent quarters began to run on that date; that if he filed the TWCC-52s for the second through the seventh quarters late, he had good cause for such late filing; and that the carrier is not relieved of liability for SIBS for the second through the seventh quarters. The carrier responded, urging that the decision of the hearing officer be affirmed.

DECISION

We affirm.

Generally, the summary of the evidence will be limited to the issues concerning timely filing of TWCC-52s, good cause for not timely filing TWCC-52s, and relief of liability of the carrier. The claimant testified that Dr. F, his treating doctor, told him that he was 100% disabled; that at the request of the carrier, he was sent to Dr. N; that Dr. N certified that his IR was 80%; that the carrier disputed the IR assigned by its doctor; that he went to Dr. S, the designated doctor; and that Dr. S certified that his IR is 60%. That certification is contained in a Report of Medical Evaluation (TWCC-69) dated March 26, 1998. The claimant said that he does not independently remember dates, that his wife has a book in which she keeps records, that his wife is being treated for cancer, and that she has been known to make mistakes in her record keeping. He testified that he thinks he remembers receiving a letter from the Commission dated May 21, 1998, advising him that it had not received a TWCC-52 from him; that he went to the Commission and spoke with a lady; and that he does not remember when he went to the Commission, but that he thinks that it was in June 1998 because he was in another state the last part of May. The claimant stated that he received a letter from the Commission stating that he was not entitled to SIBS for the first quarter; that he thinks that it is the letter dated June 24, 1998; that he does not remember when he received the letter; that he spoke with the lady at the Commission; that she told him that she could not tell him how to fill out the forms because he was represented by an attorney; that she told him that it would not do any good to file the forms without medical records stating that he could not work; that he went to his attorney's office; that the attorney called the lady at the Commission; and that the attorney told him that medical records were needed before the forms could be filed. He said that at the end of September 1998 a contested case hearing was held and that the hearing officer determined that he was entitled to SIBS for the first quarter. The claimant testified that Dr. F was being treated for a serious illness and was not going to his office when he, the claimant, requested medical reports stating that he could not work during the filing periods; that he was also being treated for another condition by the (hospital); that doctors there were precluded by (hospital) directives from providing a statement on the extent of his disability; and that another doctor's office was contacted and that office advised that the doctor could not provide an opinion on his, the claimant's, ability to work for time prior to the doctor seeing him. The claimant said that in August 1998, Dr. F's nurse called and advised that Dr. F could see him. In a short letter dated August 11, 1998, Dr. F stated that the claimant sustained lung damage on _____; that since that date he has been disabled and unable to work in any gainful employment due to the accident; and that he has been seen by numerous doctors and has had tests that show his condition. In an undated letter, Dr. F

states that it is an addendum to his August 11, 1998, letter; gives more detailed reasons why he thinks that the claimant was unable to work since February 7, 1997; and corroborates the claimant's testimony that he, Dr. F, first assigned a 100% disability rating, that he changed it to 80% because the carrier and the Commission would not accept a 100% disability rating, and that the (hospital) doctors would not assign a disability rating. It is not clear when this letter was written by Dr. F or when it was received by the claimant or the attorney representing him, but there is some indication that it may have been near the end of September 1998 before a hearing concerning entitlement to SIBS for the first quarter was held. The claimant testified that after reviewing the TWCC-52s for the second through the sixth quarter, he agreed that he signed them on October 14, 1998; that the TWCC-52s were not mailed on that date because he had to list jobs that he had applied for; that he had applied for jobs before he knew anything about SIBS because he wanted to find something that he could do; that his wife wrote in a book everything that they did; that his wife reviewed the book and told him about jobs he looked for and the dates that she wrote that he looked for those jobs; that after the list of jobs he looked for was made in the attorney's office, the TWCC-52s were sent to the carrier; that he agreed that he signed the TWCC-52s for the seventh and eighth quarters on November 3, 1998; and that he does not have information to dispute that the TWCC-52s were received by the carrier on November 9, 1998, as indicated by stamps on copies of them. Letters signed by the Commission's field office manager dated May 21 and June 24, 1998, are in the record; indications are that the claimant spoke with the person who signed one of the letters; but she did not testify at the hearing.

We first address the claimant's contention that the Commission failed to make an initial determination of SIBS entitlement prior to the end of the IIBS period. It is well recognized that problems are created by an IR not being decided at the time or soon after the time that a claimant reaches maximum medical improvement, whether because further material recovery from or lasting improvement to an injury can no longer be reasonably anticipated or because of the expiration of 104 weeks from the date on which income benefits began to accrue. In a TWCC-69 dated March 26, 1998, the designated doctor certified that the claimant's IR is 60%. It is undisputed that the IIBS period ended February 6, 1997. We agree that the Commission failed to make an initial determination of entitlement to SIBS prior to the end of the IIBS period. But that does not automatically make filing of TWCC-52s after that date timely.

We next address the contention that the claimant timely filed the TWCC-52s for the second through the seventh quarters. The Appeals Panel in several decisions has addressed timely filing after a late initial determination by the Commission. In Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995, the Appeals Panel held that the date of first determination of entitlement to SIBS by the Commission was the day the Commission's disability determination officer approved or disapproved entitlement to SIBS on the TWCC-52. In that decision, the Appeals Panel also quoted from sections of the 1989 Act and Commission rules pertaining to SIBS and wrote:

Under the particular facts of this case wherein the Commission was over one and one-half years late in determining initial entitlement to SIBS and the

claimant filed SESs [TWCC-52s] for the second through the eighth compensable quarters well within three months of the initial determination, we believe that the great weight and preponderance of the evidence shows that the claimant did timely file for SIBS for the second through the eighth compensable quarters and that there is no sound basis under Section 408.143(c) to relieve the carrier of liability for SIBS for those compensable quarters.

In Texas Workers' Compensation Commission Appeal No. 951975, decided January 8, 1996, the claimant did not file the TWCC-52s for the second through the sixth quarters until more than three months after the Commission's initial determination of entitlement to SIBS and the claimant did not explain his delay in filing those forms. The Appeals Panel held that the late filing of the TWCC-52s relieved the carrier of liability for those quarters of SIBS. In the case before us, the hearing officer properly applied the law concerning the date of the first determination of entitlement to SIBS and the time that a claimant has to file TWCC-52s after the late first determination of entitlement to SIBS.

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 may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. 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 own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The determinations of the hearing officer as to when the Commission made the first determination of entitlement to SIBS and when the claimant filed the TWCC-52s for the second through the eighth quarters are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find that the hearing officer properly applied the law in making those determinations and that the evidence is sufficient to support them, we affirm them.

We now address the contention that the hearing officer erred in finding that the claimant did not have good cause for not timely filing the TWCC-52s. Whether good cause exists is a question of fact for the hearing officer and the test for reversing the decision of the hearing officer is whether he or she abused her discretion. Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992. The test for abuse of discretion is whether the hearing officer acted without reference to any guiding standards, principles, or rules. Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993. If good cause exists, it must continue to exist until the time that the party claiming good cause for delay acted. Texas Workers' Compensation Commission Appeal No. 950148, decided March 3, 1995. The claimant had difficulty

receiving medical reports concerning his ability to work. Apparently he received a report from Dr. F in August 1998. He received an undated report with more information, apparently prior to a contested case hearing held near the end of September 1998. He signed TWCC-52s for the second through the sixth quarters on October 14, 1998; decided to obtain information about jobs he applied for; and apparently had those forms mailed on November 3, 1998, after he signed TWCC-52s for the seventh and eighth quarters on that day. The forms were received by the carrier on November 9, 1998. The hearing officer did not abuse his discretion in determining that good cause did not exist for not timely filing the TWCC-52s.

Lastly, we address the contention that the carrier should be estopped from asserting that it should be relieved of liability because of late filing of TWCC-52s by the claimant. At the hearing, the attorney representing the carrier made statements about what the carrier would do or not do if the claimant was seen by a doctor of its choice. The record does not contain evidence on that point, the claimant did not request that the hearing officer make determinations to resolve that question, the hearing officer did not make determinations to resolve that question, and there are no determinations related to that question for us to review.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge