

## APPEAL NO. 94116

On November 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). The issues at the hearing were: (1) whether the appellant (claimant) was injured in the course and scope of his employment on (date of injury); (2) whether the claimant has had disability; and (3) whether the claimant made an election of remedies. The hearing officer determined that the claimant was not injured in the course and scope of his employment on (date of injury); that the claimant has not had disability; and that the claimant did not make an election of remedies when he filed for medical benefits under his group health insurer. The hearing officer decided that the claimant is not entitled to workers' compensation benefits because he was not injured in the course and scope of his employment. The claimant disagrees with the hearing officer's decision and contends that he was injured in the course and scope of his employment. The carrier responds that the claimant's appeal was not timely filed and that the evidence supports the hearing officer's decision.

### DECISION

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

Records of the Texas Workers' Compensation Commission (Commission) show that on December 21, 1993, the hearing officer's decision was distributed to the parties with a cover letter dated December 17, 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 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." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)) provides that a request for review shall be 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 hearing officer's decision.

The claimant's appeal is dated January 26, 1994, and was received by the Commission on January 31, 1994. Attached to the appeal is a letter dated December 24, 1993, from the claimant to the hearing officer "C/O Appeals Clerk, Hearings" with the address of the Commission's central office in (city), Texas, where the Appeals Panel is located. The letter advises the hearing officer that the claimant received the hearing officer's decision yesterday (December 23rd) and that the claimant does not agree with the hearing officer's findings. Upon receipt of the appeal dated January 26, 1994, the administrative staff of the Appeals Panel contacted the hearing officer about the letter dated December 24, 1993, and was advised that the hearing officer had not received the letter of

December 24th nor was the letter in the claimant's file at the field office. The Appeals Panel also has no record of receipt of the letter of December 24th prior to receiving it on January 31, 1994, as an attachment to the appeal dated January 26, 1994.

In that the claimant received the hearing officer's decision on December 23, 1993, his appeal was due no later than Friday, January 7, 1994. There is no record of the Commission having received the claimant's letter of December 24, 1993, prior to January 31, 1994, when the Commission received it with the appeal dated January 26, 1994. Consequently, we conclude that the claimant's appeal was not timely filed with the Commission. Pursuant to Section 410.169, a decision of a hearing officer regarding benefits is final in the absence of a timely appeal.

Had the claimant's appeal been timely filed, we are satisfied from our review of the record that we would have found that the hearing officer's determination of no injury in the course and scope of employment was supported by sufficient evidence and was not against the great weight and preponderance of the evidence. Succinctly, the hearing officer was confronted with conflicting testimony as to what transpired at the claimant's workplace on the alleged date of injury. The claimant and one other witness testified that the claimant hit his shoulder on a door frame when he was forced out of the employer's building, whereas another witness testified that the claimant was escorted out of the building and that he did not hit the door frame. As the judge of the weight and credibility to be given to the evidence, the hearing officer could choose to believe the witness whose testimony contradicted the testimony of the claimant and the claimant's witness.

The decision and order of the hearing officer have become final pursuant to Section 410.169.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge