APPEAL NO. 93841

On August 23, 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 disputed issues at the hearing were: (1) whether the appellant (claimant) was injured in the course and scope of his employment; (2) whether the claimant timely reported the injury; and (3) whether the claimant has disability as a result of that injury. The hearing officer concluded that the claimant was not injured in the course and scope of his employment; that he failed to timely notify his employer of the alleged injury; and that he does not have disability. The claimant appeals, citing only his disagreement with the decision of the hearing officer and requests benefits under the 1989 Act.[1]

DECISION

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

Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was distributed to the claimant, the employer and the carrier's Austin representative on September 9, 1993, with a cover letter of September 7, 1993.

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 that 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."

The claimant does not state the date he received the hearing officer's decision, thus we apply Rule 102.5(h) which provides that the Commission shall deem the received date of notices and other written communications to be five days from the date mailed. Since the decision in this case was mailed to the claimant on September 9, 1993, and applying the five day deemed rule plus the 15 days for filing an appeal, the last day of the period for filing the appeal was Wednesday, September 29, 1993. The envelope containing claimant's undated appeal[2] is post-marked October 4, 1993, and was received by the

[1]The claimant attached to his appeal a handwritten statement of his wife who was a witness at the hearing. Since this statement was not introduced into evidence at the hearing, it would not be considered by the Appeals Panel were this appeal timely. Section 410.203(a). *See also* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992.

[2]The appeal itself is undated but reflects service on the opposing party on September 21, 1993. Carrier's counsel by affidavit to its response to this appeal denied ever having received a copy of the appeal from the claimant.

Commission on October 6, 1993. This appeal is, therefor, determined to be untimely and the jurisdiction of the Appeals Panel has not been properly invoked. Accordingly, pursuant to Section 410.169 the decision of the hearing officer has become final.

Although not necessary to our decision, we have nonetheless examined the record in this case. The claimant has the burden of establishing by a preponderance of the evidence that an injury in the course and scope of employment occurred. This is ordinarily a question of fact to be determined by the hearing officer. Section 410.165. To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of the claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 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 wrong and unjust do we reverse. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951). The claimant claimed he was injured at work on (date of injury). He testified that while using a scrubber to clean floors at work he injured his back and legs. The claimant's supervisor said that the claimed date of injury was a normal day off and that no one, including the claimant and the claimant's wife, were working that day. The claimant said he immediately reported the injury to his supervisor. The supervisor said that the claimant never reported an injury to him. The claimant's wife testified that she worked with the claimant, she did not see him get injured, but he told her he was injured using the scrubber and that he was going to report his injury to the supervisor. She also said that she overheard the claimant report his injury to the supervisor two weeks after the injury. A medical report dated July 9, 1993, from Dr. C indicated that he saw the claimant on February 26, 1993, for left leg pain which he incurred when a scrubber hit him. The report indicates a date of injury of February 11, 1993. The documentary evidence and testimony presented some inconsistency as to the date of injury; however, no attempt was made to clarify the discrepancy at the hearing. The claimant continued to work until he was denied access to the work site on or about March 23, 1993, due to a security problem. The claimant did not work for the employer after March 23rd. The employer's manager said that the employer was not informed of the claimed injury until May 12, 1993. Conflicts in the evidence were for the hearing officer to resolve. A doctor's recitation of the history of an injury as reported to him by the claimant, does not necessarily compel a finding that an injury occurred as recited in the history. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Had the appeal been timely filed, we would have concluded that the hearing officer's decision was supported by sufficient evidence and was not against the great weight and preponderance of the evidence.

The claimant's appeal was not timely filed. Thus, the decision of the hearing officer has become final by operation of law.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Thomas A. Knapp
Appeals Judge