

## APPEAL NO. 93853

On March 30, 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) suffered a compensable back injury on (date of injury), in the course and scope of his employment, and (2) whether the claimant was entitled to temporary income benefits (TIBS) from January 12, 1993, to the date of the hearing. The hearing officer concluded that the claimant did not show by a preponderance of the evidence that he sustained an injury in the course and scope of his employment and that he was, therefore, not entitled to benefits under the 1989 Act. The claimant in a letter dated and received by the Texas Workers' Compensation Commission (Commission) on September 24, 1993, appeals the decision of the hearing officer asserting as the basis for his appeal his belief "that witnesses that testified were lying."<sup>1</sup> The carrier responds that the claimant's appeal is untimely and should be denied.

### 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 Commission show that the hearing officer's decision was distributed to the claimant, the employer and the carrier's Austin representative on April 8, 1993, with a cover letter of April 7, 1993. In his request for review dated September 24, 1993, the claimant states:

Also be advised that I never received the decision and order by the hearing officer until the (city) Field Office sent me a copy of what they had on file about 3 weeks ago.

The claimant's address on the April 7, 1993, cover letter from the Commission contains the claimant's name, the name of the mobile home park, lot number, city and zip code where he lives. Commission officials of the (city) Field Office also indicate that they mailed a copy of the hearing officer's decision to the claimant on July 30, 1993, after the claimant called and said he had trouble getting a copy.<sup>2</sup>

Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party

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<sup>1</sup>We note that the only witnesses at the hearing were those called by the claimant (including himself).

<sup>2</sup>At the conclusion of the CCH, the hearing officer advised the claimant of the time limitations for filing an appeal and that if he did not receive a copy of the decision by April 20, 1993, he should call the (city) office of the Commission to track it down.

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 the Commission shall deem the received date of written communications to be five days from the date mailed. Although there is no explanation why the claimant did not receive a copy of the hearing officer's decision in April 1993, even if we were to assume that he first was mailed a copy on or about July 30, 1993, applying the five day deemed rule plus the 15 days for filing an appeal, the last day of the period for filing the appeal would have been August 19, 1993. Since the appeal was dated and received September 24, 1993, it is determined to be untimely and the jurisdiction of the Appeals Panel has not been properly invoked.

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, decided April 14, 1992. The claimant in a workers' compensation case has the burden of establishing that an injury in the course and scope of employment has occurred. The existence of an injury is ordinarily a question of fact to be determined by the hearing officer based on 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) and is entitled to believe all or part or none of the testimony on any witness. Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. The hearing officer, declining to give credence to the claimant's testimony, resolved the factual issue of the existence of a compensable injury against the claimant. We believe there was sufficient evidence on which hearing officer could have based his findings. See Texas Workers' Compensation Commission Appeal No. 92106, decided April 27, 1992. Under these circumstances, even were we to have considered claimant's appeal, we would have concluded that the hearing officer's findings 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.

Since the claimant's request for review was not received until September 24, 1993, his appeal was untimely and consequently, the jurisdiction of the Appeals Panel was not properly invoked. Accordingly, pursuant to Section 410.169, the decision of the hearing officer has become final.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Susan M. Kelley  
Appeals Judge