

APPEAL NO. 990447

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 on January 27, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the second quarter for supplemental income benefits (SIBS) began on October 27, 1998, and ended on January 25, 1999. The hearing officer made findings of fact about the claimant's compensable injury, treatment for his injury, his condition, and his incarceration. The hearing officer also made the following findings of fact and conclusion of law:

**FINDINGS OF FACT**

12. During the filing period for the second quarter, Claimant has been unable to work and in need of extensive medical care to deal with both arms and elbows and to treat the infection that has developed in the right arm.
13. Claimant was incarcerated all but 3 weeks of the filing period for the second quarter and his unemployment is a result of his incarceration and not a direct result of his impairment.

**CONCLUSION OF LAW**

2. Claimant is not entitled to [SIBS] for the 2nd compensable quarter.

The claimant appealed. First, he requested that the Appeals Panel determine that the period from October 1 through October 26, 1998, is greater than three weeks as found by the hearing officer in Finding of Fact No. 13. He also contended that the determination that his unemployment during the filing period was not the direct result of the impairment from the compensable injury is contrary to the great weight and preponderance of the evidence and requested that the Appeals Panel reverse that determination and render a decision that his unemployment during the filing period was a direct result of his impairment from the compensable injury and that he is entitled to SIBS for the second quarter. In the alternative, he requested that the Appeals Panel reverse the decision of the hearing officer and remand for additional proceedings. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed. The determination that during the filing period the claimant was unable to work has not been appealed and has become final under the provisions of Section 410.169.

**DECISION**

We reform Finding of Fact No. 13. We affirm it, as reformed; and also affirm Conclusion of Law No. 2; the decision; and the order of the hearing officer.

The filing period for the second quarter for SIBS ended on October 26, 1998. We reform Finding of Fact No. 13 to state:

13. Claimant was incarcerated for all of the filing period for the second quarter except for the period beginning with October 1, 1998, the date of his release, and ending on October 26, 1998, the last day of the filing period for the second quarter for supplemental income benefits and his unemployment is a result of his incarceration and not a direct result of his impairment.

We next address the determination that during the filing period, the claimant's unemployment was not a direct result of his impairment from the compensable injury. The claimant worked as a welder and was required to lift about 60 or 70 pounds. On \_\_\_\_\_, the claimant fell about 50 feet. His injuries included fractures of both legs and both elbows. He had numerous surgeries that included the insertion of rods and pins. He has not returned to work after the fall. His ability to lift is limited because of the injury, and he can no longer lift the objects he was required to lift in the job at which he was injured. The claimant was incarcerated from some time in 1997 to October 1, 1998, because of parole violation. He said that while he was in prison he did not want to go to the prison hospital because of what he had been told about it; that he did request and was provided medication for pain; and that if he thought he was in serious need of medical care, he would have gone to the hospital. On October 1, 1998, he was again released on parole. He said that he tried to get an appointment with Dr. S, his treating doctor, soon after he was released because part of a scar on his elbow came off while he was bathing; that he saw Dr. S on October 21, 1998; that he was diagnosed with an infection, placed on antibiotics, and had surgery on November 21, 1998; that he was told that he also needs surgery on the other elbow; and that he was scheduled to have surgery on the other elbow the week after the hearing.

The burden is on the claimant to prove that his unemployment during the filing period was a direct result of his impairment from the compensable injury. The Appeals Panel has held that when a claimant has sustained a serious injury with lasting effects and cannot reasonably perform the work he was doing at the time of the injury, the hearing officer may also consider a subsequent injury to the claimant, his termination, his resignation, or his incarceration in determining whether the claimant's unemployment is a direct result of the impairment from the compensable injury.

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. This is equally true regarding medical evidence. Texas Employers Insurance

Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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). That a different determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer made a finding of fact that the claimant was released on parole on October 1, 1998, and the filing period ended on October 26, 1998. That the hearing officer incorrectly referred to the period of time from the release on parole to the end of the filing period as three weeks rather than 25 days in Finding of Fact No. 13 does not cause the other portions of that finding of fact to be reversed. The hearing officer could consider the portion of the filing period during which the claimant was incarcerated. The slight difference in the number of days that the claimant was not incarcerated during the filing period did not result in reversible error. Finding of Fact No. 13 as reformed and the conclusion of law that the claimant is not entitled to SIBS for the second quarter 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).

We affirm Finding of Fact No. 13, as reformed. We also affirm Conclusion of Law No. 2; the decision; and the order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge