APPEAL NO. 93221

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On February 16, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The record was closed on February 23, 1993. The sole issue at the CCH was: "Whether the Claimant sustained an injury in the course and scope of her employment." The hearing officer determined that the appellant (claimant) did not sustain an injury in the course and scope of her employment on (date of injury). Claimant contends that the evidence supporting the hearing officer's decision ". . . was contradictory, inconsistent and insufficient to overcome the legislature's directive that the workers' comp laws be construed in favor of the injured worker" and requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds by challenging jurisdiction of the appeal and alternatively responding that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Carrier's response alleges that claimant's request for review was sent to carrier by regular mail and therefore was not in compliance with Rules 143.1 and 143.3 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 143.1 AND 143.3). Accordingly, carrier claims noncompliance with Rule 143.3 is "jurisdictional in nature as reflected by Appeals Panel Decision 92036 (decided March 11, 1992)." We do not agree. Texas Workers' Compensation Commission Appeal No. 92036, *supra*, dealt with the matter that the appellant's failure to file an appeal within 15 days as required by Article 8308-6.41 and Rule 143.3(a)(3) was jurisdictional in nature and we could not consider the appeal. The appeal in this case was timely filed (even without considering allowable mailing time under Rule 102.5). We have specifically held that failure by an appellant, claimant in this case, to properly serve respondent does not effect timeliness of an appeal and only delays the inception of the time respondent is allowed to reply. *See* Texas Workers' Compensation Commission Appeal No. 92051, decided April 30, 1992, and Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992. In this case, carrier does not allege it did not receive a copy of the appeal, or that it did not have an opportunity to adequately respond or was in any way prejudiced. Carrier's point is without merit.

Claimant, in her appeal, as quoted above, argues that the employer's evidence "was contradictory, inconsistent and insufficient" and should not overcome the legislature's directive that the workers' compensation laws "be construed in favor of the injured worker." In Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993, the Chief Appeals Judge interpreted the "liberally construed" concept in its relation to the 1989 Act. As applied to this case, Appeal No. 93057 stated "[w]e do not believe the weight of authority extends `liberal interpretation' to questions of fact," citing Jackson v. U.S.

Fidelity and Guaranty Co., 689 S.W.2d 408 (Tex. 1985). As the instant case turns almost entirely on the credibility of the witnesses and involves questions of fact, the Texas Supreme Court's language in Jackson, *supra*, is instructive. The Court, in referring to the doctrine, held at pages 411, 412:

This case, however, involves a determination of the facts, rather than the law. . . .

> Therefore, the Act itself offers nothing to resolve this case, and the rule of liberal construction certainly does not authorize liberally construing ambiguous fact findings in favor of the claimant.

Consequently, we will review the appeal on a sufficiency of the evidence standard.

The evidence in this case is fairly and accurately set out in the hearing officer's statement of evidence and is adopted for purposes of this decision. Succinctly, claimant testified she was employed by (employer) as a part-time worker to work on a cafeteria line at a middle school. Claimant testified she was to work three hours a day, from 10:45 a.m. to 1:45 p.m. on school days, "helping set up the line," filling drink machines, serving, and sometimes running the cash register. Claimant testified one of her duties was to get tea containers out of a walk-in cooler and put them on the serving line. On (date of injury), claimant testified that shortly after she came to work, she took a cart into the cooler to get a container which had two or three gallons of tea and as she was moving the container of tea off the shelf, she lost her balance, or slipped on the floor, and fell. Claimant testified that the container did not hit her, but went in one direction toward the door of the cooler while claimant fell on her buttocks away from the door. It was undisputed that claimant was wearing a white blouse and black knit pants. Claimant's testimony was that tea got on her pants but not on her blouse. The amount of tea on claimant's pants is variously described as "soaked," "soaking wet," "dripping wet," "wet," and "wet all over." Claimant testified she sat on the floor "a couple of minutes . . . maybe a minute or two" before getting up and reporting the incident to her manager, (Ms. R). Ms. R was employer's kitchen manager at the school in question. Ms. R testified claimant came to the office and reported the incident as claimant stated, but that neither claimant's shirt or pants were wet. Both claimant and Ms. R agree that Ms. R took claimant to the school nurse.

The school nurse testified that she saw the claimant after the incident and that claimant stated she had fallen and hurt herself. The nurse testified that claimant stated her right back rib cage area was hurting, that she briefly examined claimant without lifting her blouse, that claimant did not appear to be wet, that claimant did not appear to be severely injured and that she told claimant if she was in a lot of pain she might need to see a doctor. Both claimant and Ms. R agree that Ms. R offered to take claimant to a doctor and that claimant refused stating she would see her own doctor. Claimant testified she left work and drove 15 miles to her boyfriend's house where she changed clothes and washed her pants. Claimant then states she drove another 15 miles and saw (Dr. A), M.D.

Dr. A records a visit on 9/3/92 with a history of "slipped straining her R side of her neck and back." His impression was "neck and back strain" and he instructed claimant to "rest for next 5 days, may return to work on Sept 8."

It is undisputed that on September 8, 1992, claimant called (Ms. S), employer's food service director. What was discussed is disputed. Ms. S testified claimant was inquiring about her regular pay check and when she could pick it up. Ms. S testified claimant asked about holiday pay and that Ms. S told her about employer's policy that to be eligible for holiday pay an employee must have worked the day before and the day after the holiday. It was Ms. S's testimony that she asked claimant if claimant had seen a doctor and that claimant had said no. Claimant testified she called Ms. S to discuss whether claimant would "be able to get compensation for the days that [claimant] had been off. . . ."

After claimant's conversation with Ms. S, claimant saw (Dr. K), who referred claimant to Doctor's Clinic and (Dr. C), M.D. In an unsigned report (a notation said: "Report dictated but not read. Subject to transcriptional and dictational variances."), Dr. C finds range of motion is limited to 30 percent with pain in the cervical area; and "[t]enderness in the parathoracic musculature with slight muscle spasm. Muscle spasms in the cervical musculature, as well."

The hearing officer found that "claimant did not slip and fall while in the walk-in cooler carrying a container of tea" and consequently concluded that "[t]he Claimant was not injured on (date of injury), while in the course and scope of her employment." Claimant appeals citing that "[t]he Hearing Officer gave more credence to a nurse than to a physician who on the date of injury examined Claimant. . . ." Carrier asserts a key element of credibility is that claimant alleges two or three gallons of tea were spilled and at various times that her pants were "soaked," or some variation of "wet" while the evidence from Ms. R and the school nurse was that claimant's pants were not wet, that certainly claimant's white blouse was not wet or stained, and that it is unlikely that two or three gallons of tea could be spilled in a cooler without claimant getting some on her.

In this case, the factual determinations, on which the legal conclusions are based, depend largely on the credibility of the witnesses and the weight to be given to their testimony. The hearing officer saw and heard the testimony and observed the demeanor of the witnesses, including the claimant. Article 83408-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. An employee seeking workers' compensation benefits for a work-related injury has the burden of proving that the injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). That the claimant is the only witness to an injury does not defeat a valid claim. However, the claimant's testimony is that of an interested party and

only raises an issue of fact for the hearing officer who is the trier of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer, after considering all the evidence, chose to believe the carrier's witnesses, which would tend to indicate no accident happened, or at least not as claimant stated. When there is conflicting evidence, as there was in this case, the hearing officer, as 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 (Tex. 1986).

Where, as here, there is sufficient evidence to support the hearing officer's determinations, there is no sound basis to disturb the decision. Only if we were to determine, which we do not in this case, that the decision of the hearing officer was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would we be warranted in setting aside the hearing officer's decision. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) ; In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Applying these standards of review, we affirm.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge