

APPEAL NO. 94054

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 3, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues presented to the hearing officer for resolution were:

. . . whether Claimant was acting within the course and scope of her employment when she sustained a gunshot wound on (date of injury), whether Claimant has sustained disability as a result of her injury of (date of injury), and whether Carrier has waived its right to contest the compensability of Claimant's injury by failing to timely file a contest of compensability specifically raising the defenses of Claimant's alleged willful intent to injure herself, horseplay, and an assault directed at Claimant for reasons unconnected with her employment.

The hearing officer determined that although claimant's injury of (date of injury), was not sustained within the course and scope of claimant's employment, carrier's failure to timely controvert the compensability of such injury has resulted in carrier's waiving its right to do so.

Appellant, carrier herein, initially contended that the hearing officer: 1) erred in concluding that carrier waived its right to contest compensability; 2) erroneously concluded that claimant was entitled to workers' compensation benefits for the gunshot wound; and 3) erroneously concluded that claimant had disability. Respondent, claimant herein, responded that carrier's request for review was not timely filed citing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3) and responded to other portions of carrier's appeal. Carrier subsequently filed an "Appellant's Response to Respondent's Response" setting forth reasons that carrier's appeal was timely filed. Claimant then filed a "response to the appellant's response to our response" commenting on carrier's argument that its appeal had been timely filed. Claimant concludes he sees "no provisions for the Appellant's attorney to respond to our response."

Initially we would note that although neither the 1989 Act, in Section 410.202(b) nor the Texas Workers' Compensation Commission (Commission) rules (Rule 143.4) provide for responses to responses, we have considered explanations why an appeal may or may not have been timely filed. Texas Workers' Compensation Commission Appeal No. 93146, decided April 8, 1993. Consequently we will consider both carrier's and claimant's responses insofar as they relate to the timeliness of the request for review.

DECISION

We find that the appeal in this matter was not timely filed within the time limits required by Section 410.202(a), that an untimely appeal is jurisdictional and that the decision of the hearing officer is the final administrative decision in this case. See Section 410.169. A

review of Commission records indicates that the decision of the hearing officer was distributed, by mail, to the claimant and the carrier's attorney, and to Crawford & Company, carrier's (city) representative in its box at the Commission's central office in (city), on December 22, 1993. Carrier's initial appeal, dated January 12, 1994, did not recite a date of receipt, nonetheless, the provisions of Rule 102.5(h), became applicable as the decision was placed in the (city) representative's box. Rule 102.5 provides:

(h)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.

The "deemed" date of receipt, using Rule 102.5(h), would be five days after December 22nd or December 27, 1993. Carrier submits a December 28, 1993, date stamped copy of Crawford & Company's copy of the hearing officer's decision and argues that the carrier did not receive its copy of the decision until December 28th. We find that inexplicable as the copy of the hearing officer's decision was placed in Crawford & Company's box (Box 22) on December 22nd. We recognize that a notice may be lost in the mail, or not delivered by the U.S. Post Office, for a period of longer than five days and where a party alleges, and can prove non-receipt through the U.S. mail, beyond the presumptive five days we may under certain circumstances consider the reason for non-receipt. However, that is not the case here. As the claimant states, if a carrier chooses not to pick up its mail for six days that "is their problem." The decision was placed in the carrier's box on December 22nd, and was available to carrier at anytime after that date, or at least on December 22nd, 23rd, and 27th. That carrier chose not to pick up the decision and/or not date stamp the decision until December 28th, does not extend the deemed receipt date. The Appeals Panel has held that the failure of a carrier's (city) representative to retrieve the decision from its box within a reasonable time (five days) does not constitute a reason to extend the carrier's time to file a request for review. See Texas Workers' Compensation Commission Appeal No. 93327, decided June 3, 1993; Texas Workers' Compensation Commission Appeal No. 92727, decided February 12, 1993; Texas Workers' Compensation Commission Appeal No. 931075, decided January 7, 1994.

Carrier cites Texas Workers' Compensation Commission Appeal No. 92099, decided May 21, 1992, for authority that the date of receipt is the date the party says it received the decision. The exact dates involved in Appeal No. 92099 are not readily apparent in the decision, but it is clear that in that case the decision was sent through the mail, that the party in its initial request for review recited the date of receipt and that all the circumstances notwithstanding, the appeal was still held untimely. We find this distinguishable from situations where delivery is made to the carrier representative's box.

In the instant case, the decision was distributed to the carrier by placing a copy of the

decision in the box of the carrier's (city) representative's box on December 22nd, the deemed date of receipt was five days later on December 27, 1993. Section 410.202 requires a party to file a written request for review "not later than the 15th day after the date on which the decision of the hearing officer is received . . .," therefore, the last day on which an appeal could be filed was Tuesday, January 11, 1994. Carrier's appeal is dated January 12, 1994, and the postmark indicates the appeal was mailed on January 12, 1994. The provisions of Rule 143.3(c) which allow until the 20th day after receipt of the decision for the Commission to receive the appeal are conditional on mailing the appeal not later than the 15th day after receipt of the decision. This was not the case here and the 20th day receipt by the Commission does not apply as the appeal was not placed in the mail by January 11, 1994.

Section 410.169 states the decision of the hearing officer is final in the absence of a timely appeal. Determining the appeal was not timely filed, as set forth above, we have no jurisdiction to review the hearing officer's decision.

The hearing officer's decision and order has become final.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge