APPEAL NO. 94117

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 12, 1993, and October 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding (RS had presided at the January 12, 1993, session). He determined that appellant (claimant) was not injured in the course and scope of employment on (date of injury), while employed as a teaching assistant. Claimant asserts that the hearing officer erred in not granting a continuance and that she disagrees with the outcome. Respondent (school) replies that claimant had been granted several continuances, the evidence supports the decision, and claimant did not timely file an appeal.

DECISION

Since the appeal was not timely made, the decision of the hearing officer is final. *See* Section 410.169.

The decision of the hearing officer was sent to the parties by cover letter dated November 18, 1993, which was distributed on November 22, 1993. The copy to claimant was addressed to the same address that claimant used as a return address on her untimely appeal. Claimant's file contains no indication that this decision was returned to the Texas Workers' Compensation Commission (Commission) as being undeliverable, etc. Claimant's appeal is dated January 28, 1994; in it she states that "this decision was never received by me through mail. I finally received a copy of this decision on January 28, 1994." No further explanation, such as theft of mail at her residence, was offered, nor was any inquiry of postal authorities reported by claimant. *See* Texas Workers' Compensation Commission Appeal No. 94030, decided February 15, 1994. The school received its copy of the decision on November 24, 1993.

With no explanation offered, with the appeal filed more than 30 days late, and no return to the Commission of the decision in question sent to claimant, the provisions of Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) are applicable and provide:

> 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.

Texas Workers' Compensation Commission Appeal No. 92090, decided April 24, 1992, stated that the word "deem" in this rule means "hold," such as "the commission shall hold the received date to be five days . . . ." Where Commission records show distribution on a particular day to the address confirmed by claimant as being accurate, a mere statement that the decision was not received in the mail is not sufficient to extend the date of receipt past the deemed date of November 27, 1993 (*See* Texas Workers' Compensation Commission Appeal No. 931040, decided December 27, 1993), under the circumstances set forth herein.

Section 410.202 allows 15 days to file a written request for review after the date the decision is received. With a deemed date of receipt of November 27, 1993, the appeal must have been filed by December 12, 1993. Since that date was a Sunday, the due date was the next day, Monday, December 13, 1993. *See* Rule 102.3(a)(3). It was filed on February 1, 1994, and therefore was not timely.

While the decision of the hearing officer is final, a review of the record and decision indicates that if the appeal had been timely, the decision would have been affirmed.

The record reveals that three benefit review conferences were scheduled for claimant; she attended the last one. The injury was alleged to have occurred on (date of injury). A contested case hearing was first set for claimant on October 27, 1992. Carrier acknowledged in its argument against a continuance at the October 29, 1993, hearing that claimant gave birth to a premature baby in September 1992. Claimant was granted continuances from hearings scheduled for October 27, 1992, January 12, 1993, May 28, 1993, and August 24, 1993. The January 12, 1993, hearing did convene but claimant did not appear, notifying the Commission on January 23, 1993, that she had been sick on January 12th. Claimant contacted the Commission about a continuance for the May 28th hearing on May 25th; for the August 24th hearing on August 23rd. After the continuance was granted which set the hearing for October 29, 1993, the hearing officer made sure that the claimant had an appointment with the ombudsman; the appointment was for October 7, 1993; claimant cancelled the appointment.

Claimant called the Commission on October 25, 1993, and asked for another continuance, stating she had a child support hearing the same week. (No assertion was made that such hearing was the same day.) Citing another hearing she had in December, she asked for a setting for this hearing in January 1994. The continuance was not granted and claimant stated she would not attend. The hearing officer offered to conduct the hearing by telephone with her in attendance in that manner. She refused. Claimant did appear at the Commission on October 27th at 5:15 p.m. and talked with the ombudsman until 6:30 p.m., indicating that she would not attend the hearing. Claimant then said that she could not leave her child to attend the hearing. After personally talking to personnel at the clinic where claimant had the baby to confirm the school's assertion that the baby was no longer at high risk, the hearing officer found there was not good cause for granting another continuance.

We have considered the action of the hearing officer in regard to claimant's oral request, which was treated as a request for continuance, as a question of whether the hearing officer abused his discretion. *See* Texas Workers' Compensation Commission Appeal No. 92265, decided August 5, 1992, and Texas Workers' Compensation Commission Appeal No. 93059, decided March 3, 1993. Based on the reasons stated for making the request, the information obtained by the hearing officer, the offer by the hearing officer to conduct a telephone hearing, and the past record of continuances granted in this proceeding, we do not conclude that the hearing officer abused his discretion in not granting a continuance and conducting the hearing on October 29, 1993.

Testimony at the hearing indicated that the school principal attempted to counsel claimant about improvement and "professionalism" on February 4, February 6, February 7, and February 18, 1992 (which included a "Professional Improvement Plan" which claimant saw). Each time, claimant walked out of the discussion refusing to acknowledge any criticism. On (date of injury), after several attempts to communicate with claimant, claimant refused to leave a classroom to go to the office, but went to the teacher's lounge. The principal, with a witness, (Mr. G), followed her there, where she then entered a restroom within that area and locked the door. Either Mr. G or the principal was immediately outside the restroom all the time until claimant came out. The walls are thin; normal conversation inside can be heard outside. No fall was heard, and no screaming was heard. When she exited the restroom after approximately 15 minutes, she walked past the principal and Mr. G without saying anything, just as she had been walking before. (Principal stated claimant was wearing a "neckbrace" which she had worn for "several weeks.") She returned to a classroom where she paced back and forth refusing to acknowledge that principal had followed her there. The principal ordered her to leave the school grounds. Claimant again left the classroom and returned to the lounge, going into a telephone enclosure. She came out once, saw the principal, and went back in. She subsequently came out and said that she had fallen in the restroom. She did not state that she was hurt.

The medical records of (Dr. F) contained two letters written by Dr. F to an attorney in 1993. Dr. F related in those letters that he first saw claimant on February 3, 1992, after her car accident of January 17, 1992. She presented complaining of neck pain and wearing a cervical collar. He referred to having seen claimant in March, April, and December 1992, and August 1993. He never referred to any report of a fall on (date of injury), or to any other aggravation or incident other than the car wreck. In 1993, Dr. F said that she returned with severe pain but "could not recall any specific incident which may have re-injured her neck . . . ." The hearing officer asked the principal if she knew of any medical record indicating injury at school to claimant. She replied that she did not. The hearing officer then asked the attorney for the school if he knew of any such medical record, and he replied in the negative. The hearing officer then called the school's loss control coordinator, who was attending, to the stand, placed her under oath, and asked if she knew of any medical report indicating injury to claimant at the school; she also stated that she did not.

Claimant's statement given on April 22, 1992, was admitted at the hearing. In it claimant stated that she slipped and fell when she went into the restroom on (date of injury), when Mr. G was outside. She also said that she "yelled for help at the time" and was unconscious for about five minutes. She said that she went to Dr. F but did not say anything about workers' compensation to him.

The hearing officer at the end of the school's presentation of evidence held the record open until November 3, 1993 for claimant to submit evidence. Claimant on November 2nd provided one document, "Certificate to Return to School," which was signed by a (Dr. G). It said that claimant had been under his care from October 29 to November 1, 1993, and had "brought in ill child" with "upper resp. inf. - cough." It said she was able to return to

school on November 1, 1993.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could believe the principal and Mr. G when they said that no yell for help was heard in the restroom. He could question an injury on (date of injury) when claimant saw Dr. F in February, March, and April and said nothing of an accident at school. He could question claimant's motives because of the circumstances of the personnel action that was being attempted at the time claimant reports she fell. Had there been a timely appeal, the decision and order of the hearing officer would be found to be supported by sufficient evidence and would have been affirmed.

With no timely appeal, the decision of the hearing officer is final as specified in Section 410.169 of the 1989 Act.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge