APPEAL NO. 000571

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 February 29, 2000. The issues at the CCH were whether the respondent/cross-appellant (claimant herein) was entitled to supplemental income benefits (SIBs) for the second quarter, from November 24, 1999, through February 22, 2000; and whether appellant/cross-respondent (carrier herein) timely contested claimant=s entitlement to SIBs for the second quarter. The hearing officer determined that the claimant failed to prove he met the requirement for eligibility to SIBs for the second quarter, but, since the carrier failed to timely dispute claimant=s entitlement, the carrier is required to pay SIBs for the second quarter. The carrier appeals, contending that it timely contested claimant=s entitlement to SIBs for the second quarter. The carrier argues that the evidence was legally and factually insufficient to support the hearing officer=s determination that it did not timely contest the claimant's entitlement to SIBs. There is no response from the claimant to the carrier's request for review in the appeal file. The claimant does file a request for review arguing that the evidence established he was unable to work at all during the filing period for the second compensable quarter, contrary to the findings of the hearing officer. The carrier responds that the claimant's appeal is untimely and that the hearing officer's finding that the claimant did not have a total inability to work during the filing period is sufficiently supported by the evidence. The claimant also later mailed a letter to the Texas Workers= Compensation Commission (Commission) with a report attached from his doctor concerning his inability to work.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The carrier questions whether the claimant timely filed his request for review. Records of the Commission show that the decision of the hearing officer was mailed to the claimant on March 10, 2000. The claimant recites that he received the decision on March 21, 2000. We note the claimant was deemed to have received the decision under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 102.5(d) (Rule 102.5(d)) five days after it was mailed, or on March 15, 2000, unless the great weight of the evidence is otherwise. We note that the cover letter under which the Commission sent the hearing officer's decision was sent to the same address that the claimant confirmed at the CCH as his mailing address and that he used as the return address on the envelope in which he sent his request for review. We do not find the great weight of the evidence contrary to receipt of the hearing officer's decision by the claimant on March 15, 2000, and we find that the claimant was deemed to have received the decision of the hearing on that date. The claimant mailed his request for review to the Commission postmarked April 1, 2000, and the Commission received it on April 3, 2000. Thus, since he did not mail his request for review to the Commission within 15 days of his receiving the hearing officer's decision, the claimant's request for review is untimely. *See* Section

410.202(a); Rule 143.3(c). We lack jurisdiction to consider it. Nor can we consider the letter mailed by the claimant to the Commission on April 13, 2000, with an attached copy of a narrative report from his treating doctor as this document is untimely to be either a request for a review or as a response to the carrier's request for review. *See* Section 410.202(a) and (b). Also, we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992.

The only issue before us on appeal is whether the carrier waived its right to dispute claimant's entitlement to SIBs for the second compensable quarter by not timely contesting his right to these benefits. As the hearing officer points out, the applicable rule is Rule 130.104(a) which provides that a carrier shall issue a determination of entitlement or non-entitlement within 10 days after receipt of an Application for Supplemental Income Benefits (TWCC-52). The parties stipulated that the carrier filed its dispute of second quarter (SIBs) benefits on November 23, 1999. The case hinges on the question of when the carrier received the claimant's TWCC-52.

The parties put into evidence a copy of the third page of the claimant's TWCC-52, which contains a date stamp from the carrier. The date stamp is obscured by a line on the form. The carrier contended that the date stamp reads "November 18, 1999" and the claimant contends it reads "November 10, 1999." The claimant's testimony concerning the date he mailed the TWCC-52 to the carrier is ambiguous. The hearing officer found that the carrier received the claimant's TWCC-52 on November 10, 1999, giving the following rationale for so finding:

> The date of receipt of the TWCC-52 is crucial to this issue. Rule 130.104(d) provides that upon receipt, the Carrier shall date stamp [TWCC-52] forms with the date the Carrier received the form. However, at the [CCH], only the 3rd page of [the] TWCC-52 was produced by the Carrier, and the date stamp is illegible. Looking at page 3 of HO Exhibit #3, one can make out the month of November, but whether the Carrier received it on 11-10-99, as Claimant contends, or 11-18-99, as Carrier contends, is unclear. Equally unclear is why the Carrier only produced the 3rd page of the TWCC-52, and not the first two pages. It is clear that Claimant submitted the application as required by Rule 130.104(c), and Carrier never argued that Claimant did not submit a complete application, it simply took the position that it no longer could locate the first two pages, only the 3rd page, with the illegible date stamp.
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> The issue then becomes who has the burden of establishing when the Carrier received the TWCC-52. Normally, the burden rests on the Claimant to prove entitlement to [SIBs], but what happens when the Rules require that a carrier shall date stamp all [TWCC-52] forms per Rule 130.104(d) and the Carrier has custody and control of the TWCC-52, once it has been filed with the carrier, and

> Claimant has not kept a copy nor has he sent it return receipt requested? Claimant did not produce a copy, and his memory was somewhat sketchy although he testified that he filed the TWCC-52 within 3 days after it was mailed to him by the insurance carrier.
>
> Parties agreed that the filing deadline for the TWCC-52 was 11-17-99. Claimant testified that he believed that he mailed it prior to his filing deadline, and he also testified that he could have mailed it around 11-17-99. Claimant also testified that it was his position that he mailed it before 11-10-99, and the Carrier's date stamp reads 11-10-99.
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> Claimant is 75 years old, and I believe from the credible evidence produced at the [CCH], that he mailed his TWCC-52 prior to his filing date, and that the Carrier received his TWCC-52 on 11-10-99.

Section 410.165(a) provides that the contested case hearing officer, as finder offact, 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). 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 this standard, we believe that from the evidence before her and reasonable inferences from that evidence, there is sufficient evidence to support the hearing officer's finding that the carrier received the claimant's TWCC-52 on November 10, 1999. Given the stipulation of the parties that the carrier did not file a dispute until November 23, 1999, and applying Rule 130.104(a), the hearing officer did not err in finding that the carrier had waived its right to contest the claimant's right to SIBs for the second compensable quarter.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCURRING OPINION:

When ink is stamped on a document, I have found it leaves a slightly raised, superimposed track which can even carry through onto a photocopy. I have taken a magnifying glass and turned the disputed document at an angle, and could see the slight raised area which plainly appeared to me to be the continuation of a "zero" rather than an "eight." I am therefore satisfied that the record supports the hearing officer.

Susan M. Kelley
Appeals Judge