APPEAL NO. 93605

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. Articles 1.01 through 11.10 (Vernon Supp. 1993). On May 20, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that Mr. F, the appellant (claimant), did not prove an injury sustained in the course and scope of his employment by a preponderance of the evidence. The hearing officer ordered that (carrier), the respondent (carrier), is not liable for the payment of any workers' compensation benefits on this claim. The claimant filed an appeal contesting the hearing officer's decision. The carrier did not file a response.

DECISION

Finding that the appellant did not timely file a request for review of the hearing officer's decision, we find that the hearing officer's decision has become final pursuant to the provisions of Article 8308-6.34(h). However, even if the appeal had been timely filed, sufficient evidence exists in the record to support the hearing officer's decision.

The hearing officer closed the contested case hearing on January 12, 1993. The hearing officer signed the decision and the order on January 19, 1993. The decision of the hearing officer was distributed by mail on January 25, 1993. Without assistance of counsel, the claimant filed a request for review by a letter dated July 13, 1993. The request for review had a postmark of July 14, 1993. The commission received and file stamped the request on July 19, 1993.

Article 8308-6.41(a) requires that "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. *See* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE Section 143.3(a)(3) (Rule 143.3(a)(3)).

For purposes of determining the date of receipt of these notices and other written communications which require action by a specific date after receipt, the commission shall deem the received date to be five days after the date mailed. Rule 102.5(h). The commission rules deem that the claimant received the hearing officer's decision on January 30, 1993, which is five days after the mailing date of the decision. The claimant does not state when he received the decision. The claimant had until 15 days from the deemed receipt of the decision. The 15 day date would have ended on Sunday, February 14, 1993, which deadline would be extended to the next non-holiday weekday of Monday, February 15, 1993. Rule 102.3(3) and Rule 102.7. We conclude that the claimant failed to file a timely request for review in accordance with Article 8308-6.41(a) and Rule 143.3. In the absence of a timely request for review to the Appeals Panel, the decision of the hearing officer became final by operation of law. Article 8308-6.34(h); Rule 142.16(f); Texas Workers' Compensation Commission Appeal No. 92265, decided August 5, 1992.

In this case, the claimant's main argument to consider his appeal timely filed is that his attorney represented to the claimant that the attorney would file a request for review.

As the claimant admits in his request and as is clear from the commission records, a request for review was not sent and was not received by the commission until claimant's own request in July 1993. In his request for review, the claimant states that his attorney returned the claimant's file to the claimant on June 16, 1993. Further, on June 16, 1993, the claimant's attorney withdrew from representing the claimant. The claimant, in his own request for review, states June 16th was when he realized a request for review had not been filed. The claimant argues in his request as follows:

> There were great communication problems as I am a Spanish speaking person. I did not understand all that was going on or the procedures that need to be followed. This was complicated by the fact that my attorney did not follow through with the request for review to the Appeals Panel and then, later, withdrew.

Before any testimony was taken at the hearing, the hearing officer diligently told the claimant, through the translator, that an "excellent possibility" existed that people in (city) may review the hearing so he, the claimant, needed to speak clearly and to make sure he understood questions he was asked before responding. The hearing officer proceeded to make sure both the claimant and the translator believed that the claimant understood what was going on at the hearing. Both the claimant and the translator testified that the claimant understood what was going on at the hearing. At the close of the hearing, the hearing officer reminded both parties that if they are dissatisfied with the decision from the hearing, either party must file an appeal no later than 15 days after his decision is issued to challenge the hearing officer's decision.

The Texas Workers' Compensation Commission sent the decision of the hearing officer directly to the claimant by a letter dated January 25, 1993. As discussed above, this gives the claimant until Monday, February 15, 1993, to request a review. This letter with the hearing officer's decision also contained a fact sheet pamphlet which explains the appeal procedures. The commission also sent this same information to the claimant's attorney.

The statute gives "a party" the right to appeal a hearing officer's decision in the 15 day specified time limit. Article 8308-6.41. A "party" refers to the claimant's right to appeal and does not refer to the attorney and does not refer to the representative. Texas Workers' Compensation Commission Appeal No. 92219, decided July 15, 1992. Texas Workers' Compensation Rule 102.4(b) requires:

> After the insurance carrier or the commission is notified in writing that a claimant is represented by an attorney or other representative, all copies of notices and reports to the claimant will be thereafter mailed to the representative and the claimant, unless the claimant requests delivery to the representative only. However, copies of settlements, notices setting benefit review conferences and hearings, and orders of the commission shall be sent to the claimant by the commission.

The claimant's request for review dated July 13, 1993, and postmarked July 14, 1993, was clearly not filed timely, and the hearing officer's decision became final by operation of law. Article 8308-6.34(h); Texas Workers' Compensation Appeal No. 92219, decided July 15, 1993.

The claimant appears to advance a good cause argument as an exception to the timely filing of a request for review; however, the 1989 Act does not provide for a good cause exception for late filing of an appeal.

The claimant argues that his reliance on his attorney caused his request for review of the hearing officer's decision to be filed late. Even if there were provisions for exceptions for late filing, reliance on an attorney to preserve a client's rights must be determined from an agency relationship. Texas Employers Insurance Ass'n v. Wermske, 162 Tex. 540, 349 S.W.2d 90, 95 (1961). In Wermske, the Supreme Court of Texas explained:

> That an attorney employed to prosecute a claim for workmen's compensation is the agent of the client, and his action or nonaction within the scope of his employment or agency is attributable to the client. Where the Legislature has said the claim shall be filed within 6 months after the injury, the failure to file the claim for 20 months under the facts and circumstances here present does not constitute good cause for the late filing as a matter of law. Id. at 95.

In Wermske, a widow employed an attorney to handle her claim for workers' compensation from her husband's death on (date of injury). Id. at 91. The widow testified that the attorney assured her the claim had been filed. The first attorney later withdrew from representation on the workers' compensation claim in late 1958. The widow retained new attorneys to represent her on the workers' compensation claim. After receiving a letter from her new attorneys dated December 30, 1958, the Industrial Accident Board notified the new attorneys that no record of any such claim existed. Id. Insufficient evidence was introduced to show that a claim was mailed timely by the first attorney to try to raise the presumption of the claim having been duly received. Id. at 92. In Wermske, the Supreme Court of Texas stated that the general rule of the relationship of the attorney and the client is one of agency. Under this agency rule, the omissions or the commissions of an attorney are regarded as the acts of the client whom he represents, and an attorney's neglect is the equivalent of the client's own neglect. Id. at 93; Nunnery v. Texas Casualty Company, 362 S.W.2d 865 (Tex. Civ. App.-Austin 1962, no writ); Texas Employer's Insurance Association v. Tobias, 614 S.W.2d 901, 902-903 (Tex. Civ. App.-Austin, 1981, writ dismissed). The Wermske case is extremely close to the facts of the present case where the claimant relied upon his attorney's representations that an appeal would be filed.

Not only will an attorney's neglect be attributable to the client, but so will bad advice from an attorney as to the time for filing a claim for compensation, and this bad advice does not constitute good cause as a matter of law. St. Paul Fire & Marine Insurance Company v. Lake Livingston Properties, Inc., 546 S.W.2d 404, 407 (Tex. Civ. App.-Beaumont, writ ref'd n.r.e.); Dillard v. Aetna Insurance Co., 518 S.W.2d 255, 257 (Tex. Civ. App.-Austin, writ ref'd n.r.e). In this case, the claimant's reliance on his attorney could not, even if authorized under the 1989 Act, constitute good cause for failure to file a request for review

almost six months after the receipt of the hearing officer's decision.

We have reviewed the evidence to determine its sufficiency to support the challenged findings and conclusions of the hearing officer. The hearing officer found that the claimant did not injure his neck on (date).

Through a translator at the hearing, the claimant testified that on (date), while working as a forklift operator for his employer, he turned his head quickly and injured his neck. The claimant testified that the incident which caused his neck and shoulder injury occurred on (date). The evidence from the hearing indicated that the claimant suffered a prior neck injury while driving a forklift. The claimant, even in his request for review, admits to the prior forklift injury, but he states he did not go to the doctor at that time. Evidence in the record shows that Dr. (N) examined the claimant on July 20, 1992. Dr. (N) noted that the claimant was complaining of neck pain radiating into the his left shoulder and into the left side of his head. Of significance, Dr. (N) also noted that the claimant experienced this pain for the past two months. The medical notes of Dr. (N) provide evidence of the onset of symptoms of a neck injury in May of 1992. Other evidence at the hearing supported that the claimant suffered two prior injuries to his neck and shoulder before the incident of (date).

Even if the claimant had timely appealed, the record indicates that the Appeals Panel would have found that sufficient evidence supported the hearing officer's decision. The hearing officer's decision was not against the great weight and the preponderance of the evidence. Pool v. Ford Motor Co., 715 S.W.2d 629, 636 (Tex. 1986).

Because the appeal was not timely filed, the decision of the hearing office is final. Article 8308-6.34(h).

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Thomas A. Knapp
Appeals Judge