APPEAL NO. 93279

At a contested case hearing held in (city), Texas, on March 16, 1993, the hearing officer, (hearing officer), determined adversely to the appellant (claimant) the two disputed issues, namely, whether there is a causal connection between claimant's back and neck problems and the accident of (date of injury), and whether claimant has disability from such accident. Claimant challenges the hearing officer's conclusions that he failed to prove by a preponderance of the evidence both that he sustained injuries to his back and neck in the course and scope of his employment and that he had disability as that term is defined by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1993) (1989 Act). Claimant also challenges three of the factual findings. The respondent (carrier) first asserts the untimeliness of claimant's request for review and next contends the evidence is sufficient to affirm the challenged findings and conclusions.

DECISION

Finding that claimant's appeal was timely filed and that the evidence is sufficient to support the challenged findings and conclusions, we affirm.

Claimant's request for review stated he received the hearing officer's decision on March 25, 1993. Thus, he was required by Article 8308-6.41(a) to file his request for review with the appeals panel not later than 15 days thereafter, that is, by April 9, 1993. As the carrier points out, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a) (3) (Rule 143.3(a)(3)) further requires the request for review be filed with the (city) central office of the Texas Workers' Compensation Commission (Commission) not later than the 15th day after the hearing officer's decision is received. Claimant's request for review was addressed to the Commission's Appeals Clerk, Hearings & Review, at the 9city), Texas, address stated in the Commission's letter forwarding the decision to claimant. However, no envelope accompanied claimant's appeal which is dated April 5, 1993, date-stamped as having been received at the Commission's (city) field office on April 5, 1993, and date-stamped as having been received at the Commission's Chief Clerk's office in (city) on April 12, 1993. Accordingly, while the request was timely received at the Commission's field office, it was not timely received at the Commission's central office in (city) because the field office did not take immediate action to forward the request. We have previously addressed the timeliness of appeals sent to Commission field offices and have found such to be timely filed. Under the circumstances of this case, we find that claimant's appeal was timely filed and that this panel's jurisdiction was invoked. *See* Texas Workers' Compensation Commission Appeal No. 92045, decided February 25, 1992, and Texas Workers' Compensation Commission Appeal No. 93072, decided March 12, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 92099, decided May 21, 1992, where the claimant's appeal was received untimely at both the Commission's field office and its (city) central office.

The parties stipulated that on (date of injury), claimant was employed by. (employer), and that he suffered an injury to his elbow as a result of an accident on the job. Claimant

testified that on that date at around 11:00 a.m., while standing near an iron gate, he pulled the starter cord of a blower and his right elbow struck the gate, causing immediate pain in his elbow and up to his shoulder. He said he also "twisted" at that time and told a nearby coworker, (Mr. C), that his back had "popped." However, claimant did not then have back pain and finished his work that day which included continued use of the blower. When he awoke the next morning, claimant said his back hurt. He did not work that day and said he told employer his arm and back were hurting. On the following day, employer's operations manager, (Mr. J), took claimant to (Dr. M) who examined his arm (but not his back or neck), took x-rays, told him he had "pulled a nerve" in his arm, gave him medication, and released him for light duty work. Dr. M's records indicate he saw claimant on (date), diagnosed epicondylitis and elbow contusion, and released claimant to return to work the following Monday restricted to light duty for one week. The following Monday, claimant worked for one-half the day until employer stopped the work because of rain. He said he did not return to work the rest of the week because of the pain in his arm and back and had his wife call employer on those days. When his wife called employer on Friday, claimant said Mr. J advised her to take claimant back to Dr. M and further referred to claimant as "a lazy ass" (which Mr. J denied). For that reason, claimant said he did not return to Dr. M but went to the Texas Workers' Compensation Commission (Commission) and filed a claim. His claim form was signed on February 28, 1992, and stated that his injury affected his right arm, waist and back. He said he never returned to work for employer because of his pain. Claimant further stated he did not see Dr. M again, and in fact sought no further medical treatment until he saw (Dr. Z) late in July 1992 after returning to (city), Texas, from (city), Texas, where he had gone to live and work for a time.

Claimant said that when he filed a claim with the Commission, he was told employer had no workers' compensation insurance, so he moved to (city). He worked at a restaurant in that city serving food in the food line until the restaurant closed and he returned to (city) in late July 1992. He testified, variously, that he has not worked since returning to (city) because he is "afraid of the insurance or something with my social security," that "if I work, then they're going to say that I'm not injured," and that he had applied, unsuccessfully, for a job at a restaurant and at a company which never opened. Claimant said Dr. Z told him he had "pulled a nerve" in his arm and that he has a "disc hernia" but never mentioned his neck which claimant said does hurt "from time to time." According to the records of Dr. Z, claimant was first seen on July 23, 1992, diagnosed with lumbosacral radiculopathy and a herniated lumbar disc, and given medication. Dr. Z took claimant off work on July 30th.

Mr. J testified that he learned of claimant's accident the day after the accident from Mr. C, that claimant never told him he had hurt his back, that he took claimant to Dr. M's office and that, in Mr. J's presence at least, claimant never mentioned his back to Dr. M. Mr. J heard Dr. M tell claimant he wanted to see him in a week. Claimant said, variously, that he never returned to Dr. M because Mr. J never took him and because Mr. J had insulted him. After claimant performed light duty for the half-day period when the work was stopped

for rain, Mr. J asked him how it went and claimant responded, pointing to his elbow, "not too bad, still a little pain." According to Mr. J, neither claimant nor his wife contacted employer the rest of that week until Friday when claimant's wife called to advise that claimant's elbow was hurting and Mr. J said he told her to tell claimant to return to work so that Mr. J could get him to the doctor. Sometime the following week, claimant's wife told Mr. J claimant could not come to work because his car was broken. According to Mr. J, claimant voluntarily left his job. When claimant came to employer's premises two or three weeks later, Mr. J told claimant he still had a job. When he asked claimant about returning to work, claimant responded: "Well, we'll see. Maybe." An entry in Dr. M's records stated that employer had come by Dr. M's office, showed concern because claimant had not returned to work, that claimant had not followed up there, and that employer had tried unsuccessfully to have claimant followed up by Dr. M without success.

(Mr. S) testified that although he was at the job site on the day of claimant's accident, he did not witness it. He stated that claimant never mentioned his back, however, and that when he observed claimant later performing the light duty, which consisted of bending over to pick up papers and pull weeds, claimant appeared to have no difficulty. (Mr. R), who worked with claimant and said he talked with claimant and his wife, testified that claimant never mentioned his back or neck, and that it was his impression that claimant did not return to work after his injury because of "personal doings of his own," such as car trouble.

In addition to the conclusions that he failed to prove he sustained compensable injuries to his back and neck and further failed to prove he had disability as defined in Article 8308-1.03(16), claimant challenges findings that he did not injure his back or shoulder when he pulled the cord on the employer's blower, that the reason claimant did not return to work was not due to or the result of the injury to his elbow, and that the reason claimant did not return to work cannot be determined from the evidence presented. The disputed issues presented fact questions for the hearing officer to resolve. Article 8308-6.34(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. Conflicts in the evidence are for the hearing officer to resolve. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Amarillo 1973, no writ). We will not substitute our judgement for that of the hearing officer where the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 289-290 (Tex. App.-Texarkana 1989, no writ).

Respecting the issue concerning the extent of claimant's injuries on (date of injury), while the testimony of a claimant can establish a compensable injury and disability from such injury, the hearing officer here could consider the evidence that no coworker was aware of claimant's having injured his neck and back when he pulled on the blower cord and hurt his elbow, that claimant saw Dr. M on only one occasion and did not seek a follow-up visit, that Dr. M's record of the single visit had no reference to claimant's neck and back, and that claimant worked in a restaurant for several months before late July 1992 when the first

reference to his back appeared in a medical record. Further, the hearing officer could consider that the only evidence whatsoever concerning claimant's neck was his testimony that his neck hurt "from time to time." While we are satisfied the challenged findings and conclusion concerning the neck and back injury issue find sufficient support in the evidence, we do find it necessary to modify Finding of Fact No. 7 which was stated as follows: "The Claimant did not injure his back or shoulder when he pulled the cord on the Employer's blower." (Emphasis supplied.) Since the disputed issue was whether claimant injured his back and neck on (date of injury), and since the evidence and argument of the parties addressed those particular areas of claimant's body, we are confident the hearing officer simply misspoke herself in that finding when referring to claimant's shoulder rather than to his neck. Under the circumstances of this case and given the evidence of record, we may and do imply a finding that claimant's neck was not injured when he pulled the cord on the blower and we disregard as harmless error so much of that finding as refers to the shoulder. *See* Texas Workers' Compensation Commission Appeal No. 91071, decided December 30, 1991, and Texas Workers' Compensation Commission Appeal No. 92129, decided May 14, 1992.

Disability is defined as the "inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). While the parties stipulated that claimant had a compensable injury to his elbow, the hearing officer determined, correctly we believe, that claimant failed to prove he had a compensable back and neck injury. In determining that claimant failed to prove that his elbow injury resulted in his inability to obtain and retain employment at his preinjury wages, the hearing officer could credit the evidence that claimant completed his work on the day of his injury, did not see Dr. M until two days later, did not return to Dr. M for any follow-up treatment, did work for one-half day until stopped by rain on February 24th, and later worked at a restaurant serving food for several months until the restaurant closed. The hearing officer could also consider the several explanations testified to by the claimant for not working upon his return to (city). As we were with the issue of injury to claimant's neck and back, we are similarly satisfied the evidence sufficiently supports the hearing officer's findings and conclusions respecting the disability issue. The challenged findings (as modified) and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660; Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge