APPEAL NO. 94102

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 3, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) injured her back in the course and scope of her employment on (date of injury), and whether she had disability as a result of this injury. The hearing officer found that the claimant did not injure her back on (date of injury), but that she had a back injury on or about (date), that caused her disability from May 20, 1993, through July 26, 1993. The claimant appeals this decision expressing dissatisfaction with a finding of injury on (date), and urging instead that the injury was on (date of injury). The claimant does not address the finding of disability related to a May 20, 1993, injury. No service of the appeal was made by the claimant on the respondent (carrier). However, the carrier was notified of the appeal by facsimile transmission from the Texas Workers' Compensation Commission (Commission) on January 26, 1994. The carrier replies that the claimant's appeal is untimely and alternatively urges affirmance because the decision "is well-founded and based on factual documentation contained within the record and exhibits . . . . "

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.

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 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 December 16, 1993, with a cover letter of December 15, 1993. The claimant does not indicate in her appeal the date she received the hearing officer's decision, but states that she contacted the Commission on December 20, 1993, "for a rehearing appeal." She says that she was informed she would receive a letter, but if she did not receive the letter within 30 days, she was to contact the Commission again. Since she did not receive the letter, she says she again contacted the Commission "for the information I needed." Her appeal then followed. The claimant does not identify anyone at the Commission with whom she spoke.

Rule 102.5(h) provides that the Commission will deem the received date for decisions mailed to claimants to be five days after the date mailed. The evidence in this case

discloses that the decision of the hearing officer was mailed to the same address used by the claimant in her appeal. There is no indication that the copy mailed to her on December 16, 1993, was returned. Absent some evidence of fault or irregularity in the mailing of the hearing officer's decision, or a plausible assertion by the claimant of the date the decision was received, we are unwilling to conclude, based solely on the claimant's contention to the contrary, that she did not receive the decision mailed to her on December 16, 1993, within five days of mailing. *See* Texas Workers' Compensation Commission Appeal No. 93327, decided June 3, 1993, and cases cited therein. Accordingly, the claimant is deemed to have received the decision on December 21, 1993, which is five days after it was mailed, and her appeal was required to be mailed to the Commission not later than 15 days later, that is, by January 5, 1994. Rule 143.3. The claimant's appeal is postmarked January 24, 1994, and was received on January 26, 1994. Her appeal was thus not timely filed.[1]

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

At the hearing, the claimant sought to admit into evidence a statement from (Dr. M), the claimant's treating doctor, which attempted to correct a self-described "mistake" in his earlier report which referenced a back injury only on (date), and inadvertently did not reflect another back injury on (date of injury), as claimed. The carrier successfully objected to the admission of this statement because it was not timely exchanged. Section 410.161; Rule 141.4. Thus the only records of Dr. M in evidence (introduced by the carrier) reflect a date of injury of (date).[2] The document objected to by the carrier was dated September 16, 1993, the date of the Benefit Review Conference, and, according to the carrier's attorney, seen for the first time at the hearing. When queried by the hearing officer about this untimely exchange, the claimant's attorney had no explanation for why it was not exchanged. The test for admissibility of otherwise untimely exchanged documents is good cause for the lack of timely exchange and our standard for review of a hearing officer's decision as to good cause is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993; Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992. In this case, the claimant's attorney made no attempt to establish good cause. Thus, were we to consider this issue on appeal, we would have found no abuse of discretion by the hearing officer in refusing to admit this document.

We have also examined the record in this case to determine whether there was sufficient evidence to support the hearing officer's determination that the claimant did not

[1]We also observe that the hearing officer advised the parties at the close of the hearing that any appeal must be filed no later that the 15th day after the date his decision was received.

[2]The claimant in her testimony clearly pointed out that she no longer suffered from a (date), back injury and was not now contending that her current back injury occurred on that date.

sustain a back injury on (date of injury), in the course and scope of her employment. The claimant has the burden of establishing by a preponderance of the evidence that a compensable injury occurred. Martinez v. Travelers Insurance Company, 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). This is ordinarily a question of fact to be determined by the hearing officer based on his or 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(a)) and is entitled to believe all or part or none of the testimony of any one witness. Texas Workers' Compensation Commission Appeal No. 93416, decided July 7, 1993. 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 erroneous and unjust do we reverse. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The claimant testified that she had worked one day on an assembly line putting together and stacking empty boxes on pallets. She said that the injury "most likely" occurred on (date of injury), in the early morning when she felt a burning pain in the neck and lower back. She went to the Baylor University Medical Center for treatment on May 6, 1993. Treatment records for this visit reflect only rectal pain and hemorrhoids. The claimant admitted she did not tell the treating doctor about her back problem "when I saw he wasn't going to take care of it," a conclusion reached when she became dissatisfied with his treatment of her other condition. A report from Dr. M of a visit of (date), refers to low back pain which, according to Dr. M, the claimant attributed to an injury of February 8, 1993. No mention is made of a (date of injury), injury. The claimant insisted she told Dr. M she was injured on both dates and cannot explain why he mentioned only February. Other hospital progress notes of treatments on May 11 and July 26, 1993, diagnose primarily hemorrhoids with references to back pain "of unknown etiology." Based on this evidence, the hearing officer resolved against the claimant the issue of whether she was injured on (date of injury). The medical records contained only vague references to a back injury and conflicting evidence about when the alleged injury occurred. Having thus reviewed the record, even were we to have considered claimant's appeal, we would have concluded that the hearing officer's findings and conclusions 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. Because the decision of the hearing officer that the claimant did not suffer a compensable injury on (date of injury), has become final, the issue of disability before May 20th as a result of that alleged injury is moot. Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993.

Having determined that the claimant's appeal was not timely filed, the decision of the hearing officer is final. Section 410.169.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge