APPEAL NO. 92201

On March 2 and March 24, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that (claimant), the appellant, did not sustain a compensable injury in the course and scope of his employment for (employer) on (date of injury). Appellant asks that this determination be reviewed and reversed. Respondent replies that the appeal was not timely filed with the commission within 15 days, in accordance with Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-6.41(a) & (b) (Vernon Supp. 1992) (1989 Act), and that the decision of the hearing officer should be upheld. Respondent also points out that additional medical evidence attached to the appeal is not part of the record of the case and cannot be considered.

DECISION

After reviewing the record, we affirm the decision of the hearing officer.

I.

On the matter of timely filing of the appeal, we find that it was. Article 8308-6.41(a) of the 1989 Act provides in part as follows:

"A party that desires to appeal the decision of the hearing officer shall file a written appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings and shall on the same date serve a copy of the request on the other party . . . ."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (TWCC Rules) provides that a request for review of the hearing officer's decision shall be filed with the Commission's central office in Austin "not later than the 15th day after receipt of the hearing officer's decision; . . ." Rule 143.3(c) goes on to provide the following:

"(c)A request made under this section shall be presumed to be timely filed or timely served if it is:

(1)mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and

(2)received by the commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision."

Finally, Rule 102.5, regarding mailing of communications to and from the

commission, subsection (h), states:

> 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.

If a due date for a period falls on a weekend or a legal holiday, the ending date of that period is the next business day. Rule 102.3 (a)(3).

The hearing officer signed his Decision and Order on April 16, 1992. The Commission's Division of Hearings & Review forwarded to the parties a copy of the decision on April 21, 1992, with a fact sheet explaining what to do if an appeal is desired. Appellant's request for review does not state the date he received the Commission's transmittal letter. However, the appeal is postmarked May 11, 1992 and was received at the commission's central office on May 14, 1992.

Applying Rules 102.3 and 102.5, the deemed date of receipt of the hearing officer's decision is April 27, 1992. Fifteen days from April 27 yields a due date for filing an appeal of May 12, 1992. According to the rules cited above, appellant's appeal was timely filed.

II.

The Appeals Panel may only consider matters on the record in reviewing a decision of a contested case hearing officer. Art. 8308-6.42. The additional letter from appellant's doctor, dated May 6, 1992, submitted well after the hearing, is not part of the record and will not be considered for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91121 (Docket No.) decided February 3, 1992.

III.

(Claimant), the appellant, was employed by the employer as lead tong man on Rig No. 5. He stated that on (date of injury), while he was working with a team dismantling the rig and breaking up pipe, his tongs slipped off the pipe, hit him in the chest, and knocked him back against the derrick. He stated that all his coworkers saw the accident, and that he was helped up. Appellant said that he hit the middle part of his back, between his shoulders and waist. He said that he filed an accident report that day with (Mr. C). Appellant worked four hours of the next day to complete taking down the rig; this was the total amount of time needed to complete this job, and he did not work less than a full day because of the injury. Appellant stated that he knew that he would be out of work for about a month until the rig was to be set up again. According to his testimony, as well as statements filed from coworkers, he showed up in mid-October to work at the rig, but was either terminated or not rehired, for reasons he stated were unknown to him. Thereafter, on October 24th, he consulted with (Dr. K) about his back, and applied for workers' compensation and unemployment compensation benefits.

Statements on file from his supervisor and coworkers state that no one saw appellant get injured, and further indicate that the first time an injury was reported was after appellant showed up for work in October and was terminated. Mr. C states that appellant never filled out an accident report, and that he first heard that appellant claimed an injury sometime after appellant was not rehired to work on the rig.

Only one medical document from Dr. K was put into evidence, through the benefit review conference report. Basically, the report recounts the history of the injury as

provided by appellant, but does not state a diagnosis or describe a physical injury. Appellant stated that the last consultation with Dr. K was a month before the hearing.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. Art. 8308-6.34(e) (Vernon's Supp. 1992) (1989 Act). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Although an accident does not have to be witnessed to be compensable, and the claimant's testimony alone may establish the occurrence of an injury, Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989), the trier of fact is not required to accept the testimony of the claimant but may weigh it along with other evidence. Presley v. Royal Indemnity Insurance Co. , 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

Based upon the record in this case, we agree that there is sufficient evidence to support the hearing officer's determination, and affirm his decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge