APPEAL NO. 92199

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On January 14, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant, appellant herein, was not injured in the course and scope of employment in April 1991. Appellant appeals. Respondent takes issue with the timeliness of the appeal and with the degree of specificity in the appeal.

DECISION

Finding that the appeal was timely made, and the decision was not against the great weight and preponderance of the evidence, we affirm.

The letter accompanying the decision of the hearing officer sent to the parties in this case was dated January 28, 1992. Appellant's appeal was dated May 12, 1992, was postmarked May 15, 1992, and was received by the commission on May 19, 1992. The letter shows that the decision was sent to appellant at (address).

Texas W. C. Commission, 28 Tex Admin Code § 102.5(a) (rule 102.5(a)), states, "[a]ll notices and written communications to the claimant or claimant's representative will be mailed to the last address supplied by that claimant or representative." At the end of the hearing, the following exchange took place between appellant and the hearing officer:

H.O.There had been an address of (address)--is that no longer your address?
App.Inaudible

H.O.So your present address is just General Delivery, (city), Texas?
App.Inaudible

H.O.Until we hear from you otherwise, it will be sent to that address.

Rule 102.5(h) provides: For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed. While it is clear that appellant did not appeal a decision mailed in January until May, the statutory time for appeal is not later than the 15th day after the date of receipt of the hearing officer's decision. Article 8308-6.41(a) of the 1989 Act. While rule 102.5(h) deems a receipt date of five days after mailing, rule 102.5(a) obliges the commission to send that decision to the "last address supplied by that claimant." The record of hearing makes it clear that the commission did not comply with its rule by sending the decision to 3817 NE 20th. The commission should not impose its rule 102.5(h) that deems a decision to be received unless it has complied with rule 102.5(a) by using the address supplied by the appellant. *See* Texas Workers' Compensation Commission Appeal No. 92090 (redacted Docket No.) decided April 24, 1992. The commission recognized that appellant had not received the decision and mailed a copy of the decision to appellant's current address, which

was different from the address used previously. His appeal from the notification dated May 1, 1992, was filed within the time provided in the 1989 Act and applicable rules.

II

Appellant worked for (employer) since September of 1990. His claim in question was for a back injury during the month of April. The claim asserted (date of injury), as the injury date, but appellant consistently stated at hearing that he was not sure when the date was. The record indicates that his back had been hurt previously. In answer to a question as to whether the date could be the (dates), appellant said, "yes." In an unsigned statement made in September 1991, admitted as Carrier Exhibit No. 7, appellant was questioned as follows:

Q.Okay, and then I understand that you reinjured your back?
A.Yes sir, (date of injury).

Q.On (date of injury). Okay, what time did you injure your back?
A.I don't recall, but uh, it was in the . . .

Q.A.M., P.M.?
A.It was in the morning time.

Appellant agreed that he went to an (Clinic) in April which treated him and restricted him to light duty. As part of Appellant's Exhibit A, admitted in evidence, a physician's status report dated April 22, 1991, lists the date of accident as (date of injury). The accident date listed may be questionable because the date shown in that space, (date of injury), is written over some other date beneath it. That report showed that appellant could return to work on April 23, was to return to the doctor on April 25, and was to lift no more than 30 pounds between April 23 and 25. In addition appellant was seen on several occasions by (Dr. F) beginning on August 7, 1991; his reports show a date of injury as (date of injury). Appellant also saw (Dr. C) in September of 1991. Dr. C says the back was first injured in March 19<u>90</u> (emphasis added). He referred to an injury in April and found a "transitional vertebra at L5." He indicated that a myelogram and CT scan should be done.

Appellant, at hearing, did not at first recall that he had injured his back on (date). He thought the injury prior to April may have been in March 1991, but upon referral to carrier's exhibits, appeared to agree that the prior injury was at the end of January and was not in March 1991. Carrier's Exhibit No. 8 also shows that a physical examination given to appellant in September 1990, included the observation, "mild narrowing L4-L5 innerspace (Class II)." Appellant denied that he complained of back pain after the injury of (date).

Appellant also said in answer to the question as to what he did to injure his back in April, "quite a number of things." He later said that he "twisted my back unloading a ramp." Again he said, "I twisted my back, kept working with jack hammers and shovels."

There was some disagreement between appellant and employer as to whether appellant quit or was fired. The employer maintained that appellant never worked for the company again after going to the doctor on April 18, 1991. Appellant was said to have come back on April 26 to get his check at which time he was informed that the doctor had released him to light duty as of April 23. Appellant maintained he was fired. Appellant agreed that he began work for a meat packing firm on April 22, 1991, passed a physical examination to take that job, and worked there until June 18, 1991. (The reasons for departing that job varied from "back trouble" to being fired for transportation problems.)

The respondent's witness, (TS), said that appellant was on suspension (dates) for tardiness and did not work from April 14 through April 17 because April 14 was a Sunday. Not counting the short time appellant was at work on April 18 before going to the doctor, he said that appellant's last day of work was (date). A memo made by TS dated April 18 shows that appellant told him the back started hurting on (date of injury), but he did not know where or when it happened. A fellow employee, (LA) who worked frequently with appellant was reluctant in some answers but acknowledged that appellant complained of his back between January and April 1991.

Appellant was vague throughout the hearing as to both the date of the incident and the way in which it happened. While his claim, dated September 13, 1991, describes that he "felt a sharp pain in my back" when he took ramps down from a truck, he was never that definite at hearing. He mentioned "twisting" his back in connection with handling ramps, and he mentioned "running a mixer" and "unloading vaults." All medical and business documents created at, near, or at least closer in time to the event than the hearing, when referring to a date, say the incident occurred on (date of injury). (One document by Dr. C in September 1991 only refers to "months," not days, in describing injuries.) The appeals panel has upheld hearing officers who found injury at a time in variance with some statements of a claimant. A lack of pleading specificity, in itself, has not required reversal of a decision for a claimant. *See* Texas Workers' Compensation Commission Appeal No. 91123 (redacted Docket No.) decided February 7, 1992. Similarly, a variance between a date specified in a claim and a date, or approximate date, developed out of evidence at hearing has not precluded affirmance of a finding of compensable injury when investigation had not been thwarted. *See* Texas Workers' Compensation Commission Appeal No. 91097 (redacted Docket No.) decided January 16, 1992.

In this instance, there is strong evidence that any injury had to have occurred on or earlier than (date). Appellant's testimony did not tie injury to a certain event, such as a payday or meeting that night, and then simply confuse the issue by a mistake as to the calendar date. On the contrary, appellant several times stated that he could not recall when he was hurt. Such testimony was not inconsistent with the memo of TS that said on April 18 that appellant did not know how or when he hurt himself. The hearing officer did not believe that appellant hurt his back at work on (dates). The suspension (April 15, 16, and 17) and Sunday off (April 14) support his decision. The hearing officer could choose to

believe the memo of TS recording appellant's statement that he did not know how he hurt himself on (date of injury), rather than believe appellant at hearing. As trier of fact, he could believe part, none or all of appellant's testimony, and he could reconcile inconsistencies within appellant's own statements and between his testimony and that of LA. *See* Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The hearing officer is sole judge of the weight and credibility of evidence. Article 8308-6.34(e) of the 1989 Act.

The finding that appellant was not hurt on (dates) and the conclusion of law that appellant was not injured in the course and scope of employment is not against the great weight and preponderance of the evidence. The decision is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge