APPEAL NO. 93928

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. art 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on September 3, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) sustained an injury to his ankle but not to his colon on (date of injury), that he did not timely report any injury occurring on (date of injury), and that he did not have good cause for such failure to timely report an injury. The claimant appeals asserting his disagreement with several of the hearing officer's findings of fact. Respondent (carrier), who also filed a conditional appeal (conditioned upon the claimant appealing), urges that there is insufficient evidence to support a finding and conclusion that the claimant sustained an ankle injury but that there is sufficient evidence to support the findings and conclusions with which the claimant takes issue. Carrier also asserts that the appeal by the claimant was not timely filed.

DECISION

Finding the evidence sufficient to support the hearing officer's findings and conclusions, we affirm. We also determine the claimant's appeal was timely filed, the decision having been distributed on October 1, 1993, and the appeal having been postmarked October 20, 1993, with five days allowed for mail time.

The evidence in this case is set out fairly and adequately in the hearing officer's Decision and Order and is adopted for purposes of this decision. Very briefly, the claimant testified he injured himself at work on (date of injury), when he slipped on a stairway. Although he did not fall completely to the ground, he twisted himself as he grabbed a stair railing and fell on his left leg and ankle. Both he and his wife testified that that evening his ankle was swollen and bruised and that they bought some over-the-counter medication for it. The ankle apparently bothered him for a couple of days, but he did not think it was serious. There is evidence that a coworker noticed that he was limping. In any event, the claimant worked up to December 1, 1992, when he was terminated for other reasons. He testified that he had some stomach problems shortly after the incident of (date of injury), and that he took some over-the-counter medications such as Zantac and Maalox for long standing stomach problems. The claimant and his wife testified that his stomach condition got worse and he was taken to the hospital on December 7th on an emergency basis where a colon or bowel blockage was diagnosed. He underwent surgery on the 8th of December and a Report of Operation states in part:

> Distal small bowel was caught underneath a loop of omentum that had been adherent to the old appendectomy scar. Once this omentum was freed from the anterior abdominal wall, the bowel could be freed of its volvulus around the omental adhesion. The bowel was then run in its entirety from the lumen of Trietz to the cecum and no other adhesions were found.

The claimant and his wife testified that while the claimant was in the hospital following his surgery they discussed the cause of the claimant's condition with the surgeon who asked

if the claimant had lifted anything heavy or had an accident. (There was also evidence that the discussion with the doctor may have occurred during an office visit on December 21, 1992). According to their testimony, the surgeon suggested to them that the claimant may have torn an adhesion causing his colon problem in his fall. A medical record in evidence indicated that the adhesions appeared to be from a previous surgery and that it could not be determined whether the adhesions were torn as a result of the incident of (date of injury). There was no medical evidence establishing a causal linkage between the colon blockage and the incident of (date of injury).

The testimony with regard to notice of injury was in considerable conflict with some inconsistency in the claimant's testimony. The employer records and the testimony of the supervisor and personnel specialist showed that the first notice of any work related injury by the claimant was made in early January 1993. The initial accident report filled out by the claimant was dated January 14, 1993. On the other hand, the claimant testified that he told his supervisor about the job related injury shortly after he got out of the hospital on December 15, 1993, and that he had not made any connection between the colon problem and his slip at work until after his talking to his surgeon while in the hospital. The claimant's wife had talked to the former supervisor while the claimant was in the hospital but apparently only about safekeeping of the claimant's tools.

The findings of fact with which the claimant takes exception are those that state he did not suffer an injury to his colon, that he should have know that his colon problem might be related to the incident on December 21, 1992, that the claimant did not notify the employer of any (date of injury) injury until on or about January 4, 1993, that the claimant did not have good cause for failure to notify beyond December 25, 1992, and that the employer first knew of the injury in January 1993 and the carrier first knew on March 8, 1993. As indicated, there was considerable conflicting evidence, particularly regarding the notice issue. The hearing officer is the fact finder (Section 410.168(a) and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). Here, the lack of medical evidence to establish a causal link between the colon blockage (*see* Texas Workers' Compensation Commission Appeal No. 93358, decided June 23, 1993) and the incident, together with the operation report and the claimant's medical history, and the circumstances surrounding the incident, were sufficient evidence for the hearing officer's determination that the claimant did not suffer an injury to his colon on (date of injury). In a like vein, the testimony of the claimant, his wife and a coworker formed a sufficient basis for the hearing officer's determination that the claimant did sustain an injury to his ankle on (date of injury). Where there is sufficient evidence to support the determination of the fact finding hearing officer, we will not substitute our judgment for that of the hearing officer. Texas Workers' Compensation Commission Appeal No. 93931, decided November 23, 1993. Only were we to find, which we do not, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound reason to disturb his decision. Texas Workers' Compensation Commission Appeal No. 92232, decide July 20, 1992.

As indicated, the evidence regarding the notice issue was in conflict and the testimony of the claimant indicated some inconsistency. The hearing officer apparently did not give great credence to the testimony of the claimant on this issue, and that was clearly within his prerogative, as is the case with all witness. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.- Corpus Christi 1983, writ ref'd n.r.e.). Again, we find sufficient evidence in the record to support his findings on the issue of timely notice and find no basis to disturb his decision. Appeal No. 92232, *supra*.

The decision is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge