APPEAL NO. 990514

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was commenced on October 8, 1998, and concluded January 6, 1999. With regard to the issues before her, the hearing officer determined that appellant (claimant) had not sustained a compensable injury on _____ (all dates are 1998 unless otherwise indicated), and that claimant did not have disability.

Claimant appealed, contending that he had gone to the company doctor who took x-rays and said that he was hurt. (We accept that as a challenge to the sufficiency of the evidence.) Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging that claimant's appeal is untimely and otherwise that the hearing officer's decision should be affirmed.

DECISION

Affirmed.

First, regarding the timeliness of the appeal, the hearing officer's decision and order was distributed on February 17, 1999, by a cover letter of that date. Since claimant does not state when he received the hearing officer's decision, we apply the five-day deemed receipt rule of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)). Claimant is deemed to have received the hearing officer's decision on February 22, 1999. Section 410.202 provides that to be timely, an appeal must be filed within 15 days of receipt of the hearing officer's decision. If the deemed receipt date is February 22, 1999, the statutory time for filing the appeal is Tuesday, March 9, 1999. Claimant's appeal is postmarked March 6, 1999, and was received by the Texas Workers' Compensation Commission (Commission) on March 10, 1999, and is, hence, timely. Section 410.202(a); Rule 143.3(c).

On the merits, claimant was employed as a laborer by (employer), a manufacturer of metal water tanks. Claimant testified that on the afternoon of _____, he and several other workers were loading the trailer of an 18-wheeler tractor trailer when he experienced a sudden and immediate onset of pain in his low back. There is various testimony regarding the weight of the tanks and it is undisputed some were large and others were small. The "Picking Sheet" (loading document) indicates the tanks weighed from a low of 6.7 pounds to a high of 176 pounds. The testimony indicates that the one 176-pound tank was loaded by a forklift and pushed into place. Claimant testified that he continued work until 4:00 p.m., when he left early because of his back. Other testimony was that claimant had requested and received permission to work through the lunch hour and to leave early. It is undisputed that claimant called the employer the following day, (day after date of

injury), and left a message saying that he would be in late because of a conflicting holiday bus schedule (claimant said that he usually took the bus to work). Some of claimant's testimony was that he also reported a work injury, which was disputed by the employer and carrier, while in other portions of his testimony, claimant appeared to be saying he only reported that he would be late. It is undisputed that claimant did not go in to work at all on (day after date of injury). (2 days after date of injury) was both a holiday and weekend where claimant was not scheduled to work. (4 days after date of injury), was a compensatory holiday because the (2 days after date of injury) was on a (day of the week). Claimant went in to work on (5 days after date of injury). A coworker testified that he saw claimant sitting on a stone curb, get up and walk without distress before work on (5 days after date of injury). (Mr. D), employer's plant manager, testified that he terminated claimant when he saw him on (5 days after date of injury) for failing to come in or call in to excuse his absence on (day after date of injury). Claimant testified that he reported his work injury before he was terminated (claimant also testified that he did not even know he had been fired until the first session of the CCH on October 8th), while Mr. D testified that the decision had been made to terminate claimant on (day after date of injury), when claimant failed to come in at all after calling to say he would be late because of the bus schedule and that he had terminated claimant before claimant reported the work injury. Nonetheless, the employer sent claimant to the doctor.

Also in evidence is a written reprimand, dated June 16th and signed by employer's general manger and claimant, warning claimant that he had "an alarming number of absences" and that if claimant did not "resume his regular work schedule" he would be terminated. Other managers testified that in the two months claimant had been employed, he had missed work five days and had been late to work 14 times.

Claimant was seen by (Dr. C) on (5 days after date of injury), who took x-rays and diagnosed a lumbar strain. In the history, Dr. C noted that claimant injured his back "loading a trailer with water tanks about (80 x 300 lbs.) and hurt his lower back." Dr. C prescribed medication and returned claimant to limited work on (5 days after date of injury). Claimant subsequently saw Dr. R, D.C., who referred claimant to Dr. B, D.C. for an impairment rating (IR). In a report dated September 14th, Dr. B certified claimant was at maximum medical improvement with a four percent IR. Dr. B assessed claimant with a lumbar sprain/strain and lumbar radiculitis.

The hearing officer, in her Statement of the Evidence, commented that while claimant's work activities "could cause a back injury," she did not think claimant had sustained an injury as alleged. The hearing officer commented:

> He ultimately failed to show up at work at all on (day after date of injury), and never called [employer] back to explain his absence. This undisputed evidence, coupled with the credible evidence that the claimant did not display

(or say anything about) symptoms of any back pain or problems when he left work on _____ and first returned back to work on (5 days after date of injury), counsels against a finding that he was injured on _____. He also did not report a _____ injury to [employer] until after he was fired on (5 days after date of injury) for his unexcused absence on (day after date of injury). The claimant, therefore, failed to meet his burden of proof on the issue of compensability.

Claimant, in his appeal, argues that he went to the "comp. doctor" (meaning Dr. C), who took x-rays and said that he was hurt. Actually, what both Dr. C and Dr. B did was recite the history of the injury as given to them by the claimant. The claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer found that the claimant was not injured at work on _____. A fact finder is not bound by the testimony of a medical witness where the credibility of that testimony is manifestly dependent upon the credibility of the information imparted to the medical witness by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and is not contrary to the overwhelming weight of the evidence.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge