

## APPEAL NO. 92620

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On October 14, 1992, a contested case hearing was held in (city), Texas, to consider whether appellant, claimant herein, injured his back in the course and scope of employment on (date of injury). The hearing officer, (hearing officer), held that there was no back injury on that day. Claimant appealed asserting that the decision was against the great weight of the evidence and emphasizing that medical evidence supported the position of the claimant. Respondent stated that claimant's appeal was untimely and that the hearing officer should be upheld.

### DECISION

Finding that the decision is sufficiently supported by the evidence, we affirm.

Claimant's appeal was timely. See Article 8308-6.41 (a) which calls for a request for review not later than the 15th day after the date the hearing officer's decision is received from the division of hearings. See also Tex W. C. Comm'n, 28 Tex. Admin. Code §§102.5 and 143.3 (Rules 102.5 and 143.3), which provide that correspondence from the Commission is deemed to be received five days after it is sent and which considers a request as timely if mailed within 15 days after received by appellant if thereafter received by the Commission within 20 days after date appellant received the decision. In this case the hearing officer's decision was mailed to the appellant on October 28, 1992, and appellant mailed his request for appeal on November 12th, which was then received on November 17, 1992. Note that appellant's rebuttal to the response, mailed December 3, 1992, was outside the time provided and was not considered.

Claimant worked for a construction company. In a prior claim, he stated that he suffered a hernia from lifting concrete pipe in July 1991. After surgery, he returned to the job, on light duty, immediately after labor day. On that day, Tuesday, (date of injury), he reports that at approximately 8:00 a.m., he hurt his back by manually moving a heavy elevator door. He testified that he reported this to (D), who he described as a supervisor, and was placed on sweeping duty in lieu of elevator duty. He saw his doctor, Dr. H, to whom he complained of pain in his back and in his hernia repair. An MRI disclosed "borderline mild congenital stenosis L3-L4 and L4-L5"; the report went on to describe that his condition could cause "symptoms on occasion."

Claimant called AF who testified that she lives near claimant and had translated for him with regard to his employer and his medical care. She testified that she called the employer for claimant after he said he was hurt on (date of injury) and then went to the employer's site with claimant. She said that she related to SG (an office employee whose title is not specified) that claimant's back was hurt. She also testified, however, that claimant had first told her of his back hurting right after his hernia surgery.

The hearing officer stated for the record that claimant had previously appeared in a contested case hearing which determined that he did not injure his back in July.

The carrier called (D) and employer's safety director who both testified that claimant did not report a back injury. Neither indicated any knowledge that claimant had ever been assigned to operate the elevator or had operated the elevator. Documents were produced which showed that claimant was assigned to clean-up details, which did not include elevator operation. The safety director also indicated that another employee was assigned throughout the day to operate the elevator. (D) did recall hearing a conversation between the safety director and claimant's foreman which referred to claimant's groin pain as a result of light duty. A statement from SG said that claimant and a woman reported to her that claimant was still having pain from his hernia surgery. SG did not recall any discussion of back pain, but rather said the discussion involved claimant's surgery for the hernia.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Article 8308-6.34 (e) of the 1989 Act. He could question claimant's account of the injury in view of employer records that showed claimant never worked at the task said to have hurt him. He could believe employer's other employees who said that claimant only complained about his recent hernia surgery and not his back. The hearing officer could question the apparent conflict between claimant's testimony that his back injury on (date of injury) was a new injury and that of AF who said claimant told her his back hurt prior to that time. While medical records did show some abnormality in the claimant's back, they did not show, in themselves, that the back problem stemmed from an injury. The hearing officer could view these medical records as not inconsistent with a determination that claimant was not injured in the course and scope of employment on (date of injury).

This appeal consists only of fact questions which were for the hearing officer to decide. Finding that his decisions as to findings of fact and conclusions of law are supported by sufficient evidence of record, we affirm.

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Joe Sebesta  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge