APPEAL NO. 93671

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing was held in (city), Texas, on June 24, 1993, (hearing officer) presiding as hearing officer. He concluded that the appellant (claimant) did not sustain a compensable injury (described as serum sickness) in the course and scope of her employment on (date of injury), as a result of receiving a hepatitis-B vaccination and flu shot,[1] and has not had disability therefrom. The claimant, a registered nurse, appeals these determinations. The respondent (carrier) urges affirmance of the decision of the hearing officer.

DECISION

Finding that the request for review was not timely filed and the jurisdiction of the Appeals Panel has not been properly invoked, the decision of the hearing officer has become final pursuant to the provision of Sections 410.169 and 410.202(a) (1989 Act) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3).

Section 410.202(a) provides that a party desiring to appeal the decision of the hearing officer must file its appeal with the Texas Workers' Compensation Commission (Commission) and serve a copy on the other party no later than the 15th day after receiving the hearing officer's decision from the Commission's hearings division. Rule 143.3(a)(3) provides that a request for review 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) provides that a request for review shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and is received by the Commission not later than the 20th day after such date. The hearing officer signed the decision on June 28, 1993. Commission records disclose it was distributed to the parties on July 2, 1993.

Pursuant to Rule 102.5(h), receipt of the hearing officer's decision by the claimant is deemed to have occurred five days after mailing, that is, on July 7, 1993. Applying the five day rule to the date of mailing plus the 15 days for filing an appeal, we conclude that the filing deadline and last day to invoke the jurisdiction of the Appeals Panel was July 22, 1993. Had the claimant mailed her request for review no later than July 22, 1993, and had it been received by the Commission within five days of mailing, that is, July 27, 1993, the appeal would have been timely.

We have no evidence of the original request for review ever having been received by the Commission. The carrier received a copy of the claimant's appeal on July 26, 1993, and forwarded a photocopy of the appeal to the Commission where it was received on August 5, 1993. This photocopy was the first and only request for review of the claimant

[1]The parties agreed at the hearing that the flu shot produced no adverse effect on the claimant.

received by the Commission.

Although not necessary to our decision, we have nonetheless examined the record in this case to determine whether there was sufficient evidence to support the hearing officer's determinations on the matters submitted for appeal. *See* Texas Workers' Compensation Commission Appeal No. 92080, April 14, 1992. The claimant has the burden of establishing by a preponderance of the evidence that a compensable injury occurred. Martinez v. Travelers' Insurance Company, 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). This is ordinarily a question of fact to be determined by the hearing officer based on his or her evaluation of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and is entitled to believe all or part or none of the testimony of any one witness. Texas Workers' Compensation Commission Appeal No. 93416, decided on July 7, 1993. The hearing officer, as the trier of fact, also resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W. 2d 286 (Tex. App. - Houston [14th District] 1984, no writ). In reviewing the sufficiency of the evidence to support a finding, only if we determine that the evidence is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust do we reverse. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 93477, decided July 19, 1993. The hearing officer resolved against the claimant the issue of whether the hepatitis-B vaccination caused a reaction which constituted a compensable injury. The record contains extensive medical documentation about the possible etiology and correct diagnosis of claimant's medical condition on (date of injury), as well as substantial data about numerous other medical conditions and medications taken by the claimant, all of which may have some bearing on the claimant's asserted injury. The medical opinions relied on by the hearing officer, even though there was some contrary evidence, form a sufficient foundation for the hearing officer's conclusions. *See* Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993. In addition, the claimant's inconsistent testimony about the cause of her inability to work, as recorded in another contested case hearing, raised doubts about her claim for disability in this case. Having thus reviewed the record, even were we to have considered claimant's appeal, we would have concluded that the hearing officer's findings and conclusions are not so against the great weight of the evidence as to be clearly wrong and manifestly unjust. *See* Texas Workers' Compensation Commission Appeal No. 93440, decided July 15, 1993.

One other matter deserves comment. The claimant describes as "incorrect" certain parts of the hearing officer's statement of evidence. We have reviewed the record and believe his statement of the evidence is a fair and accurate recitation of pertinent facts gleaned from various portions of the evidence.

Since the claimant's request for review was not received until August 5, 1993, her appeal was untimely and, consequently, the jurisdiction of the Appeals Panel was not properly invoked. Pursuant to Section 410.169 and Rule 142.16(f), the decision of the hearing officer has become final.

The decision of the hearing officer has become final by operation of law.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge