

## APPEAL NO. 990367

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 January 7, 1999. The appellant (claimant) sustained a compensable injury on \_\_\_\_\_. The hearing officer determined that the claimant did not sustain cervical or lumbar spinal injuries as a result of his on-the-job accident of \_\_\_\_\_. The claimant appealed; stated that he did not receive the decision of the hearing officer until February 5, 1999; attached an affidavit of a legal assistant of the attorney representing the claimant, stating that she calendared that the office received the decision of the hearing officer on February 5, 1999; urged that the hearing officer erred in not permitting his girlfriend to testify; contended that the evidence established that the fall on \_\_\_\_\_, caused injuries to his cervical and lumbar spine; and requested that the Appeals Panel reverse the decision of the hearing officer. The respondent (carrier) replied; contended that the appeal was not timely filed; argued that the hearing officer properly excluded the testimony of the claimant's girlfriend, and that if the hearing officer erred in excluding the testimony, the error was harmless; urged that the evidence is sufficient to support the decision of the hearing officer; and requested that it be affirmed. On March 11, 1999, the attorney representing the claimant filed a reply to the carrier's argument of untimely filing in which he stated that he, the attorney representing the claimant, received the hearing officer's decision on February 5, 1999.

### DECISION

The claimant's request for review was not timely filed and the decision and order of the hearing officer have become final.

The records of the Texas Workers' Compensation Commission (Commission) reflect that the decision of the hearing officer was distributed on January 19, 1999, with a letter dated that same day. The claimant's appeal is signed by the attorney representing him and contains:

The cover letter to the hearing officers [sic] decision is dated January 19, 1999. However, Appellant received said decision on February 5, 1999. Attached as Exhibit A, is an affidavit of Ms. H, which indicates when this office actually received the hearing officer's decision.

In the affidavit, Ms. H states "[o]n February 5, 1999, I calendared that we received the hearing officer's decision on [claimant's] case." The claimant's reply to the carrier's arguments on untimely filing states "[o]n February 5, 1999, Appellant's chosen counsel received notice of the hearing officer's decision in this matter." Receipt by the party, not receipt by the attorney representing a party, controls. Texas Workers' Compensation Commission Appeal No. 941695, decided January 27, 1995. The request for review and the reply to the carrier's arguments of untimely appeal indicate that February 5, 1999, was the date the attorney representing the claimant received the decision of the hearing officer.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) provides that the Commission shall deem the received date to be five days after the date mailed. The decision of the hearing officer was sent to the claimant at address, city, the address the claimant used in his testimony at the hearing and the records of the Commission do not indicate that it was returned to the Commission by the United States Postal Service. A statement by a claimant that the decision of the hearing officer was not received or was received late alone is not sufficient to extend the date of receipt beyond the deemed date under Rule 102.5(h). Texas Workers' Compensation Commission Appeal No. 941057, decided September 22, 1994. The fifth day after January 19, 1999, was Sunday, January 24, 1999, and the claimant is deemed to have received the decision on Monday, January 25, 1999. Section 410.202 provides that a party that desires to appeal the decision of the hearing officer shall file a written request for review 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 Commission's Division of Hearings. The last day for the claimant to file an appeal was February 9, 1999. The claimant's appeal is dated February 19, 1999; was mailed on that day; and was not timely filed. Under the provisions of Section 410.169 and Rule 142.16(f), a decision of a hearing officer regarding benefits is final in the absence of a timely appeal.

The jurisdiction of the Appeals Panel was not properly invoked and the decision and order of the hearing officer became final under the provisions of Section 410.169 and Rule 142.16(f).

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge