APPEAL NO. 92219

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). On April 6, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to resolve the sole disputed issue between the parties, namely, whether appellant suffered a compensable injury in the course and scope of his employment with (employer). Although finding that appellant did suffer an injury to his back on or about (date of injury), rendering him unable to work on (date), the hearing officer further found that appellant did not sustain his back injury while performing work for employer and concluded that appellant had not sustained a compensable injury. Appellant generally disputes the sufficiency of the evidence to sustain the hearing officer's adverse findings and also contends that when respondent raised as a "defense" that the injury occurred outside the course and scope of employment the burden of proof shifted to respondent to prove such as a matter of "inferential rebuttal." In addition to urging the sufficiency of the evidence to support the challenged findings, respondent states that appellant's request for review was not timely filed and should be denied for that reason alone.

DECISION

Finding that appellant's request for review was not timely filed, the decision of the hearing officer has become final.

Article 8308-6.41(a) (1989 Act) provides in part that "[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 for review on the other party . . . ." *See also* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §143.3 TWCC Rule).

The Decision and Order (decision) of the hearing officer was transmitted directly to appellant by a letter dated April 27, 1992 from the Hearings and Review Division of the Texas Workers' Compensation Commission (Commission). This letter, which also included a fact sheet explaining the appeal procedures, was sent as well to respondent's attorney, to respondent, and to employer, but not to appellant's attorney. By letter of May 14, 1992, the Commission sent a copy of the decision to appellant's attorney and apologized for his being inadvertently omitted from the distribution list of the April 27th letter. In his request for review, dated and mailed on May 30, 1992, appellant stated that his attorney received the decision on May 18, 1992. In its response, the respondent essentially argues that it matters not that appellant's attorney didn't receive the decision until May 18th because it is the party, not the attorney, who is governed by the statutory 15-day time limit to appeal. TWCC Rule 102.4(b) provides as follows:

(b)After the insurance carrier or the commission is notified in writing that a claimant is represented by an attorney or other representative, all copies of

> notices and reports to the claimant will be thereafter mailed to the representative and the claimant, unless the claimant requests delivery to the representative only. However, copies of settlements, notices setting benefit review conferences and hearings, and orders of the commission shall be sent to the claimant by the commission.

Since the statute gives the party, not the representative, the right to appeal, and provides the party, not the representative, with 15 days in which to file an appeal, and since TWCC Rule 102.4(b) requires that Commission orders be sent to claimants, the operative date for determining the timeliness of this appeal is the date appellant, not his representative, received the Commission's decision. TWCC Rule 102.5(h) provides that "[f]or 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." Since the Commission's letter transmitting the decision and appeals fact sheet to appellant was dated April 27, 1992, it is deemed to have been received five days later, namely, on May 2, 1992. Appellant's deadline for filing his appeal was 15 days from that date or May 17th. However, since May 17th was a Sunday, the deadline was extended to the following Monday, May 18, 1992. *See* TWCC Rules 102.3(3) and 102.7. Appellant's request for review was dated and postmarked May 30th and thus was clearly untimely and failed to invoke our jurisdiction. Pursuant to Article 8308-6.34(h), the decision of the hearing officer became final. *See* Texas Workers' Compensation Commission Appeal No.92080 (Docket No. AM-91118212-01-CC-LB41) decided April 14, 1992.

We have reviewed the evidence to determine its sufficiency to support the challenged findings and are satisfied appellant has not been denied benefits to which he might otherwise be entitled. The evidence is sufficient and the challenged findings are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Appellant testified, through a translator of the Spanish language, that on (date), while working as a cook for employer, he prepared vegetable soup in a large metal pot and, after filling it with water, carried it towards the stove. He set the pot on the floor in front of the stove so he could move a pan on the stove, then lifted the pot and placed it on the stove. He said that since the pot was quite large and full of vegetables and water, it was heavy and that he hurt his back in lifting it to the stove. He wasn't sure the incident was witnessed but said that two coworkers, (Mr. S) and (Mr. M), were in the vicinity. The next day appellant's back hurt making it difficult for him to get out of bed and get out of his car but he did go to work and complained of pain to his supervisor, (Mr. B). He denied having told two assistant managers, (Mr. B) and (Mr. S), that he had hurt his back getting into his car; rather, he said he told (Mr. B) his back hurt so he had trouble getting out of the car. Appellant further testified that he told a former employee, (Mr. M), who had come in to check on a dispute over his hours and who was in the vicinity, about the injury. (Mr. M's) testimony basically

corroborated appellant in this regard.

On or about (date of injury), (Mr. B) saw appellant holding his back as he was departing the premises and inquired. (M). (B) and (S) both testified that appellant then told them he had hurt his back getting into his car at his apartment. According to (Mr. B), on or about June 2nd, appellant had given employer 30 days notice of his intent to resign. (M). (B) and (S), as well as a former general manager, (Mr. C), all testified that soup was cooked in a pressure cooker bolted to the floor in employer's kitchen and not in pots on top of the stove. (M). (B) and (S) denied ever having seen appellant prepare soup in a portable pot.

The point was raised as to the possibility of a language barrier and miscommunication between appellant and (M). (B) and (S) concerning appellant's explanation for his injury. Appellant took the position he spoke little if any English. (M). (B), (S), and (Mr. C) all testified they were able to adequately communicate with appellant in English. In fact, (Mr. S), being a new supervisor at the time, even took the precaution of having another employee translate the discussion of appellant's injury into Spanish to avoid any miscommunication as to whether or not it occurred on the job. Respondent introduced entries from employer's daily activities log which corroborated some of the testimony of respondent's witnesses.

The essence of the problem for the hearing officer at the close of the evidence was to sift through the testimony and other evidence and resolve the conflicts. The hearing officer, as the finder of fact, was charged with the sole responsibility for judging the relevance, materiality, weight and credibility of the evidence. Article 8308-6.34(e) (1989 Act). We cannot substitute our judgment for that of the hearing officer where the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ).

The appeal not having been timely filed, the decision of the hearing officer is final. Article 8308-6.34(h) (1989 Act).

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge