

APPEAL NO. 012181
NOVEMBER 1, 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 (CCH) was held on August 10, 2001. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) compensable injury of _____, does not extend to and include injuries to the claimant's back or neck. The claimant appealed and the respondent (carrier) responded. The carrier asserts that the claimant's request for appeal was not timely filed.

DECISION

The hearing officer's decision is affirmed.

TIMELINESS OF APPEAL

We first address the carrier's assertion that the claimant's request for appeal was not timely filed. According to records of the Texas Workers' Compensation Commission (Commission), the hearing officer's decision was mailed to the claimant on August 23, 2001. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), 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. The fifth day after mailing was August 28, 2001, which is the date the claimant states that he received the hearing officer's decision. Pursuant to Section 410.202, as amended June 17, 2001, the claimant had 15 days after the date he received the hearing officer's decision, not including Saturdays and Sundays and holidays listed in Section 662.003, Texas Government Code, to file his request for appeal. Thus, the due date for the appeal was September 19, 2001. The claimant's original request for appeal was received by the Commission on September 14, 2001, and was thus timely filed and will be considered. However, the claimant's "revised" appeal, which was received by the Commission by facsimile transmission on October 1, 2001, was not timely filed and will not be considered.

CLAIMED INJURY TO BACK AND NECK

It is undisputed that the claimant sustained a compensable chemical inhalation injury on _____. The claimant testified that while he was escaping from the cab of his crane to get away from the chemical fumes, he injured his back and neck. The hearing officer determined that the claimant's compensable injury of _____, does not extend to and include injuries to the claimant's back or neck. The claimant had the burden to prove the extent of his compensable injury. Texas Workers' Compensation Commission Appeal No. 010293, decided March 21, 2001. The claimant contends that the carrier's witnesses were untruthful, and he expresses disagreement with the hearing officer's "Statement of the Evidence." Conflicting evidence was presented at the CCH with regard to the disputed issue. The hearing officer is the sole judge of the relevance and materiality

of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence. Thus, the credibility of the witnesses was for the hearing officer to decide. The hearing officer wrote that he did not find the claimant to be credible. The claimant has not shown any reversible error with regard to the hearing officer's "Statement of the Evidence." The hearing officer's decision with regard to the disputed issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We note that the hearing officer did make a confusing statement when he wrote, with regard to an April 28, 2000, physical examination, that the claimant "certified he did not have a negative medical history, including no history of either head or spinal injuries"; however, we do not perceive that statement to be the basis for a reversal of the decision in light of the fact that later on in the decision the hearing officer correctly noted that "claimant certified in writing on April 28, 2000, that he had a negative medical history, including no history of either head or spinal injuries."

OTHER MATTERS

The claimant has not shown that the hearing officer erred in admitting into evidence, over the claimant's objection as to relevance, Carrier's Exhibit No. 13, a claims search report. As previously noted, the hearing officer is the sole judge of the relevance of the evidence.

While questioning a carrier witness, the claimant mentioned having an "early out slip," which he said he did not timely exchange, but he did not actually offer that slip into evidence as an exhibit. The carrier's objection at that point appeared to be based on the claimant's attempt to testify about the slip while the claimant was cross-examining a witness. The hearing officer sustained the objection, and in doing so noted that the slip was not in evidence. Since the claimant did not actually offer the slip into evidence, the hearing officer made no ruling as to its admissibility. Thus, there is no ruling of the hearing officer for us to review on appeal with regard to the admissibility of that slip. The claimant attached the slip, dated _____, to his original appeal. Since we consider the record developed at the CCH (Section 410.203(a)(1)) and the slip is not part of the CCH record, we do not consider it on appeal. In addition, the slip has not been shown to constitute newly discovered evidence. See Texas Workers' Compensation Commission Appeal No. 93311, decided June 7, 1993, citing Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ARGONAUT MIDWEST INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH A. YURKOVICH
1431 GREENWAY DRIVE, SUITE 450
IRVING, TEXAS 75038.**

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge