APPEAL NO. 93617

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act). On May 25, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) (hearing officer) presiding. She determined that Mrs M, the appellant (claimant), did not suffer a compensable injury sustained on (date of injury), in the course and scope of her employment. The hearing officer ordered that Travelers Indemnity Company, the respondent (the 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 filed a response in support of the hearing officer's decision. The carrier further argued that the claimant's appeal was not timely filed and should be dismissed.

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 Section 410.169. However, even if the appeal had been timely filed, sufficient evidence exists in the record to support the hearing officer's decision and the decision would have been affirmed.

The hearing officer closed the contested case hearing on May 25, 1993. The hearing officer signed the decision and the order on May 28, 1993. The Texas Workers' Compensation Commission (Commission) distributed the decision by mail on June 8, 1993, with a letter dated June 7, 1993. However, this was returned because of an address correction and the decision was remailed on June 15, 1993. Without assistance of counsel, the claimant filed a request for review in a letter with a date of July 5, 1995 (sic). However, the request for review had a postmark of July 21, 1993. The Commission received and file stamped the request on July 22, 1993.

Section 410.202(a) requires "[t]o 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." *See also* Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE § 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 following the second mailing on June 20, 1993, which is five days after the June 15th mailing date of the decision. The claimant does not state when she received the decision. The claimant had until 15 days from the deemed receipt of the decision. The 15-day date would have ended on Tuesday, July 5, 1993.

At the close of the hearing, the hearing officer reminded both parties that if they are unhappy with her decision from the hearing, then either party may file a written appeal within 15 days after her decision. The Commission sent the decision of the hearing officer directly

to the claimant by a letter which also contained a fact sheet pamphlet which explains the appeal procedures. The Commission also sent this same information to the claimant's attorney. The claimant admits to the delay in sending her request for review and the Commission records make clear, a request for review was not sent and was not received by the Commission until claimant's request was received on July 22, 1993.

Because the claimant did not mail her appeal until July 21, 1993 (the postmark date), we conclude that the claimant failed to file a timely request for review in accordance with Section 410.202(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. Section 410.169; Rule 142.16(f); Texas Workers' Compensation Commission Appeal No. 92265, decided August 5, 1992.

We have, nonetheless, 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 her back on (date of injury). The evidence from the hearing is uncontradicted that the claimant suffered a back injury in the course and scope of her employment on (date) and was off work for almost a year and a half. Although the claimant testified that she slipped on ice on the ground in the workplace, and this caused her to suffer a further back injury on (date of injury), there is considerable evidence that ever since she returned to work in June 1992 that she continued to experience back pain and had to leave work early on several occasions. Also, there was evidence that no one at work observed, and the claimant did not mention to anyone, that she injured her back on (date).

While the claimant urged that her injury on (date of injury), was a new injury, two supervisors of the claimant said nothing new happened on (date) and that the claimant often complained about her back pain and often left work early because of her sore back.

The issue of whether the claimant suffered a "continuation" or an "aggravation" of a pre-existing injury had to be determined by the hearing officer as the finder of fact. Texas Workers' Compensation Commission Appeal No. 92654, decided January 22, 1993. An aggravation of an injury to be compensable must amount to a new or distinct injury which gives rise to benefits. A continuation of a pre-existing injury refers not to a new or distinct injury but an ongoing reoccurrence of the original pre-existing injury. Texas Workers' Compensation Commission Appeal No. 93515, decided on July 26, 1993. This can be, as we have observed, a difficult factual question to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93577, decided August 18, 1993.

The claimant returned to light duty work for her employer on a part-time basis in June of 1992 while she was still undergoing treatment for her back. Returning to work does not automatically transfer an earlier injury into a new injury if the symptoms recur. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. When a claimant returns to work and is not completely healed from an injury and the claimant experiences subsequent pain or medical problems related to the original injury, then the

subsequent pain or medical problems and accompanying disability are not automatically an aggravation or a new injury. Texas Workers' Compensation Commission Appeal No. 93317, decided June 4, 1993. The testimony from the claimant and her fellow workers evidences that the claimant experienced back pain on a number of occasions after returning to work. The claimant often asked to leave work early because of back pain, and her supervisors would let her leave early. The claimant gave a statement to the carrier's representative on October 12, 1992, and in that interview, the claimant answered the representative's questions concerning what occurred on (date of injury):

Q:OK, and then what happened on August the 21st?

A:OK, around 2:00 in the afternoon, I work from around 3, 10:00 to 3:00, and my back just gave out. I did a lot of repeat bending and I had no help, but all of a sudden, as I was going to the register, my back just gave out completely. I got spasms everywhere.

Q:OK, so you were going to the register?

A:Uh huh.

Q:And back gave out?

A:It just gave out.

Q:Had you been lifting a bunch of stuff?

A:No, just bending, doing a lot of bending.

Q:OK

A:That's the night before, we were real busy and it was hurting also.

Q:OK, so it started hurting the night before on August the 20th?

A:Yes, sir.

* * * *

Q:OK, and you just . . .

A:It just gave out, my back. I couldn't walk no more.

Q:OK.
A:I was just limping.

The claimant's own recorded statement does not reveal a new and distinct cause of her

back pain; rather, that her back just gave out from a lot of bending. The claimant's statement supported the idea that she continued to have back pain and on several occasions left work early because of the pain in her back even though she testifies at the hearing that she slipped on ice, did not fall down, but did injure her back on (date of injury).

(Dr. B), on August 26, 1992, in his medical notes of an exam of the claimant writes: "A significant amount of pain and spasm is still present in the low back region." In his October 15, 1992, medical notes, Dr. B writes: "The patient is a little stiffer in the mornings with radiation of pain to the hip as well as down the back of the right leg. There is no new injury." (Emphasis added.) In his letter dated May 17, 1993, Dr. B seemed to contradict his earlier records when he wrote about the claimant:

> On or about (date of injury), she aggravated her pre-existing condition and reinjured herself at work, apprently [sic] slipping on some water on the floor from an ice machine. There is no question that this was a new injury as [claimant] had been working two and a half months prior to the reinjury occurring.

The evidence in this case is analogous to a situation where the evidence and the testimony clearly indicate that the original injury to a claimant had gotten better and worse, depending on the circumstances, but the original injury had never healed. *See* Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992; Texas Workers' Compensation Commission Appeal No. 93317, decided June 4, 1993. The evidence sufficiently supports the hearing officer's determination that no injury occurred to the claimant on (date of injury).

Because the appeal was not timely filed, the decision of the hearing officer is final. Section 410.169.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge