

APPEAL NO. 011059
FILED JUNE 26, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 4, 2001. With regard to the issues, the hearing officer determined that (the deceased) compensable right knee injury of _____, was not a producing cause of the decedent's death on April 27, 2000. The hearing officer also made unappealed determinations on who the eligible beneficiaries were.

The claimant beneficiaries's (herein referred to as the claimant) appeal argues first the jurisdictional aspects of the timeliness of the appeal and otherwise urges reversal of the hearing officer's decision on the merits. The respondent (carrier) responds, urging that the claimant's appeal is untimely and otherwise urges affirmance.

DECISION

A timely appeal not having been filed, 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 the decision of the hearing officer was mailed to the claimant on April 18, 2001, under a cover letter of the same date. The claimant's attorney asserts that his firm received a partial copy of the hearing officer's decision from the claimant beneficiary on May 15, 2000, and a full copy from the Commission's Hearings Division on May 16, 2000. The appeal recounts a sequence of events that the claimant beneficiary inquired about the case on April 16, 2001, and again on a voice mail message on April 24, 2001; that as a result of the voice mail message, a legal assistant contacted the Commission's proceedings clerk who advised the legal assistant that she (the proceedings clerk) did not have the decision. The claimant beneficiary again called the attorney's office on May 2, 2001, referencing the hearing officer's decision that "it went against us." The claimant's attorney apparently assumed that the claimant received the decision on May 2, 2001, and "calendared the appeal date 5/16/2001." The claimant's attorney asks us to apply the "principle of estoppel" based on the proceedings clerk's representation that she did not have the decision, that the 15 days to appeal should run from May 2, 2001, the date the claimant's attorney assumed the claimant beneficiary had received the decision and that the deemed receipt rule of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)) should not be strictly applied because the Commission had failed to send the claimant's attorney a copy of the hearing officer's decision as required in Rule 102.5(a).

Section 410.202(a) provides that to 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 hearing officer's decision is received from the division." TWCC Advisory 93-11 dated November 4, 1993, subject: Modification of Commission Operations Concerning Delivery of Documents states, in part:

All documents and notices related to workers' compensation dispute resolution proceedings that are required to be provided by the [Commission] to claimants will continue to be mailed to the Claimant. Notice to the Claimant for all purposes will be established by this notification. If the Claimant is represented by an attorney before the Commission, and the Commission has the address of such attorney in its files, then a courtesy copy of all such documents will be mailed to such attorney.

Texas Workers' Compensation Commission Appeal No. 941144, decided October 4, 1994, addressed the very situation we have in this case where we held that since the 1989 Act gives the party, not the attorney, the right to appeal, and provides the party, not the attorney, with 15 days in which to file an appeal, the operative date for determining the timeliness of the appeal is the date the claimant, not his or her attorney, received the hearing officer's decision. While Rule 102.5(a) does provide that written communications to the claimant shall be sent to the representative, this has been interpreted to be a courtesy copy as provided for in TWCC Advisory 93-11 and does not operate to extend or change the 15 days after receipt of the hearing officer's decision by the party.

Rule 102.5(d) provides that unless the great weight of the evidence indicates otherwise, the claimant is deemed to have received the hearing officer's decision five days after it was mailed, or in this case, on Monday, April 23, 2001. We do not consider the claimant's attorney's explanation for the late filing to be the great weight of the evidence contrary to the deemed receipt date. Indeed, there is evidence by which inferences can be drawn that the claimant beneficiary did actually receive the hearing officer's decision on or about April 24, 2001, when she called the attorney's office.

If the deemed date of receipt is Monday, April 23, 2001, 15 days after that date would be Tuesday, May 8, 2001. The claimant's appeal was sent by facsimile transmission on May 16, 2001, and was also mailed and postmarked that same date. The claimant's appeal is untimely having been filed (or mailed) after May 8, 2001.

Nor do we find Texas Workers' Compensation Commission Appeal No. 94322, decided May 2, 1994, cited by the claimant's attorney, applicable to this case. As we noted in that case, the ruling was a narrow one which involved a written communication (in this case the communication was verbal) which "involved a deadline set forth in a rule, rather than a statute"; (in this case it is a statutory imposed time limit) and that the communication "was issued to both parties, who had equal benefit of the mistake" where in this case the communication was verbal only to the claimant's attorney's legal assistant.

The appeal being untimely, the jurisdiction of the Appeals Panel was not properly invoked and the decision and order of the hearing officer have become final under Section 410.169.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge