APPEAL NO. 92622

On October 8, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the claimant, (claimant), who is the appellant, did not sustain a compensable injury to his back on (date of injury), in the course and scope of his employment for (employer). The hearing officer further determined that the claimant had not given timely notice of the alleged injury to his employer, and had not shown good cause for failure to give timely notice.

The claimant asks that this determination be reviewed and reversed, arguing that the evidence shows that he was injured as claimed, and that he had good cause for failing to give timely notice. The respondent carrier replies that the appeal was not filed with the Commission within 15 days, as required by the 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.

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 that the claimant was not injured on the job as claimed, and that there was no abuse of discretion by the hearing officer in determining that no good cause existed for failure to give timely notice.

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 the 1989 Act, under Article 8308-6.34(h).

The relevant part of Article 8308-6.41(a) of the 1989 Act says:

> "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 . . . ."

The Commission has interpreted this statute in its agency rules. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (TWCC Rule 143.3) 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 say:

"(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.

In other words, the person who wants to appeal the decision must deliver or mail the appeal either on, or before, the fifteenth day after that party received it. The appeals clerk in (city) must receive it no later than the 20th day after the party received the decision.

Finally, Rule 102.5 talks about the mailing of communications to and from the Commission; subsection (h) of that rule says:

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).

In this case, we have determined that the Commission's Division of Hearings & Review mailed a copy of the decision on October 23, 1992 to the claimant, his attorney, and the insurance carrier, along with a fact sheet explaining what to do if an appeal was desired, and when. The fact sheet said that the appeal had to be filed with the appeals clerk in (city). The claimant's request for review does not state the date he received the hearing officer's decision. However, his appeal certifies that it was prepared on November 13, 1992, and a date-stamp shows it was received by the (city) field office of the Commission on that same day. It was delivered by the (city) office to the (city) Appeals Clerk in (city) on November 19, 1992.

Applying Rule 102.5, the "deemed" date of receipt of the hearing officer's decision is October 28, 1992. Fifteen days counted from October 28, 1992 means that the deadline for filing an appeal was November 12, 1992 and that it had to be received in (city) by November 17, 1992. None of the days at the end of these periods were holidays or weekends, so no extra days can be added to the due date. Because the appeal was not delivered to the (city) office (or even the (city) office) until after November 12th (and according to the certification on the appeal not prepared either until after that date), the claimant's appeal was not timely filed.

II.

In the event that the appeal were timely filed, we would affirm. The record has been reviewed and the evidence supports the hearing officer's decision both on the issue of whether an injury occurred, and the lack of good cause for the claimant's failure to report the injury within 30 days.

The record indicates that the claimant began working for employer on February 17, 1992, and that he contended he injured his thoracic spinal area on (date of injury) as he lifted an 80 lb. parcel out of the cargo bin of a bus he was driving. He stated that a co-driver, (Mr. S), witnessed the incident, and that, although he was in extreme pain following the incident, he continued to drive, although he guessed he could have asked Mr. S to relieve him. The claimant testified that he had been beaten up by his son in September or October 1990, and had a prior work-related injury to his shoulder in 1978 or 1979.

A statement by Mr. S to the adjuster for the carrier indicates that Mr. S recalled that claimant had lifted a heavy box on the date in question, but that the claimant did not complain that day about his back, and that his first knowledge that claimant contended he hurt himself was in May or June. Mr. S stated that they rode together for about a day and a half after the lifting incident.

Although claimant said that he did not have trouble getting to work before or after (date of injury), the record indicates that there had been some complaint about his availability for dispatch. The claimant said he first sought medical treatment for the injury on April 13, 1992, and paid for it himself, because he feared that filing a work-related injury claim would result in termination. He acknowledged that he had a conversation in mid-May with his supervisor, (Mr. R) about complaints that he had been falling asleep behind the wheel. The claimant stated that this was because of his injury. However, he told Mr. R that his medical problem related to a testicular condition. Mr. R testified that he asked claimant repeatedly for documentation to support his assertion of his medical condition, as an explanation for why he was not available for dispatch. Mr. R said he finally asked claimant to give him the name of his doctor so that he himself could confirm the medical condition. Near the end of May, Mr. R said that the claimant said he had back pain but that it was from a flareup of a condition was related to the time his son beat him. Mr. R said that he gave the claimant a choice of resigning, or being terminated, as a result of complaints about his performance and unavailability for dispatch. The claimant told him around June 1st or 2nd that he would not resign, and Mr. R thereafter terminated him. Mr. R stated that claimant never contended or mentioned that he was injured on the job, and that he did not know that a work-related injury was asserted until contacted by the adjuster around the 20th of July.

An unsworn written statement from the union representative, (Mr. LS), indicates that he talked with claimant around May 15th about the impending resignation or termination, and that claimant indicated it was because of a back injury. The statement goes on to say

that Mr. LS told him ". . . that there was really nothing the union could do for him, being on probation unless the injury was job related. He recollected that he hurt his back while lifting a piece of freight during a training run with a regular driver."

There is sufficient evidence from which the hearing officer could conclude that the injury did not occur on (date of injury). Moreover, although the claimant asserted that he did not want to file a claim for fear of being terminated, this would not explain why, when being asked to resign or be terminated, he would continue to tell Mr. R that his injury was a result of matters that were not work related. The statement from Mr. LS indicates that claimant was even delayed in asserting that he had a work-related injury to the union representative, and did not do so until told that this was the only way he could get assistance from the union as a probationary employee. There was no abuse of discretion by the hearing officer in determining that the evidence did not support that there was good cause for the admitted failure of the claimant to timely report the injury. Were the appeal timely, the record in this case would support an affirmance of the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge