APPEAL NO. 93534

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing, (hearing officer) presiding, was held in (city), Texas, on May 6, 1993. The issues at the hearing were: 1. whether the appellant (claimant herein) was injured in the course and scope of his employment; 2. whether the respondent (carrier herein) waived its right to contest the issue that the claimant was injured in the course and scope of his employment; 3. whether the claimant notified his employer of his injury in a timely manner. The hearing officer found that the carrier had not wai ved its right to contest whether the claimant was injured in the course and scope of his employment, that the claimant was not injured in the course and scope of his employment, and that claimant did not timely report the injury to his employer.

The claimant, through his wife, wrote a letter to the Texas Workers' Compensation Commission (Commission) stating a desire to appeal and requesting information concerning the appellate process. The claimant later sent the Commission a request for review. The carrier responds alleging that the claimant's appeal is untimely.

DECISION

Finding the appeal timely, no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

First we must consider whether the appeal is timely. Commission records reflect that the decision of the Commission was distributed on June 10, 1993. Claimant does not indicate when he received this decision, so we will deem his receipt, pursuant to Tex. W. C. Comm'n 28 TEX. ADMIN. CODE § 102.5(h) to have been on the fifth day after the decision's distribution or on June 15, 1993. Pursuant to Article 8308-6.41(a) (1989 Act), a party desiring to appeal the decision of the hearing officer is required to do so not later than 15 days after receiving the decision, or in this case, by June 30, 1993. The claimant mailed a letter to the Commission, dated June 27, 1993, postmarked June 28, 1993, and received by the Commission on June 30, 1993, requesting information concerning filing an appeal. In this letter the claimant states, "[w]e wish to appeal our case," and that "[w]e do feel we can win an appeal and wish to be heard." A copy of this letter was transmitted by fax by the Commission to the carrier on June 30, 1993.

The claimant then filed a request for review postmarked July 6, 1993, and received by the Commission on July 8, 1993. This request for review stated specific grounds of appeal and related that the reason that the claimant had been delayed in appealing was that the claimant's attorney had withdrawn after the hearing leaving the claimant uncertain as to whether he could appeal until after his wife had written a letter to the Commission at "the end of June requesting an appeal." Both the letter of June 27th and the request for review are handwritten and are signed with the claimant's name, although the claimant's request for review seems to indicate that the June 27, 1993, letter may have been written and

actually signed by the claimant's wife.

The letter of June 27, 1993, was filed within 15 days of the date the claimant was deemed to have received the decision of the hearing officer, and if sufficient to appeal the claimant's case, it is clearly timely. As to sufficiency of an appeal, we have repeatedly held that no particular form of appeal is required and that an appellant's appeal, even though terse, or inartfully worded, will be considered. Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993 and cases cited therein. The statement in claimant's letter of June 27, 1993, that he wished to appeal his case is essentially the same as the statement we held in Texas Workers' Compensation Commission Appeal No. 92292, decided August 17, 1992, to be sufficient to constitute an appeal. In such cases, we have presumed that the appellant's complaint is based on sufficiency of the evidence to support the findings of fact and conclusions of law of the hearing officer. Appeal No. 92292, *supra*; Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992. Whether or not it was the claimant or his wife who actually sent the letter of June 27, 1993, is not relevant as we have recognized that a wife, and other family members, may assist a claimant in pursuing a claim. *See* Texas

Workers' Compensation Commission Appeal No. 91041, decided December 17, 1991; Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992.

While the letter of June 27, 1993, was sufficient to constitute a timely appeal on the grounds of evidentiary sufficiency, the request for review mailed by the claimant on July 6, 1993, was clearly untimely, and we will not consider it. Thus we will review the sufficiency of the evidence in the present case.

The hearing officer summarizes the evidence in detail in his Decision and Order, and we adopt his statement of evidence for purposes of our decision. To briefly review the facts, the claimant worked as a security guard for his employer and testified that while working on (date of injury), he found a roof hatch left open. Claimant stated that he tried to close the roof hatch but could not because it was too heavy. He testified that he called for assistance and a coworker came and assisted him to lift the hatch. The claimant contends that he injured his back while lifting the hatch.

Claimant testified that he told his dispatcher that he had hurt his back and was going home to take medicine and rest. Claimant states that he worked his normal shift the following day, but after work, due to back pain, he went to a hospital emergency room. Medical records from this emergency room visit on June 14, 1993, indicate that the claimant did not give a history of any job related incident, but reported he had been suffering from back pain for a week. Claimant denies providing this history at the emergency room. Claimant was advised to take three days off work and called in sick the next day. The claimant had already been scheduled to be off the two following days. Claimant returned

to work after his days off and performed his regular duties until July 22, 1992, when, while home, the claimant had a difficult time walking and almost fell. The claimant returned to the emergency room for treatment of his back, but provided a history of no trauma or heavy lifting.

The claimant was later treated by (Dr. B), who referred him to (Dr. V), an orthopedic surgeon, who he saw on July 30, 1993, and who advised the claimant that based upon an MRI scan that he had a herniated disc and would require two surgeries. The claimant testified that prior to seeing Dr. V he considered that his injury of (date of injury), was trivial but shortly after being informed by Dr. V of the need for surgery he advised his employer that his back problems related to a (date of injury), work related injury.

The carrier presented evidence indicating that the claimant was not injured at work on (date of injury), and did not report any injury until after (date). The carrier also offered a Notice of Refused or Disputed Claim (TWCC-21) dated August 27, 1992, which the carrier asserted raised the issues of the whether the claimant was injured in the course and scope of employment as well as the timely notification to the employer concerning the injury.

Article 8308-6.34(e) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, the claimant testified that he was injured in the course and scope of his employment on (date of injury). As an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). There was evidence to the contrary in the history that the claimant provided to medical service providers

as well as the statements of witnesses. In light of the evidence presented and the above described standard of review, we cannot say that there was insufficient evidence to support the finding of the hearing officer that the claimant was not injured in the course and scope of his employment.

In regard to notice, the claimant testified that he reported an on the job injury to his dispatcher on the date of injury and the dispatcher states in a sworn statement that he did not. Resolution of this conflict is clearly the province of the hearing officer. While the claimant testified that he believed that his injury was trivial until after his discussion with Dr. V on (date), there is also evidence to the contrary such as the claimant's need for medical treatment, the medical records of his treatment, and the fact that the alleged injury required the claimant to miss work. This raises a question of fact to be resolved by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 93550, decided August 12, 1993. Again we are unable to say that there was insufficient evidence to support the hearing officer's finding in light of the proper standard of appellate review.

Accepting the finding of fact of the hearing officer as to when the claimant actually reported the injury to employer, and finding no evidence to set it aside, the TWCC-21 filed by the carrier is timely to raise the issue of compensability.

For the foregoing reasons, we affirm the decision of the hearing officer.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge