APPEAL NO. 92383

A contested case hearing with (hearing officer) presiding was held in (city), Texas, on June 23, 1992, to determine whether appellant was injured on (date of injury), in the course and scope of his employment with (employer), while removing tractor weights each of which weighed 100 to 150 pounds. The hearing officer found that appellant did remove such weights on (date of injury). However, she further found that on March 1st he helped change a tractor axle, pushing heavy machinery; on March 2nd and 3rd he helped his brother and father lift and transport large stones; on March 4th he and his brother righted an outhouse which had been blown over; on March 5th he told his supervisor his back was sore from removing the tractor weights on (date of injury); from March 4th through March 13th he performed his regular work including lifting, carrying and setting in place cultivator "spiders", each of which weighed from 60 to 85 pounds; and, that he continued to do his work after March 5th and did not tell anyone he could not work. Based upon these findings, the hearing officer concluded appellant failed to meet his burden of proving by a preponderance of the evidence that he was injured in the course and scope of his employment. On appeal, appellant challenges the sufficiency of the evidence to support that conclusion while respondent urges our affirmance.

DECISION

Finding the evidence sufficient to support the findings and the challenged conclusion, we affirm the hearing officer's decision.

Respondent asserts that it was not served by appellant with a copy of appellant's request for review and finally obtained a copy from the Texas Workers' Compensation Commission on August 26, 1992. Consequently, respondent argues first that its response was timely filed on September 10, 1992. We agree and have previously spoken on this issue. Texas Workers' Compensation Commission Appeal No. 91125 (Docket No. redacted) decided February 18, 1992. Appellant was required to serve a copy of his request for review on respondent pursuant to Article 8308-6.41(a) (1989 Act) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.4(a)(4) (TWCC Rule 143.4(a)(4)). TWCC Rule 143.1 defines service on a party as "being presented to a party in person, or mailed by certified mail, return receipt requested". Appellant's certificate of service reads: "I hereby certify that I have on this 27 day of July, 1992, delivered a copy of the attached document to [respondent's counsel and address]". This certificate doesn't indicate whether delivery was by hand or by certified mail, and respondent's attorney states it wasn't received by her. As we have said, respondent's response was timely under these circumstances.

Respondent goes on to assert that the failure of service by appellant should effectively invalidate appellant's request for review and thus deprive the Appeals Panel of jurisdiction. We cannot agree. Respondent cites no authority for the proposition that a failure of service is jurisdictional. Our jurisdiction was invoked by appellant's having timely filed his request for review pursuant to Article 8308-6.41(a) and TWCC Rule 143.3(c). *See* Texas Workers' Compensation Commission Appeal No. 92080 (Docket No. redacted)

decided April 14, 1992.

Appellant testified through a Spanish language translator that he had been employed by employer since 1973 driving a tractor and performing other jobs on the farm and worked 10-hour days. On (date of injury), a Thursday, while lifting a heavy (wheel traction) weight off a tractor, his "waist cracked" and he became immediately aware he was hurt. He and several coworkers were each removing the weights from the tractor. This testimony was corroborated to some extent by a coworker, (IG), in a statement offered by respondent. He continued to work but lifted no more weights, and he did not tell his supervisor, (Mr. R), of his injury until March 5th. During the intervening weekend of March 2nd and 3rd, he said he drove a truck to a canal where his father and brother picked up and loaded rocks into the truck for his use on a building project. He denied lifting any heavy rocks himself due to his waist pain. He worked for employer on March 4th and on March 5th and that work included his lifting of cultivator "spiders." On March 5th, he told (Mr. R) he had injured himself on (date of injury) lifting a weight. He went to the (clinic) on March 6th and continued to work hard for about one week thereafter, although he didn't lift heavy objects. He said he quit his job approximately one week after first visiting the clinic because employer did not want to pay him while he was absent for frequent visits to the clinic, and had no more work "that way" (apparently referring to light duty). He denied injuring himself in any manner or at any time other than the lifting accident on (date of injury). He has not worked since March 13th nor, as of the hearing date, has he looked for work.

(Mr. R) confirmed that on (date of injury) appellant, a farm laborer, had lifted weights off a tractor. On March 1st, appellant assisted in working on the front end of a tractor, which involved heavy work. He did report his back injury on March 5th saying he had hurt himself removing a tractor weight. These weights weigh approximately 100 to 110 pounds. (Mr. R) said that while out checking the crops on the weekend, [March 1st and 2nd], he drove past the area where appellant and his father and brother were loading rocks and observed appellant himself loading rocks. This testimony was corroborated by the deposition testimony of Walter Robertson who was riding with (Mr. R). On the following Monday and Tuesday, (Mr. R) observed appellant lift cultivator "spiders" which weigh approximately 65 to 80 pounds. He observed no apparent problem with appellant's performance of these activities, nor did appellant advise him he couldn't do his work. (Mr. R) also testified that a storm that weekend blew over a heavy outhouse and that when he took a backhoe to the site to lift it back up into position, appellant and another individual had already done so, apparently by hand. He opined that appellant could have injured himself picking up heavy rocks over the weekend.

According to his medical records, appellant was treated at the clinic during the period of March 6 through May 22, and was released to light duty work on March 13th. He was seen by (Dr. N), an orthopedic surgeon, on June 13th, diagnosed with lumbarsacral and cervical strains, and referred to a rehabilitation center. His MRI exam was normal. (Dr. N) signed a Report of Medical Evaluation (TWCC-69) which showed the date of injury as (date of injury), and stated that appellant achieved maximum medical improvement as of July 11, 1991 with a 20% whole body impairment rating for his "chronic mechanic (sic) low back

pain."

Appellant had the burden of proving by a preponderance of the evidence that he was injured in the course and scope of his employment. While it is apparent that appellant sustained his back and neck strains from some activity, the hearing officer was not obliged to accept appellant's testimony that the injury occurred on (date of injury) while lifting a tractor weight. She could believe he sustained his injury while helping family members load rocks over the weekend, or while helping to right the outhouse, or while engaging in some other activity. Although the testimony of a claimant can establish the occurrence of an injury (Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.)), the hearing officer need not accept the claimant's testimony at face value (Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621, 625 (Tex. Civ App.-Amarillo 1980, no writ)). The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. It is for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not substitute our judgment for that of the hearing officer where, as here, there is sufficient evidence to support the findings. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.- Texarkana 1989, no writ).

Finding that the hearing officer's findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust, we affirm the decision below.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge