

APPEAL NO. 040581
FILED APRIL 29, 2004

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 January 8, 2004, with the record closing on February 17, 2004. With respect to the issues before her, the hearing officer determined that the respondent/cross-appellant's (carrier) contest of compensability is based on newly discovered evidence that could not reasonably have been discovered at an earlier date and the carrier is, thus, allowed to reopen the issue of compensability; that the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____; that since the claimant did not sustain a compensable injury, he did not have disability; and that the claimant's average weekly wage (AWW) is \$230.95 based on the wages of a same or similar employee. The claimant appealed the hearing officer's determinations regarding newly discovered evidence, compensability, and disability. On appeal, the claimant essentially takes exception to the manner in which the hearing officer judged the credibility of the evidence. The claimant additionally asserts that the carrier waived the right to dispute compensability due to its late filing of the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21). The carrier responded, urging affirmance of these determinations. The carrier appealed the hearing officer's determination regarding AWW. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

The disputed issues in this case all involved factual questions for the hearing officer to resolve. Conflicting evidence was presented at the hearing on the disputed issues. Resolution of the issues before the hearing officer was dependent on an evaluation of the credibility of the evidence presented. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. Nothing in our review of the record indicates that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We note that despite the assertion of the claimant that the carrier waived the right to contest compensability due to its failure to timely file the TWCC-21 disputing the claim with the Texas Workers' Compensation Commission, there was no waiver issue before the hearing officer. Additionally, nothing in our review of the record indicates that a waiver issue was tried by consent. As such, we will not address it on appeal. See Texas Workers' Compensation Commission Appeal No. 032087, decided September 16, 2003.

The hearing officer's decision and order is affirmed.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Daniel R. Barry
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Veronica L. Ruberto
Appeals Judge