APPEAL NO. 94030

This appeal is brought pursuant to 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*.). A contested case hearing (CCH) was held on October 19, 1993, in (City), Texas, with (Hearing Officer) presiding as hearing officer. The sole issue arising out of the Benefit Review Conference (BRC) was whether there was good cause to set aside an agreement signed by the appellant (claimant), his attorney and the respondent (self-insured or carrier). The hearing officer found the agreement valid and binding. The claimant appeals arguing that the hearing officer erroneously refused to set aside the agreement because of inadequate representation by counsel and for other good cause shown; mischaracterized a portion of the evidence; and improperly refused to add as an issue whether he was properly ordered to see a medical examination order (MEO) doctor more than 75 miles from his residence. No service of the appeal was made by the claimant on the carrier. Carrier was notified of the appeal by facsimile transmission from the Commission on January 10, 1994. The carrier replies that the decision of the hearing officer is supported by sufficient evidence and that pursuant to Section 410.030(b), because the claimant was represented by an attorney, "the agreement would be binding even if there had been good cause to overturn it," which the carrier believes there was not.

DECISION

Determining that the claimant's appeal 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.

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." A request for review is 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 it is received by the Texas Workers' Compensation Commission (Commission) not later than the 20th day after the date of receipt of the decision. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)).

Records of the Commission show that the hearing officer's decision was mailed to the claimant on November 16, 1993, with a cover letter of November 12, 1993. However, the address to which the decision was sent included an erroneous zip code of (address), instead of the correct (address). Claimant's copy of the decision was returned unopened to the Commission on November 23, 1993, and never remailed. We thus conclude that the decision was not actually received by the claimant upon its initial mailing, *see* Texas Employers Insurance Association v. Wermske, 349 S.W.2d 90 (Tex. 1961), and furthermore we do not deem the decision was received by the 5th day after the initial mailing as provided by Rule 102.5(h).

In his appeal dated January 2, 1994, and date-stamped as hand delivered to Commission offices in Austin on January 6, 1994, the claimant refers to a telephone conversation with a Commission official on December 9, 1993, about the decision in this case. While it is unclear whether the claimant had a copy of the decision at the time of this telephone conversation, it is apparent, based on the detailed contents of the appeal itself, that he had received the decision at least by January 6, 1994. Nowhere in his appeal, however, does the claimant state when he first received the decision. Noting his delay between the December 9, 1993, telephone conversation and the January 6, 1994, receipt of the appeal, we believe it was the responsibility of the claimant to show when he received the decision and why his appeal was timely, that is, made no later than 15 days after the decision was received and returned to the Commission no later than the 20th day as required by Rule 143.3(c).[1] This he failed to do and we conclude his request for review was not timely filed.

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 matter submitted for appeal. *See* Texas Workers' Compensation Commission Appeal No. 92080, decided April 14, 1993.

It is not disputed that the claimant was injured in the course and scope of his employment in an automobile accident on (date of injury). According to his testimony, he hired an attorney on December 22, 1992, to represent him in connection with workers' compensation matters arising out of this injury and the attorney-client relationship lasted until July 1, 1993, when the claimant discharged the attorney. On May 20, 1993, at a BRC, the claimant and his attorney and the carrier signed a written "Benefit Review Conference Agreement" which resolved the issues of date of maximum medical improvement and impairment rating (April 12, 1993, and zero percent respectively), resolved that all temporary income and impairment income benefits have been paid, and agreed on the identity of the claimant's treating doctor. Claimant at the CCH sought to set aside this agreement based on inadequate representation by his counsel. In support of his position he asserts that his attorney was unskilled in the 1989 Act and that neither his attorney nor the Benefit Review Officer properly explained the agreement and its effects.

The 1989 Act encourages early resolution of disputes through either settlement or agreement procedures at the BRC. The Appeals Panel has in the past noted that "settlement" means the final resolution of all the issues in a workers' compensation claim that are permitted to be settled, see Section 401.011(40), and must be approved by the director of the division of hearings, while an "agreement" is the resolution by the parties to a dispute of one or more issues regarding an injury, death, coverage, compensability or compensation. *See* Section 401.011(3). *See also* Texas Workers' Compensation Commission Appeal No. 92426, decided October 1, 1992. We believe that in this case the

[1]We also observe that the hearing officer advised the parties at the close of the CCH about the time limits for filing an appeal.

parties entered into an agreement, not a settlement, because at least one issue remained outstanding (travel more than 75 miles to an MEO doctor). *See* Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993.

Section 410.030(b) provides in pertinent part that an agreement "is binding on the claimant, if represented by an attorney, to the same extent as on the insurance carrier." If the claimant is not represented by an attorney, the Commission can invalidate the agreement "for good cause." The claimant admits that he was represented by an attorney at the time he (and the attorney) signed the agreement. There is no allegation or evidence that the attorney acted deliberately to injure the client or was guilty of bad faith or fraud on the client. *See* Wermske, *supra*. Under these circumstances, we would hold the agreement valid and binding on the claimant and any dissatisfaction therewith is a matter to be resolved solely between the claimant and his attorney.

The claimant also asserts that the hearing officer mischaracterized the evidence in stating that he, the claimant, said his attorney explained the contents of the agreement to him and in saying the claimant never established that the Commission committed fraud on him or his attorney when in fact he never alleged fraud. We have previously held that a hearing officer is not required in a decision to recite all the evidence admitted at the hearing. The 1989 Act only requires findings of fact, conclusions of law, a statement of whether benefits are due and an award of benefits due. Section 410.168. If a statement of evidence is made, it need only reasonably reflect the record and the Appeals Panel will not ordinarily consider questions about why part of the evidence was included or omitted. Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993. There was testimony that one of the persons present at the BRC observed the benefit review officer (BRO) give a copy of the agreement to the claimant and his attorney who then left the room presumably to discuss the agreement. In any event, when they returned, the BRO reportedly asked them both if they understood the agreement. They said they did. At the CCH the claimant testified he signed the agreement because he was "depending" on his lawyer and because his lawyer said it was "okay" to sign. Therefore, the issue of whether an explanation was given or not, in our opinion, is one of degree. Based on our review of the transcript, we conclude that the hearing officer's statement of the evidence reasonably reflects the record.[2]

The claimant also contends that the hearing officer improperly refused to add an issue about a violation of Rule 126.6(h) by the carrier in having him ordered to be examined by a doctor more than 75 miles from his residence. Section 410.151(b) provides in pertinent part that issues not raised at the BRC may not be considered at the CCH except by consent of the parties or if the Commission finds good cause existed for not raising the issue at the BRC. In this case, the carrier refused to consent to a consideration of this issue at the CCH. Claimant makes no assertion that good cause

[2]We also note that the claimant signed agreements with the carrier on December 8, 1992, (before he engaged his attorney) and on August 23, 1993, (after he discharged his attorney) neither of which he contested. This suggests awareness on his part of the significance of such agreements.

existed for his not raising it at the BRC. We therefore would hold that the hearing officer properly excluded this issue from consideration.

Other issues raised by the claimant include general allegations of unfairness in the conduct of both the CCH and BRC. We have carefully reviewed these contentions and would find them without merit.

Having thus reviewed the record, even were we to have considered claimant's appeal, we would have concluded that the hearing officer's decision and order are correct as a matter of law and not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Since the claimant's request for review was untimely, the jurisdiction of the Appeals Panel was not properly invoked. Pursuant to Section 410.169 and Rule 142.16(f), the decision and order of the hearing officer have become final.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge