APPEAL NO. 000991

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 4, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury and did not have disability. The claimant appeals these determinations on sufficiency grounds. The respondent (carrier) replies that the claimant's appeal is untimely, and, in the alternative, the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

Pursuant to Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)), an appeal, to be timely, must be filed or mailed not later than the 15th day after the date of receipt of the hearing officer's decision. Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was mailed to the claimant on April 17, 2000, with a cover letter of the same date. The address to which the hearing officer's decision was sent is the same as the return address on the envelope containing the claimant's appeal.

The claimant states that he received the decision on the same day it was mailed, April 17, 2000. This is an obvious error as the Commission's records indicate that on April 26, 2000, the decision was returned to sender for an "insufficient address" and on April 27, 2000, the claimant contacted the Commission stating he had not received the decision. Rule 102.5(d), as amended effective August 29, 1999, provides that, unless the great weight of evidence indicates otherwise, the claimant is deemed to have received the hearing officer's decision five days after it was mailed. The great weight of the evidence indicates that the claimant did not receive the decision prior to April 27, 2000. For the claimant's appeal to be timely, it had to be mailed within 15 days, and received within 20 days of April 27, 2000. The 15th day after April 27, 2000, was Friday, May 12, 2000. The claimant's appeal is postmarked May 3, 2000, and was received by the Commission on May 5, 2000. Thus, it was timely.

The claimant worked for the employer as a pipe inspector. The claimant testified that on _____, he was moving a scaffolding cart, felt severe pain in his lower back and yelled to his coworkers. The claimant said that immediately thereafter he told his supervisor, (Mr. M), that he had back pain from pulling the scaffold and Mr. M told him that it was his kidneys. The claimant sought medical treatment with Dr. G on _____. According to the claimant, he told Dr. G that he had injured his back at work on _____. Dr. G's records indicate a history of "back pain for the past 2 mos.–got worse today, head spins when he lies down." Dr. G noted that the claimant had intractable back pain, diagnosed an acute lumbar sprain, and took the claimant off work. The hearing officer incorrectly states that the claimant sought medical treatment with Dr. D, on

_____. The medical records indicate that the claimant initially sought medical treatment with Dr. D on December 20, 1999. The claimant testified that one and one-half months prior to _____, he slipped on a stepladder causing back pain, but he did not seek any medical attention.

Mr. M testified that on _____, the claimant said that he was feeling pain in his back but did not say that he had hurt himself at work. The plant manager, Mr. S testified that on _____, the claimant said that he did not feel well and that based on the pain described by the claimant, Mr. S told the claimant that it was his kidney area. The coworkers identified by the claimant as working closely with him on _____, testified that they did not hear the claimant yell, or witness an injury on _____.

The claimant had the burden to prove that he injured himself as claimed on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). She resolved contradictions in the evidence against the claimant and concluded that the claimant's evidence was insufficient to prove he sustained a lumbar muscle strain, injury to his thoracic area, or right hip in the course and scope of employment on _____. When reviewing a hearing officer's decision, we will 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not sustain a compensable injury on _____.

The claimant appealed the hearing officer's finding of no disability. "Disability" is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge