

APPEAL NO. 93826

On June 21, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq.*). The issues at the hearing were: 1) whether the appellant (claimant) sustained a back injury in the course and scope of his employment on (date of injury); 2) whether the claimant timely notified his employer of an injury; and 3) whether the claimant has had disability. The hearing officer determined that the claimant was not injured in the course and scope of his employment; that he did not timely report his injury; and that he did not have disability. The hearing officer decided that the claimant is not entitled to workers' compensation benefits under the 1989 Act. In his appeal, the claimant states "I was hurt on the job."

DECISION

Determining that the claimant's request for review was not timely filed and that the jurisdiction of the Appeals Panel has not been properly invoked, the hearing officer's decision has become final pursuant to Section 410.169.

Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was mailed to the claimant on June 29, 1993, with a cover letter of June 24, 1993.

The claimant's request for review is dated "6-18-93," the certificate of service is dated July 16, 1993, the envelope in which the request was received by the Commission is postmarked September 16, 1993, and the Commission received the request on September 17, 1993. The claimant does not state the date he received the decision.

Section 410.202(a) provides that "[t]o appeal the decision of a 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." *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (Rule 143.3(a)(3)). Rule 102.5(h) provides that 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. Ordinarily when an appellant does not state the date he or she received the decision we apply the five day deemed receipt rule. *See* Texas Workers' Compensation Commission Appeal No. 93519 decided July 28, 1993. Accordingly, taking into consideration the five days mailing time and the 15 days for filing the appeal, in order to have been timely filed the request would have had to have been filed by Monday, July 19, 1993.

However, we are hesitant to apply the five day deemed receipt rule under the particular circumstances of this case because, although not raised in the appeal, we note

that the Commission transposed the middle two numbers of the claimant's street address in mailing the hearing officer's decision to the claimant. The claimant's address as shown by Commission records and by the return address on the envelope transmitting the appeal is 5327 (employer), (city), Texas 78233; whereas the Commission mailed the hearing officer's decision to the claimant at 5237 (employer), (city), Texas 78233. Although there is no indication in the Commission's records that the hearing officer's decision was returned to the Commission for remailing, we have previously observed that application of the five day deemed receipt rule presupposes mailing to the proper address. See Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992.

Although we do not apply the five day deemed receipt rule in this case, we nevertheless find that the claimant's appeal is not timely. Obviously, since the hearing officer's decision was not mailed until June 29, 1993, the claimant could not have received it by June 18, 1993, which is the date his appeal is dated. However, the claimant signed a certificate of service in which he indicates that he served a copy of his request for appeal (without indicating on whom the request was served) on July 16, 1993. Thus, the latest date the claimant could have received the hearing officer's decision was July 16, 1993. Since the 15th day after July 16, 1993 was Saturday, July 31, 1993, the claimant's time period for filing his appeal was extended to Monday, August 2, 1993, under Rule 102.3(a)(3). Rule 143.3(c) provides that a request for review shall be presumed to be timely filed if it is (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and (2) received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. According to the postmark, the claimant's appeal was not mailed to the Commission until September 16, 1993, and accordingly is determined to be untimely since it had to be mailed by August 2, 1993. Pursuant to Section 410.169, a decision of a hearing officer regarding benefits is final in the absence of a timely appeal. Consequently, the decision of the hearing officer in this case has become final.

According to the record in this case, at a hearing convened on June 15, 1993, the claimant requested a continuance which was granted, the hearing was continued until June 21, 1993, and on June 15, 1993, at the Commission field office the claimant was personally served a copy of the order continuing the case to June 21, 1993. In addition, the hearing officer notes in her decision that at the hearing on June 15, 1993, she informed all parties that the hearing was being continued until June 21, 1993, and that each party assured her that he or she could be present on that date. Notwithstanding the foregoing notice of hearing to the claimant, the claimant failed to appear at the hearing on June 21, 1993. The claimant raises no issue concerning lack of notice of hearing in his request for review nor does the claimant offer an explanation for his failure to appear at the hearing after having been properly notified of the hearing date.

Having reviewed the record, we conclude that had the claimant's request for review been timely filed, we would rule that the hearing officer's decision is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. Briefly, the claimant claimed he injured his back at work on (date of injury). The evidence showed that the claimant worked for the employer for four days commencing on October 12, 1992;

was late for work every day and was late in returning from lunch breaks every day; was counseled concerning his tardiness; and when he showed up about five hours late for work on the fourth day, October 15th, was fired. After termination the claimant filed an unsuccessful discrimination complaint with the Equal Employment Opportunities Commission (EEOC) against the employer, contacted local municipal authorities alleging violation of the building code, and hired an attorney to sue the employer for breach of an alleged employment contract. The letter from the claimant's attorney to the employer dated October 21, 1992, alleging breach of contract does not mention any work-related injury.

According to the carrier's witness, who was the person who hired and fired the claimant, the claimant did not file a workers' compensation claim until after the EEOC ruled in the employer's favor on the discrimination claim, the claimant never appeared to be injured while at work, no one at work had any knowledge regarding the claimed injury, and notice of the alleged injury was not given until about November 30, 1992, well after the 30 day statutory period for giving notice of injury to the employer. This witness also said that the reason the claimant gave for being five hours late for work on his last day of work was that he was looking for an apartment. Medical records indicate that the claimant did not seek medical attention until about December 21, 1992, and was at that time diagnosed with "post-traumatic low back pain." The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). Where, as here, the hearing officer's findings are supported by sufficient evidence and are not against the great weight and preponderance of the evidence, the hearing officer's decision will not be disturbed. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision has become final under Section 410.169.

Robert W. Potts
Appeals Judge

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge