APPEAL NO. 92484

On August 6, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the claimant, (claimant), appellant herein, did not hurt her back while dragging boxes at work on (date of injury), as claimed by appellant, and concluded that appellant did not sustain a compensable injury. The hearing officer ordered that appellant is not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer further determined that since appellant did not sustain a compensable injury, other issues before him regarding disability, maximum medical improvement, and a preexisting condition as the sole cause of appellant's inability to obtain and retain employment were moot.

Appellant contends that the hearing officer erred in his determination of no compensable injury. Respondent, the employer's workers' compensation insurance carrier, responds that appellant's request for review was not timely filed and asserts that the hearing officer's decision is supported by the evidence and asks that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

Appellant's initial request for review was timely filed. The hearing officer's decision was mailed to the parties on August 18, 1992. The initial request for review is dated September 4, 1992, and the envelope transmitting the request is postmarked September 4, 1992. The initial request was received by the Texas Workers' Compensation Commission on September 8, 1992. The initial request for review does not state the date the decision was received by appellant. Accordingly, the decision is deemed to have been received by appellant on August 23, 1992, which is five days after the date mailed. Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 102.5(h). Pursuant to Rule 143.3(c), a request for review is presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. We conclude that appellant's initial request for review was filed not later than the 15th day after the date of receipt of the hearing officer's decision as required by Article 8308-6.41(a). However, appellant's supplemental request for review which was sent to the Commission by facsimile transmission on September 15, 1992, was not filed with the Commission within the required 15 days and, therefore, will not be considered by the appeals panel. *See* Texas Workers' Compensation Commission Appeal No. 92003, decided February 12, 1992.

On (date of injury), appellant worked as a cleaning person for (employer). She testified that on that day she felt a burning sensation in her back when she dragged some cardboard boxes to the trash at work. She said that (A M), a coworker, saw her get hurt and that he asked her what was wrong with her and that she told (Mr. M) that she was tired,

could not breathe, and that her back hurt. She said that (Mr. M) and another coworker then took the boxes to the trash area while she sat down and rested. Appellant said she reported her injury to another coworker, (M M), on (date) and on the same day reported her injury to her supervisor, (C T). Medical reports showed that appellant went to (Dr. X) on May 21st and then was treated by (Dr. G) from August 1991 through May 1992. Appellant said that she missed two days of work between (date of injury) and June 6, 1991, because of pain in her leg, and that on June 6th she was told by her supervisor that she no longer had a job with the employer. Appellant said she has not worked since June 6, 1991, and that she has pain in her back, neck, and legs.

Medical records showed that appellant was examined by (Dr. X) on May 21, 1991, that he diagnosed appellant as having inflammation in the lower thoracic ribs, and that he released appellant to regular work on May 22, 1991. Appellant began treatment with (Dr. G) on August 8, 1991. (Dr. G) diagnosed thoracic spine strain and lumbar spine strain and recommended physical therapy. (Dr. G) has kept appellant off of work from the date of the initial visit through May 1992.

(A M) testified that he was working with appellant on (date of injury), that he did not see appellant get hurt on that day, that he did not ask appellant if anything was wrong with her, that appellant did not say she could not keep working, and that she did not ask him to do her work for her. This witness testified that he did not remember appellant saying anything to him about her back hurting, having a burning sensation, or being tired while at work on (date of injury). However, he stated that after work on (date of injury), appellant told him she had gotten hurt and he told appellant at that time that he had not seen anything.

(M M) testified that on (date) appellant told her that the day before she had either fallen at work or had been hurt dragging boxes at work. She also testified that appellant said she had been hurt while working at a previous job and that appellant wanted her to sign a letter regarding her injury just in case she started to hurt. (G W), the employer's vice president, testified that the employer had no plans to terminate appellant and that on June 6, 1991, appellant simply turned in her keys and told her supervisor that she would not be returning to work. He said that eventually appellant was "officially" terminated for job abandonment after she turned in her keys and failed to appear at work.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). It is the claimant's burden to establish that an injury was received in the course and scope of employment. Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-Houston [1st Dist.] 1989, writ denied). The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). Because appellant was an interested party in this case, her testimony only raised issues of fact for the hearing officer's determination. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758, 760 (Tex. Civ. App.-Amarillo 1973, no writ). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex.

1986). That the trier of fact might have arrived at findings different then he did does not justify the abrogation of the determinations the trier of fact concluded from the evidence to be the most reasonable. Escamilla, *supra*. In this case, a material portion of appellant's testimony was directly contradicted by her coworker whom she said was a witness to her alleged on-the-job injury. In a workers' compensation case, the trier of fact may believe that the claimant received an injury, but disbelieve the claimant's testimony that she received the injury while in the course of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). Viewed in its entirety, the evidence does not reveal the hearing officer's findings to be so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge