APPEAL NO. 92215

On April 10, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that (claimant), the appellant, did sustain a compensable injury on (date of injury), when he injured his esophagus by inhaling chemical or gas fumes in the course and scope of his employment for (employer). The hearing officer made an award of benefits for that injury. However, the hearing officer did not agree that a subsequent October 28, 1991, heart attack was incurred in the course and scope of appellant's employment, or that the heart attack was compensable under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. Art. 8308-4.15 (Vernon's Supp. 1992). The hearing officer further ruled that appellant had not proven that he had a disability as a result of his (date of injury), injury (according to the definition of disability set out in Article 8308-1.03(16)).

Appellant asks that this determination relating to his heart attack be reviewed and reversed, arguing that the respondent has not proven that he had a preexisting heart disease, and arguing that it is his opinion that the inhalation of fumes ultimately caused a blood clot that led to the heart attack. Appellant contends that he was harmed by the exclusion of two documents from evidence. Respondent replies that the appeal was not timely filed with the Commission within 15 days, in accordance with Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-6.41(a) & (b) (Vernon Supp. 1992) (1989 Act), and that the decision of the hearing officer should be upheld. Respondent did not appeal the hearing officer's determination that the (date of injury), esophagitis is compensable.

DECISION

After reviewing the record, we agree that the appeal was not timely filed as required by the statutes and rules of the Texas Workers' Compensation Commission (Commission). We also note that there is sufficient evidence to support the decision of the hearing officer regarding the heart attack, in that the record does not establish that the heart attack was causally linked to the injurious inhalation, nor does the preponderance of medical evidence indicate that appellant's work, rather than the natural progression of a preexisting heart condition or disease, was a substantial contributing factor of the attack, as required by the 1989 Act, Art. 8308-4.15(2).

I.

Because the appeal does not appear to have been timely filed under the applicable law and rules of the Commission, the appeals panel may not issue a formal ruling because the determination of the hearing officer has become final under Art. 8308-6.34(h).

Article 8308-6.41(a) of the 1989 Act provides in part as follows:

"A party that desires to appeal the decision of the hearing officer shall file a written

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 of hearings and shall on the same date serve a copy of the request on the other party . . . ."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (TWCC Rules) provides that a request for review of the hearing officer's decision shall be filed with the Commission's central office in (city) "not later than the 15th day after receipt of the hearing officer's decision; . . ." Rule 143.3(c) goes on to provide the following:

"(c)A request made under this section shall be presumed to be timely filed or timely served if it is:

(1)mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and

(2)received by the Commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision."

Finally, Rule 102.5, regarding mailing of communications to and from the Commission, subsection (h), states:

For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed.

If a due date for a period falls on a weekend or a legal holiday, the due date is the next business day. Rule 102.3 (a)(3).

The hearing officer signed his Decision and Order on April 21, 1992. We have ascertained that the Commission's Division of Hearings & Review mailed to the parties (including both appellant and his attorney) a copy of the decision on May 1, 1992, with a fact sheet explaining what to do if an appeal is desired. Appellant's request for review does not state the date he received the hearing officer's decision. However, the appeal was mailed, according to the postmarked envelope, by certified mail on May 23, 1992, and was received at the Commission's central office on May 26, 1992.

Applying Rule 102.5, the "deemed" date of receipt of the hearing officer's decision is May 6, 1992. Fifteen days counted from May 6th means that the deadline for mailing an appeal was May 21, 1992. None of the days ending the periods in question were holidays or weekends, so no extra days can be added. Because the appeal was not mailed until after May 21st, appellant's appeal was not timely filed.

II.

Although the appeal cannot be formally considered, it does not appear that this has resulted in depriving the appellant of relief to which he would otherwise be entitled. The record has been reviewed and the evidence supports the hearing officer's decision that the (date of injury), injury of chemical esophagitis was compensable while the October 28, 1991, heart attack was not. A November 1991 medical report by appellant's treating doctor states that the cause of the heart attack is "undetermined," and notes that "[i]t is not sure if these chemicals have induced some changes in his system causing this type of abnormality at this time." A report from a consultant toxicologist/doctor for the respondent states that, "[i]n reasonable medical probability, the myocardial infarction and hypertension manifested by this patient is unrelated to his employment and, in particular, is unrelated to exposure to diesel fumes alleged to have occurred (date of injury)."

Finally, we must note that the two exhibits that appellant contended were erroneously excluded from the record would not have supplied the preponderance of medical evidence needed to establish compensability of the heart attack. However, it does not appear that the documents were actually excluded by the hearing officer; rather, they do not appear to have been formally offered into evidence. At the beginning of the hearing, after the stipulations were made, the hearing officer identified both party's exhibits for the record, and admitted into evidence those for which no objection was raised. The respondent indicated that it would object to two of claimant's exhibits based upon failure of the appellant to exchange the documents before the hearing (an objection that may be made under Art. 8308-6.33(e)). At this time, the hearing officer indicated that these documents would be identified, but not admitted, and that he would entertain any objection to them "at the time you offer them, Mr. [appellant's attorney]." He did not then rule on admissibility. However, the documents in question were never subsequently offered by appellant's attorney, and for that reason were not part of the record in the case.

In summary, the appeal was not timely filed, but, even it were, it appears that the evidence supports the hearing officer's ruling in favor of appellant with respect to the (date of injury), chemical esophagitis injury, and the ruling in favor of respondent on the October 28, 1991, heart attack.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge