

APPEAL NO. 991168

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 19, 1999. The issues at the CCH were: (1) whether respondent/cross-appellant (claimant) was entitled to temporary income benefits (TIBS) based on preinjury earnings that were less than \$8.50 per hour; (2) did appellant/cross/respondent (carrier) waive the right to contest the compensability of the claimant's lower back injury by not contesting the extent of injury within 60 days of being notified of the lower back injury; and (3) whether claimant's compensable injury extends to include an injury to the lower back. The hearing officer determined that: (1) claimant's compensable injury extends to include his lower back; (2) carrier waived the right to contest the compensability of the lower back injury; and (3) claimant was a salaried employee at the time of the injury earning \$400.00 per week. Carrier appeals, contending that the hearing officer erred in determining that claimant's injury extended to the low back and that it waived the right to contest the compensability of the low back injury. Claimant responds that the Appeals Panel should affirm these appealed findings. In his cross-appeal, claimant contends that the hearing officer erred in determining that "claimant was not due TIBS based on hourly earnings of less than \$8.50 an hour." The file does not contain a response from carrier.

DECISION

We affirm in part and reverse and render in part.

Carrier contends the hearing officer erred in determining that claimant's compensable injury extended to include his low back. Carrier asserts that claimant's version of the events was not credible.

It was undisputed that claimant sustained a compensable injury to his foot on \_\_\_\_\_. Claimant testified that he injured both his back and his foot. Claimant immediately sought treatment for his foot and by November 25, 1998, he was also seeking treatment for his back. In a November 25, 1998, Initial Medical Report (TWCC-61), Dr. P diagnosed a back strain and noted lumbar spasms.

The applicable law and our appellate standard of review are stated in Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995; Texas Workers' Compensation Commission Appeal No. 951959, decided January 3, 1996; Section 410.165(a); and Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer weighed the evidence and determined that claimant's injury extended to his low back. This issue regarding extent of injury involved a fact question for the hearing officer, which he resolved. Appeal No. 951959, *supra*. The hearing officer could determine that claimant sustained a compensable injury based on his testimony alone, if the hearing officer found that testimony credible. The hearing officer could decide to believe all, none, or any part of the evidence and properly decide what weight to give to the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th

Dist.] 1984, no writ). After reviewing the evidence, as set forth above, we conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be wrong or manifestly unjust. Cain, *supra*.

Carrier contends the hearing officer erred in determining that it waived the right to contest the compensability of the low back injury. Carrier asserts that its "failure to file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) does not create an injury to the back where none existed." Carrier cites Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) in support of its contention. However, in this case there is an injury found by the hearing officer. The hearing officer found both a back injury and a foot injury. Therefore, Williamson does not apply in this case.

In his cross-appeal, claimant contends that the hearing officer erred in determining that "claimant was not due [TIBS] based on hourly earnings of less than \$8.50 an hour." It was undisputed that claimant was a salaried employee at the time of the injury earning \$400.00 per week. However, claimant notes that he testified that: (1) he had to work at least 55 hours per week to earn the \$400.00 per week; (2) if he did not work at least 55 hours per week, he was told that his pay would be reduced; (3) he had been working only two weeks prior to his injury; and (4) he had actually worked 55 hours both weeks.

The hearing officer determined that: (1) claimant did not prove by a preponderance of the evidence that he was an hourly employee rather than a salaried employee; and (2) claimant was a salaried employee at the time of the injury earning \$400.00 per week. The hearing officer noted that no documentation was presented showing that the reduction in claimant's salary ever occurred, for working less than 55 hours per week.

Section 408.103(a)(2) states that if an employee earns less than \$8.50 an hour, then he is to be paid TIBS at a rate equal to 75% of his average weekly wage for the first 26 weeks of the disability period. The result of dividing \$400.00 by the 55 hours actually worked by claimant equals \$7.27. *See, generally*, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 (Rule 129.2). This amount is less than \$8.50 per hour. Therefore, claimant established that the TIBS rate of Section 408.103(a)(2) applied. We reverse the hearing officer's determination that claimant was "not an hourly employee" for the purposes of Section 408.103(a)(2) and render a determination that claimant's TIBS rate is that stated in Section 408.103(a)(2).

We affirm the hearing officer's determinations regarding extent of injury and carrier waiver. We reverse the hearing officer's determination that claimant was "not an hourly employee" for the purposes of Section 408.103(a)(2) and render a determination that claimant's TIBS rate is that stated in section 408.103(a)(2).

---

Judy Stephens  
Appeals Judge

CONCUR:

---

Tommy W. Lueders  
Appeals Judge

---

Dorian E. Ramirez  
Appeals Judge