APPEAL NO. 93562

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. 1993). On June 3, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) continued to have disability from September 8, 1992, to the date of the hearing. Appellant (carrier) asserts that claimant was employed during the period and that his condition existed prior to the compensable injury. Claimant replies that the appeal of carrier was not timely and that it merely questions the weight of the evidence for which the hearing officer is responsible.

DECISION

We affirm.

At the hearing the parties agreed that the issue was whether claimant's disability continued after September 8, 1992.

Article 8308-6.42(c) of the 1989 Act states that the Appeals Panel "shall determine each issue on which review was requested."

The Appeals Panel determines:

That the appeal in this case was timely made.

That there is sufficient evidence to support the hearing officer's determination that disability continued past September 8, 1992.

The record indicates that the hearing officer's decision was distributed from (city), Texas, to the parties on June 17, 1993. Texas W. C. Comm'n 28 TEX. ADMIN. CODE § 102.5h (rule 102.5(h)) provides that such notices are deemed as received five days after mailing. Five days after June 17 is June 22, 1993. An appeal must be filed with the appeals panel not later than the 15th day after the date it was received. (*See* Article 8308-6.41(a) of the 1989 Act.) Fifteen days from June 22 is July 7, 1993, the day the appeal was received. The appeal was timely.

Claimant worked for (employer) when he was in an motor vehicle accident on (date of injury), while in the course of employment. He testified that the accident hurt his shoulder and his head. Some evidence indicated that he was able to work for approximately two months after the accident, but that fact was not said to have ruled out that a closed head injury occurred, according to (Dr. J), the medical evaluation physician who saw claimant in February 1992. Claimant introduced statements and medical records from (Dr. T), (Dr. G), and (Dr. S) which address claimant's present condition. Dr. T states that claimant was injured on (date of injury), and that he has an organic personality disorder stemming therefrom. Dr. S and Dr. G refer to surgery for claimant's chronic shoulder separation, and Dr. S relates claimant's condition to the accident in July 1991. As recently as April 1993,

Dr. T writes that claimant has poor concentration and is "disabled" in reference to the (date of injury), injury. Claimant testified to extensive medication he had received during the period in question; the medical records indicate that such medication was prescribed.

The focus of the evidence at the hearing centered on a telephone call that was made to (DMS), a telecommunications company, on a date that was described as in the fall of 1992. In that conversation, a caller named MM, inquired whether claimant was an employee at DMS. (CS) replied that he was and had been since September 8, 1992. Both CS and (DC), a vice president of the company to whom CS had turned for help in answering the caller's questions, testified that they were good friends of claimant and were aware that he was considering the purchase of a house; they wrongly concluded that this was a credit check in regard to a house purchase and therefore had lied in stating that he was an employee when he was not. DC stated that he had met claimant when he was working for employer and DMS had used employer for long distance service. DC thought claimant was very good at his job and did discuss hiring him when he received medical clearance to go back to work.

In addition to taking the position that claimant worked as an employee for DMS, based on the telephone conversation discussed in the prior paragraph, carrier also pointed out that DMS had paid "Ferris American" at least once for services. FA is a company owned by claimant's wife. While there was no issue of "sole cause" stated at this hearing, the carrier also introduced evidence of a motor vehicle accident involving claimant in 1990, which was argued as causing the problems now described as rendering claimant unable to obtain or retain employment.

Claimant, claimant's wife, and DC all testified that claimant did not work for, or provide service to, DMS or any company connected to DMS; all testified that no money was transferred from DMS to claimant (or to FA on behalf of claimant). At least some medical evidence connects the (date of injury), injury to the medical condition claimant now experiences which prevents his work. No personnel, tax, or similar records indicative of any employment of claimant by DMS or any other employer from September 8, 1992, to the date of hearing were introduced. No medical evidence introduced indicates that the 1990 accident is a causative factor for claimant's present medical condition, much less the sole cause, and claimant denies that such accident was detrimental to him.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e). He could believe that DC and CS were lying when talking on the telephone to Mark Morgan concerning claimant's employment with DMS, but that they were telling the truth at the hearing. *See* Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The hearing officer could also believe claimant when he said he had not worked for or been employed by anyone since September 8, 1992. In issues involving disability the hearing officer can reach a determination based on the

testimony of the claimant, alone. *See* Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. The medical evidence was consistent with claimant's statement that he could not work. There was no documentary evidence of employment by claimant to contradict the testimony at the hearing by claimant, DC, and CS.

The Findings of Fact and Conclusions of Law that indicate claimant cannot obtain and retain employment because of his compensable injury and that he has had disability since September 8, 1992, are sufficiently supported by the evidence. The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert Potts
Appeals Judge

Susan M. Kelley
Appeals Judge