APPEAL NO. 042264
FILED OCTOBER 29, 2004

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 5, 2004. The hearing officer determined that the appellant's (claimant) compensable injury of _____, does not extend to or include post-concussive syndrome and/or cognitive deficits.

The claimant appeals, basically on sufficiency of the evidence contending that incorrect medical histories were just "paper errors" and that the claimant's demeanor at the CCH had no relevance regarding the disputed issue. The respondent (carrier) responds that the claimant's appeal is untimely, that a medical report attached to the claimant's appeal should not be considered, and otherwise urges affirmance.

DECISION

Affirmed.

The claimant's appeal is timely. Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was mailed to the claimant on August 13, 2004. Although the claimant states that he did not receive the decision until August 27, 2004, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), as amended August 29, 1999, unless the great weight of 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 August 18, 2004.

Section 410.202(a) provides that "[t]o 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 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." Section 410.202 was amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal. Section 410.202(d). Rule 143.3(e) provides that a request for review shall be presumed to be timely if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision; and (2) received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(e) must be complied with for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 020172, decided March 12, 2002. In this case the 15th day after the deemed receipt date of August 18, 2004, excluding weekends and holidays, is September 10, 2004. The claimant's appeal is postmarked September 10, 2004, and was received on September 14, 2004, and is therefore timely.

Attached with the claimant's appeal is a letter dated September 9, 2004, addressed to the "Appeals Clerk," from Dr. B, the claimant's treating doctor. Dr. B addressed some of the hearing officer's discussion. Documents submitted for the first time on appeal are generally not considered unless they meet the standard set out in Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case, Dr. B's letter appears to be a direct appeal to the Appeals Panel and as such, Dr. B has no standing. Further, the information in the correspondence appears cumulative to his position in other reports and, while dated after the CCH, does not constitute newly discovered evidence which would warrant a remand. We also note that the claimant has incorporated much of Dr. B's information in his appeal. We will not consider Dr. B's letter.

On the merits, it is undisputed that the claimant sustained multiple injuries in a one vehicle motor vehicle accident on _____. Initially the claimant was diagnosed with neck and back strains and a concussion. Complaints of dizziness were associated with the concussion. The history the claimant gave some of the doctors that he subsequently saw, included a "severe brain injury . . . confirmed by MRI . . . ." No such MRI existed and the claimant dismissed those notations as "a paper error." The hearing officer also noted that the claimant was "relatively lucid and articulate" in responding to cross-examination. There was conflicting medical evidence regarding the disputed issue. While Dr. B believes that the claimant has the claimed conditions and that they are due to the compensable injury, other doctors including the designated doctor and a Ph.D psychologist thought otherwise.

The disputed issue in this case involved a factual question for the hearing officer to resolve. Section 410.165(a) provides that the hearing 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 to 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 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer pointed out where some of the doctors had incorrect histories. The hearing officer was not bound by medical evidence where the credibility of that evidence is manifestly dependent upon the credibility of the information imparted to the doctor by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

The claimant contends, on appeal, that his "ability to respond to questions has no relevance as to whether he suffers from a closed head injury [the claimed conditions]." We disagree. The 1989 Act makes the hearing officer the sole judge of the credibility of the evidence in part because the hearing officer has the ability to hear the testimony and observe the witness' demeanor first hand.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

CINDY GHALIBAF
7610 STEMMONS FREEWAY, SUITE 350
DALLAS, TEXAS 75247.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Edward Vilano
Appeals Judge