APPEAL NO. 950296

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 13, 1995, a hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) did not show that he injured his back at work on (date of injury). Claimant disagrees with findings of fact that address whether the injury occurred in the course and scope of employment. Respondent (carrier) replies that the appeal of claimant is untimely and, if timely, that the decision should be upheld.

DECISION

We affirm.

Claimant states in his appeal that he received the decision of the hearing officer on February 9, 1995, which was less than the five days deemed for receipt by Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)). Section 410.202 gives the parties 15 days to file an appeal, which, for the claimant in this case, would be February 24, 1995. Rule 143.3 then says that an appeal is presumed to be timely if mailed on or before the 15th day and received by the Texas Workers' Compensation Commission (Commission) not later than 20 days after receipt of the hearing officer's decision. Claimant's envelope is postmarked February 23rd and the Commission received the appeal on February 27th; the 20th day would have been March 1, 1995. The appeal was timely filed.

Claimant worked for (employer) for over two years when he said that he injured his back on (date of injury), picking up and throwing an empty pallet. He said he felt a pull in his back. He also testified that he was able to keep working, and in fact missed no work until approximately November 1994 when he left to work in a warehouse for another employer. There is no dispute that claimant told one or more persons in supervisory positions on (date), of back pain. Claimant testified that he told (SC), the manager, that he felt a pull in his back; to which SC asked if it occurred here; claimant said he replied that it did. A statement from SC says that claimant said his back hurt; to which SC said he asked if claimant hurt it at work; to which SC said that claimant replied he did not know. SC allowed him to see the company doctor, (Dr. C), because claimant did not have a family doctor and said he would use his Medicare card to pay for it. SC further states that when claimant returned from seeing Dr. C, he said he would file a claim because the medicine cost too much; to which SC again asked if he hurt himself at work; to which claimant said he did not know but that Dr. C said it could have been at work.

Claimant also testified that he had never had a back injury before. (MG) identified herself as claimant's supervisor. She said that claimant first complained of a bad back within two months of coming to work for employer. Employer, prior to the (date of injury) allegation, of injury to his back in issue at this hearing, had modified claimant's work to limit his standing. (MN) identified herself as another intermediate level supervisor. On (date), claimant asked her about a doctor for his back pain and she referred him to SC. Claimant

never told her why his back hurt. She stated that when claimant came back from seeing Dr. C he told her he thought he had a torn ligament and that it was work related. She began filling out a form but said claimant could not tell her how it happened or whether it was at the job. She also said that claimant commented that the medicine was too expensive for him. She agreed with MG that claimant had told her of his back problem before the allegation of (date of injury).

While Dr. C's initial report does not say that claimant told him he hurt himself after lifting a pallet at work, it does say, "felt [discomfort?] low back after heavy lifting." He prescribed medications for claimant. Claimant later treated with (Dr. F) who related claimant's history as "injury while working his usual duties of lifting pallets, bending, walking, and standing," without saying which one caused it. Claimant did receive physical therapy.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could question claimant's credibility when he clearly said he had no prior back injury and two other employees stated that he complained of back problems long before the current allegation. He could choose to resolve the conflict, between claimant's assertion that he told SC that injury occurred at work and SC's statement that he repeatedly said he did not know how it occurred, by believing SC. He could also credit MN's statement that claimant could not say what happened to his back when making a report on (date). He could consider that claimant never missed work. All these matters are fact questions for the hearing officer to determine. The evidence sufficiently supports the findings of fact that claimant did not know how he hurt his back, that Dr. C did not refer to a specific incident at work as causative, and that claimant failed to show that he injured his back at work.

Finding that the decision and order set forth at the conclusion of the hearing officer's opinion are sufficiently supported by the evidence, they are affirmed. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge