

APPEAL NO. 931075

This appeal is filed under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On October 18, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues presented at the contested case hearing were whether the respondent (claimant herein) sustained an injury in the course and scope of employment by (employer), a self-insured governmental entity, on (date of injury); whether such injury was a producing cause of psychological problems; and whether claimant had disability as a result of a compensable injury. The hearing officer determined all issues favorable to the claimant.

The carrier files a request for review arguing that the decision of the hearing officer is so against the great weight and preponderance of the evidence so as to be manifestly wrong or unjust. The carrier alleges that the decision was made from the "the heart, not the head." The carrier further argues that it was discouraged from calling a witness in its favor because the hearing officer indicated that she would invoke "the rule" and the carrier wished to have the witness present as its representative. The claimant responds that the decision of the hearing officer should be upheld, and that the witness did not testify because she had not been disclosed to the claimant in advance of the hearing.

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 attorney asserts that the hearing officer's decision was "received" on November 15, 1993, and that the November 30, 1993 appeal is therefore timely. The person who received the opinion on that date is not identified.

The records of the Commission reflect that the decision of the hearing officer was signed on October 25, 1993, and, under a cover letter dated November 1, 1993, was distributed to all parties on November 2, 1993. The file reflects that the decision was distributed to the carrier by placing a copy of the decision in the box of the carrier's (city) representative (Box 45) at the Commission's main office.

The carrier's request for review was delivered to the Commission under a cover letter dated November 30th, and was received that same day by the Commission. The claimant's response to the request for review was mailed under a cover letter dated December 16, 1993, and received by the Commission on December 20, 1993.

Because the timeliness of an appeal is jurisdictional, a response need not assert untimeliness for it to be placed in issue. Here, the great disparity in time between the date of distribution of the hearing officer's decision and the filing of the appeal invites scrutiny of the timeliness of the appeal. We do not doubt that the carrier's attorney did not personally receive the decision until November 15, 1993. However, we have held previously that it is

receipt by the party, not the attorney, which controls. Texas Workers' Compensation Commission Appeal No. 92219, decided July 15, 1992. Nor would the failure of the carrier's (city) representative to retrieve the decision from its box within a reasonable time constitute a reason to extend the carrier's time to file a request for review. See Texas Workers' Compensation Commission Appeal No. 93327, decided June 3, 1993; Texas Workers' Compensation Commission Appeal No. 92727, decided February 12, 1993.

The question in the present case becomes whether, under the 1989 Act and the rules of the Commission, the carrier's request for review was timely filed. Tex W. C. Comm'n 28 TEX. ADMIN. CODE § 142.16 (Rule 142.16) provides, in relevant part, as follows:

(d) No later than seven days after filing the decision, the division shall furnish to the parties, by first class mail or personal delivery:

(1) a file-stamped copy of the decision; and

(2) a statement specifying the place, manner, and time period within which an appeal must be filed.

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.

The 1989 Act, 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 of hearings and shall on the same day serve a copy of the request for review 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. . . ."

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. . . ."

The decision was addressed to the correct box number for the carrier's (city) representative. Under the provisions of Rule 102.5(h), the carrier would be deemed to have received this notice five days after it was distributed, or by November 7, 1993. The carrier then had 15 days or by November 22, 1993, to appeal to the Commission. Instead, the carrier appears to have delivered the request for review to the Commission on November 30, 1993. In accordance with Section 410.202(a), the appeal was untimely.

The case is essentially similar to Appeal No. 93327, cited above. In that case, we noted:

This result is consistent with our earlier decisions. The present case is not one in which there is evidence of failure by a party to receive the decision because it was mailed to the wrong address or because of postal error. (citations omitted) Nor is the present case controlled by those decisions in which we have held that if a reasonable actual date of receipt is later than the deemed date of receipt, we will accept the recited or proved actual date of receipt absent probative evidence to the contrary. (citations omitted)

Also, in Texas Workers' Compensation Commission Appeal No. 93519, decided July 28, 1993, the Appeals Panel applied the "deemed" receipt rule although the carrier's attorney expressly stated that the (city) representative picked up the decision 12 days after it was distributed.

While the tapes in this hearing have not been reviewed, the evidence recited in the decision, the appeal itself, and the documentary evidence in the case indicate that this was a story for which there were two sides, not one clear side. These documents include matters from the witness that the carrier states it decided not to call when it appeared the rule would be invoked. Even assuming as true the carrier's statement that the uncalled witness would have testified to certain facts set forth in the appeal, the case would not appear to be one where the balance of evidence before the hearing officer would have changed to a great weight in favor of the carrier. We have noted before that such conflicting evidence is for resolution by the hearing officer and will not be "second guessed" by the Appeals Panel absent an indication that the posture of evidence would mandate a fact finder to the opposite conclusion.

For the foregoing reasons, the decision of the hearing officer is final by operation of law, the jurisdiction of the Appeals Panel not having been properly invoked.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge