

APPEAL NO. 93009

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On November 17, 1992, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant, claimant herein, did not sustain an injury in the course and scope of his employment on either (date of injury) or (date). Claimant appeals, generally disagreeing with the hearing officer's decision and contending the hearing officer relied on "false information," contesting certain findings of fact and conclusions of law based on insufficiency of the evidence and alleging there were contradictions in the evidence. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Although not raised by the carrier, we find that the appeal in this matter was not timely filed within the time limits required by Article 8308-6.41(a) and the decision of the hearing officer is the final administrative decision in this case. See Article 8308-6.34(h) of the 1989 Act.

The decision of the hearing officer was distributed, by mail, on December 8, 1992. Claimant in his appeal does not assert when the decision was received, therefore, the provisions of Commission Rule 102.5(h) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h)) are invoked. Rule 102.5(h) provides:

(h)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.

In that the decision was mailed on December 8, 1992, the "deemed" date of receipt is December 13, 1992. Article 8308-6.41(a) requires that an appeal shall be filed with the Appeals Panel "not later than the 15th day after the date on which the decision of the hearing officer is received" If the deemed receipt date is December 13, 1992, 15 days from that date would be Wednesday, December 28, 1992, which would be the statutory date by which an appeal must be filed. Claimant's appeal was undated but postmarked December 31, 1992. The appeal was actually received by the Texas Workers' Compensation Commission's central office in Austin on January 5, 1993. Consequently, the appeal was filed beyond the statutory 15 days accorded in Article 8308-6.41(a), using the December 31, 1992 date of mailing pursuant to Rule 143.3(c)(1).

Article 8308-6.34(h) states the decision of the hearing officer is final in the absence of a timely appeal. Determining the appeal was not timely filed, as set forth above, we have no jurisdiction to review the hearing officer's decision.

Although the appeal cannot be formally considered, it does not appear that this has resulted in depriving the claimant of relief to which he would otherwise be entitled. The record has been reviewed and the evidence supports the hearing officer's decision that claimant did not sustain an injury which arose out of and in the course and scope of employment on either (date of injury) or (date).

Claimant was a 23-year-old laborer employed by (employer). Claimant alleges that he injured his back "shoveling hot mix" on a job site on (date of injury). Claimant testified he told his supervisor of the injury that day but the supervisor denies being told. Claimant did not see a doctor at this time and it is unclear whether claimant's back continued to bother him. Claimant alleges he also suffered a back injury on (date) while "jackhammering" at another site. Claimant testified he told his supervisor (the same supervisor as the July 1st incident) the following work day, July 27, 1992, his back "was still" bothering him. The supervisor agrees that claimant spoke with him on July 27th, but that claimant only told the supervisor he wanted to "go to his own doctor" for a nonwork-related injury. It is undisputed the supervisor called employer's president on July 27th who spoke with claimant. What was said is disputed. Claimant's friend and coworker testified that as they drove up to the job site on July 27th, claimant, in getting out of his car, complained of his back hurting and when asked what was wrong with his back, claimant replied "I am not sure whether it is from soda water or where my girlfriend hit me in the back with a hammer. Me and her got into an argument." Claimant went to see a doctor and the following day was laid off because employer "was low on work." Claimant thereafter filed claims for two injuries, one on July 1st and the other July 24th. Without going into a detailed recitation of the evidence there are, as claimant asserts, a number of inconsistencies on dates, who was working which job site and what was said in various conversations.

As the hearing officer pointed out in his introduction of the case, the burden is on the claimant to prove his case. The factual determinations in this case depended largely on the credibility of the witnesses. The hearing officer saw and heard the witnesses, including the claimant. Article 8308-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. The hearing officer obviously chose not to believe claimant's version. There is sufficient evidence to support the hearing officer's determinations and decision.

In summary, the appeal was not timely filed, but, even if it were, it appears that the evidence supports the hearing officer's decision finding, in essence, that claimant has not sustained his burden of proving back injuries on (date of injury) and (date).

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge