APPEAL NO. 931020

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing (CCH) was held on August 16, 1993, with (hearing officer) presiding as hearing officer. On August 20, 1993, an Order to Reopen Case and an Order Requesting Additional Evidence was signed by the hearing officer. The parties were afforded an opportunity to present additional evidence and the record was closed on October 14, 1993. The sole issue at the CCH was whether the respondent (claimant herein) had disability between April 14, 1992, and March 31, 1993, entitling him to additional temporary income benefits (TIBS). The hearing officer found that the claimant was unable to obtain employment between April 14, 1992, and March 31, 1993, earning his pre-injury wage due to the lingering effects of his compensable injury and concluded that the claimant did have disability between April 14, 1992, and March 31, 1993, entitling him to additional TIBS. The appellant (carrier herein) files a request for review contending that the claimant failed to prove disability between April 14, 1992 and March 31, 1993. The claimant replies that the decision of the hearing officer was supported by sufficient evidence and should be affirmed.

DECISION

Because the carrier's request for review was not timely, we hold the decision and order of the hearing officer has become final by operation of law.

The carrier's request for review does not state when the carrier received a copy of the hearing officer's decision. The records of the Texas Workers' Compensation Commission (Commission) reflect that the decision of the hearing officer was signed on October 14, 1993, and under cover letter of October 18, 1993, was distributed to all parties on October 19, 1993. The file reflects that the decision was distributed to the carrier by placing a copy in the box of the carrier's Commission representative at the Commission's central office in (city). The carrier's request for review was sent by electronic facsimile transmission to the Commission under a cover letter dated November 9, 1993, and was received by the Commission on November 9, 1993.

Our examination of the record in the present case raises the question of whether, under the 1989 Act and rules of the Commission, the carrier's request for review was timely. In regard to communications from the Commission, Rule 102.5 provides, in relevant part, that:

(b)Unless otherwise specified by rule, all notices and communications to insurance carriers will be sent to the carrier's (city) representative as provided by Section 156.1 of this title (relating to Carrier's (city) Representative).

* * * * *

(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 Texas Workers' Compensation Commission Advisory 92-07 dated November 3, 1992, the Commission advised all carriers that effective November 30, 1992, all documents and notices would be placed in the box of the carrier's (city) representative, and that "[n]o additional copies of such documents will be mailed to carrier's representatives who have attended such proceedings." *See* Texas Workers' Compensation Commission Appeal No. 93804, decided October 22, 1993.

Section 410.202(a) provides as follows: "To appeal the decision of the hearing officer, a party shall file a written request for 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 and shall on the same date serve a copy of the request for appeal on the other party."

Rule 143.3(a)(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 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, Section 410.169 provides in relevant part: "A decision of a hearing officer regarding benefits is final in the absence of a timely appeal by a party. . . ."

In the present case, the hearing officer signed his decision on October 14th, the day the record closed. By letter of October 18, 1993, distributed October 19, 1993, the Commission forwarded to the parties a copy of the decision. Carrier's copy was sent to carrier by providing a copy to the carrier's (city) representative. Under Rule 102.5(h) the carrier was presumed to have received this notice five days after it was distributed or by October 24, 1993. The carrier then had 15 days or to November 8, 1993, to mail a copy to the Commission, and if so mailed, the request for review would have been timely filed if received by the Commission within 20 days of the date the carrier was deemed to have received it. Rule 143.3(c). Instead the carrier both "faxed" and mailed its request for review to the Commission on November 9, 1993. Thus under Section 410.169 we must find that the decision of the hearing officer is final. *See* Texas Workers' Compensation Commission Appeal No. 93327, decided June 3, 1993; Texas Workers' Compensation Commission Appeal No. 93804, decided October 22, 1993.

Although it is not necessary for our decision, we have reviewed the entire record and were the appeal timely we would have affirmed the decision of the hearing officer. There is evidence in the testimony of the claimant that he had disability between April 14, 1992 and March 31, 1993. The carrier points to evidence concerning whether the claimant's medical restrictions were related to his injury, whether a bad economy rather than the claimant's restrictions prevented him from obtaining work at his pre-injury wage, and whether the claimant had to state he was able to work to draw unemployment benefits which he received. This evidence raised, at most, a conflict in the evidence concerning disability.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Under the proper standards of appellate review, we would have found that the hearing officer's decision was supported by sufficient evidence had our jurisdiction been properly invoked.

The decision of the hearing officer is final pursuant to Section 410.169 and Rule 142.16(f).

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge