

APPEAL NO. 93115

On December 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the appellant (claimant herein) did not sustain a compensable injury on (date of injury) while working for his employer, (employer), and that the claimant did not have disability. The hearing officer decided that the respondent (carrier herein) is not liable to the claimant for workers' compensation benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The claimant disagrees with the hearing officer's decision. The carrier responds that the decision is supported by the evidence.

DECISION

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

Article 8308-6.41(a) provides 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. At the close of the hearing, the hearing officer advised the parties of the time limit for filing an appeal. The hearing officer's decision was mailed to the parties on January 20, 1993. The claimant does not state when he received the decision. Accordingly, under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) the claimant is deemed to have received the decision on January 25, 1993, which was five days after the date mailed. 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 it is received by the Texas Workers' Compensation Commission (Commission) not later than the 20th day after the date of receipt of the decision. Rule 143.3(c). The 15th day after the deemed date of receipt was Tuesday, February 9, 1993. There is no envelope attached to the request for review and it appears that the request was either hand delivered to the Houston field office or was transmitted to the Houston field office by facsimile transmission. The claimant's request for review is dated February 11, 1993, and was received by the Commission on February 11, 1993. Consequently, the claimant's appeal was not timely filed and the hearing officer's decision has become final under the provisions of Article 8308-6.34(h).

Although the appeal was not timely filed, we have reviewed the record and conclude that if the appeal had been timely filed, we would have affirmed the hearing officer's decision because it is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

The hearing officer's statement of the evidence presents a fair and accurate summary of the testimony given at the hearing and is adopted. Succinctly, the claimant said he was hit in the back and right shoulder by a 12 foot board that was dropped from a scaffold at

work. He said there were six or seven people working on the scaffold. He said he did not report the accident at the time it occurred because he wanted to continue working but that he mentioned the accident to his coworkers. Several witnesses testified that several days after the alleged date of the accident the claimant reported that he had been injured at a time when the scaffolding had already been taken down so that it was not possible for him to have been injured as claimed. The employer also conducted an investigation of the accident and could not find any coworkers who had seen the alleged accident. The field superintendent and the foreman both said that they were at the scaffolding work site on the day of the alleged accident and that they did not see any accident nor were they told about any accident on that day. Several coworkers said in written statements that they worked with the claimant on the day of the alleged accident, that no accident occurred on that day, and that the claimant did not mention an accident to them. The claimant has the burden of proving that an injury was received in the course and scope of his employment. Spillers v. City of Houston, 777 S.W.2d 181 (Tex. App.-Houston [1st Dist.] 1989, writ denied). An injury need not be witnessed by other than the claimant to be compensable; however, the claimant is an interested witness and his testimony does no more than raise a fact issue for the hearing officer. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1989, no writ). The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). When the hearing officer is presented with conflicting evidence, he or she may believe one witness and disbelieve others. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987). We do not substitute our judgment for that of the hearing officer where, as here, there is sufficient evidence to support the hearing officer's finding that the claimant was not injured in the course and scope of his employment, and the finding is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The hearing officer also determined that the claimant does not have disability. "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). Consequently, in order to have disability as defined by the 1989 Act, the employee must have a compensable injury. Since there was no injury in the course and scope of employment, the claimant does not have a compensable injury. Hence, the hearing officer's determination that the claimant does not have disability is correct.

The hearing officer's decision has become final pursuant to Article 8308-6.34(h).

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Neseholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge