APPEALS PANEL NO. 94026
FILED FEBRUARY 1, 1994

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing was held on November 18, 1993, in (city), Texas, with _____ presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) sustained a compensable right shoulder injury; the date of the injury; whether he timely reported the injury; if not, whether he had good cause for failing to timely report the injury; and whether he had disability. The hearing officer ruled on all issues against the claimant who now appeals only the issues of compensable injury and timely notice urging that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust. The respondent (carrier) argues in response that the claimant's appeal was not timely filed and that the decision of the hearing officer was supported by sufficient evidence.

DECISION

Determining that the claimant's appeal was not timely filed and that the jurisdiction of the Appeals Panel has not been properly invoked, the hearing officer's decision has become final pursuant to Section 410.169.

Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was mailed to the claimant and his attorney on December 8, 1993, with a cover letter of December 6, 1993. Claimant's attorney asserts in his appeal that counsel received the decision on December 14, 1993, and that the request for review must be filed no later than December 29, 1993. The appeal is dated December 29, 1993, with service on the opposing party the same day. The appeal was received in the Commission's central office in Austin on January 7, 1994.

Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a) (Rule 143.3(a)). The Appeals Panel has held that the time for filing a request for appeal begins to run on the date the party, not counsel for the party, received the decision. Texas Workers' Compensation Commission Appeal No. 93353, decided June 21, 1993, and Texas Workers' Compensation Commission Appeal No. 92219, decided July 15, 1992.

The request for review does not state when the claimant received the hearing officer's decision. Therefore, under Rule 102.5(h) the claimant is deemed to have received the decision on December 13, 1993, which was five days after the date it was mailed. A request for review is presumed to be timely filed it if is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and it is received by the Commission not later than the 20th day after the date of receipt of the decision. Rule

143.3(c). The 15th day after the deemed date of receipt was Tuesday, December 28, 1993. Because the claimant's request for review is dated December 29, 1993,[1] and was received by the Commission on January 7, 1994, we conclude the request for review was not timely filed.

Although not necessary to our decision, we have nonetheless examined the record in this case to determine whether there was sufficient evidence to support the hearing officer's determinations on the matters submitted for appeal. *See* Texas Workers' Compensation Commission Appeal No. 92080, decided April 14, 1993.

The claimant has the burden of establishing by a preponderance of the evidence that a compensable injury occurred. Martinez v. Travelers Insurance Company, 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). Sections 409.001 and 409.002 require the claimant to notify the employer or an employee of the employer who holds a supervisory or management position of the injury, or to establish that the carrier had actual knowledge of the injury, not later than the 30th day after the date the injury occurs. Failure to do so, relieves the employer and carrier of liability under the 1989 Act. Whether an injury occurred and required notice was given are ordinarily questions of fact to be determined by the hearing officer based on his or her evaluation of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 93761, decided October 4, 1993, and Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer as fact finder is the sole judge of the weight and credibility of the evidence and is entitled to believe all, part or none of the testimony of any one witness. Section 410.165(a). The hearing officer also resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In reviewing the sufficiency of the evidence to support a finding, only if we determine that the evidence is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust do we reverse. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951).

In this case, the hearing officer resolved against the claimant the issue of whether he sustained an injury to his right shoulder on (date of injury). The evidence in the record discloses that the claimant had previously injured his back and undergone an L4-5 fusion in September 1992. This injury is the subject of a separate workers' compensation claim. He returned to light duty on (days before injury). The claimant testified that he injured his right shoulder while washing truck windows on (date of injury), and gave an opinion that Dr. W

[1]Although the request for review bears a date of December 29, 1993, the same date service was certified as made on the carrier, the envelope containing the request has an internal office postage meter (not an official U.S. Postal Service (U.S.P.S.) postmark) date of December 27, 1993. We consider the actual date of mailing to be December 29, 1993. The envelope bears no U.S.P.S. cancellation mark. In any event, whichever date is considered to be the date of mailing, the request was not received by the Commission no later than the 20th date after receipt of the decision of the hearing officer as required by Rule 143.3(c). *See* Texas Workers' Compensation Commission Appeal No. 931172, decided January 18, 1994.

also believed he suffered a new shoulder injury on this date. Dr. W diagnosed right shoulder impingement which he considered "secondary to his window washing" based on the history provided by the claimant. In opposition to this view, the carrier argues that any pain was, at most, simply a general soreness to be expected when someone returns to work after a long time off and that the claimant has manufactured a new injury because he anticipated from Dr. W's status report in early (month/year) that he would be returned to full-time work without restriction sometime around the end of (month). The carrier also points out discrepancies in the claimant's account of how he was injured, saying first it occurred while disassembling oil filters for recycling, then saying it occurred while washing truck windows.

The Appeals Panel has held that the testimony of the claimant, if found credible by the hearing officer, is sufficient to establish the existence of an injury in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 93972, decided December 8, 1993. We have also observed that facts set out in the history of a medical record are not probative evidence that an injury occurred as set out in the record. Texas Workers' Compensation Commission Appeal No. 931136, decided January 27, 1993. The hearing officer could believe the claimant's version of the injury or reject it as motivated by a desire to continue in a disability status or as simply not credible. In this case the hearing officer considered the evidence and found no compensable shoulder injury. While the record could support a contrary inference that an injury occurred as alleged, we cannot say that the determination of the hearing officer is subject to reversal as contrary to the great weight of the evidence or based on insufficient evidence. *See* Texas Workers' Compensation Commission Appeal No. 93620, decided September 7, 1993.

The claimant also contends that the carrier and employer received notice of his injury within 30 days. The Appeals Panel has held, citing relevant court decisions, that notice is adequate if it in some measure gives information that the employee has been injured, the nature of the injury and how and when it happened that would lead a reasonable man to conclude a compensable injury had been sustained. *See* Appeal No. 93761, *supra*. The claimant points to four such notices. First, he contends that (Ms. W), the carrier's case manager, was present for his examination by Dr. W on (days after injury), when he complained to Dr. W about his shoulder injury. Dr. W does not refer in his report of this examination to her being present. Ms. W also stated in a letter to Dr. W that she was not able to be present for the examination. Second, in a letter to the carrier of May 7, 1993, Ms. W states:

> [Claimant] reported to me that he was still having a lot of dizziness, headaches and weakness. He was barely able to continue in his position. He also complained that he began having shoulder pains.

Claimant argues that this shows actual knowledge of a new injury. Carrier responds that this letter refers only to pain and reflects no knowledge about any new injury. Third, the claimant contends that in a conversation on May 5, 1993, with his supervisor, (Mr. R), he told Mr. R about his shoulder injury and asked for two days off to get a cortisone injection.

Mr. R recalled this conversation as simply a request by the claimant for two days off for the injection, but testified that no mention of a new injury was made. He was "under the impression" that the cortisone was connected with the claimant's previous back injury. Lastly, the claimant contends that in a May 24, 1993, conversation he told Mr. R of his shoulder injury. Mr. R concedes that the claimant told him on this date that he hurt his shoulder, but recalls that the claimant gave two different versions of how it occurred (recycling oil filters; cleaning truck windows.)

The carrier argues that this conversation of May 24, 1993, is the first notice of the injury. The claimant's first TWCC-41, dated July 20, 1993, gives a date of injury of (days before injury) - more than 30 days prior to the May 24th conversation. On July 23, 1993, the carrier disputed the claimed injury giving as a reason that the claimant did not timely report the injury. It was not until September 13, 1993, after the claimant was informed that the carrier disputed liability based on untimely notice, that the claimant submitted a new TWCC-41 in which he claimed injury on (date of injury) - within 30 days of the conversation with Mr. R.

The hearing officer found, based on this evidence, that the claimant did not timely notify the employer of his injury. The claimant was inconsistent in not only describing the job-related activities that he claims caused his shoulder injury, but also in reporting three different dates for the injury (claimant admits telling Dr. W in his first conversation with him after the injury that the injury occurred on (days before injury)). While his explanation of inexact recollection and similarity of duties on the different days when he contended the injury occurred may have been plausible, the inconsistencies in his testimony raised doubts about not only when he was injured, but also about when and how he reported the injury. Having thus reviewed the record, even were we to have considered claimant's appeal, we would have concluded that the hearing officer's findings and conclusions that the claimant did not give timely notice of his claimed shoulder injury are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Texas Workers' Compensation Commission Appeal No. 93440, decided July 15, 1993.

Since the claimant's request for review was untimely, the jurisdiction of the Appeals Panel was not properly invoked. Pursuant to Section 410.169 and Rule 142.16(f), the decision of the hearing officer has become final.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge