APPEAL NUMBER 94959
FILED SEPTEMBER 1, 1994

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 6, 1994. The issues at the CCH were injury and disability. The hearing officer found that the appellant (claimant herein) did suffer a compensable injury, but had failed to establish disability. The claimant herein appeals the latter determination of the hearing officer arguing that medical reports he had provided to the hearing officer after the hearing (and copies of which he attaches to his request for review) establish disability. The respondent (carrier herein) argues that the claimant's appeal is untimely, that medical reports submitted after the close of the record of the CCH were correctly not considered by the hearing officer and that the evidence presented by the claimant fails to establish disability.

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 decision of the hearing officer has become final pursuant to Section 410.169.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16 (Rule 142.16) provides that the Texas Workers' Compensation Commission (Commission) shall furnish the parties a copy of the hearing officer's decision. In regard to communications from the Commission, Rule 102.5 provides, in relevant part, that:

(a)All notices and written communications to the claimant or claimant's representative will be mailed to the last address supplied by that claimant or representative.

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(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.

Section 410.202(a) of the 1989 Act provides as follows:

To appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later that 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.

Rule 143(a)(3) provides that a request for review of the hearing officer's decision shall be filed with the Commission's central office in Austin "not later than the 15th day after receipt of the hearing officer's decision. . . ." Rule 143.3(c) goes on to provide the following:

> (c)A request made under this section shall be presumed to be timely filed or timely served if it is:
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> (1)mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and
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> (2)received by the commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision.

Finally, Section 410.169 provides in relevant part: "A decision of a hearing officer regarding benefits is final in the absence of a timely appeal by a party. . . ."

In the present case, according to Commission records, the Commission distributed a copy of the decision to the parties on June 29, 1994, under a cover letter dated June 27, 1994. The claimant does not state in his request for review the date he received this decision. Under Rule 102.5(h) the claimant was presumed to have received this notice five days after it was distributed or by July 4, 1994. The claimant had only 15 days or by July 19, 1994, to mail his appeal to the Commission. Instead the claimant mailed his request for review to the Commission postmarked July 21, 1994. Thus under Section 410.169, we must find that the decision of the hearing officer is final.

Although it is not necessary for our decision, we have reviewed the entire record and were the appeal timely we would have affirmed the decision of the hearing officer. The question of disability is one of fact. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Section 410.165(a) provides that the CCH officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of

the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying the above standard of review, we would not have said that the evidence presented by the claimant on the issue of disability constituted the overwhelming weight of the evidence. The claimant's testimony on his ability to work was somewhat ambivalent. Even had this testimony been unambiguous, the hearing officer still could have rejected it. As an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The medical evidence was also unclear as to claimant's work status, even if we were to consider the medical reports from Dr. D which the hearing officer refused to consider because they were filed after the close of the evidence.

Pursuant to Section 410.169 and Rule 142.16(f), the decision and order of the hearing officer have become final.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge