APPEAL NO. 950134

        This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act).   On December 6, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding.   The issues were:

1.Whether Claimant has sustained disability since (date of injury), and

2.Whether an alleged subsequent injury of (date of injury), constituted the sole
            cause of Claimant's current condition.

The hearing officer determined that a noncompensable injury of (date of injury), was the sole cause of claimant's current left knee problems and that claimant has not sustained disability.   Appellant (claimant) contends that the hearing officer misunderstood some of the testimony and requests that we reverse the hearing officer's decision and render a decision in his favor.   Respondent (carrier) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

        The appeal in this case was not timely filed and the decision and order of the hearing officer are final.   *See* Sections 410.169 and 410.202.

        The decision of the hearing officer was forwarded to the parties by cover letter dated December 14, 1994, and distributed December 15, 1994.   Claimant does not state in his appeal when he received the decision, so the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) are invoked.   Rule 102.5(h) provides:

(h)For purposes of determining the date of receipt of those notices and other written
            communications which require action by a date specific after receipt,
            the commission shall deem the received date to be five days after the
            date mailed.

        In that the decision was mailed on December 15, 1994, the "deemed" date of receipt is December 20, 1994.   Section 410.202 provides that an appeal shall be filed with the Appeals Panel "not later than the 15th day after the date on which the decision of the hearing officer is received . . . . "   If the deemed receipt date is December 20, 1994, 15 days from that date would be Wednesday, January 4, 1995, which would be the statutory date by which an appeal must be filed.   Claimant's appeal is dated January 20, 1995, and the postmark indicated the appeal was mailed on January 24, 1995, and was received January 26, 1995.   In that the appeal was filed beyond the statutory 15 days accorded in Section 410.202 (being after January 4, 1995), claimant's appeal is untimely.

Section 410.169 states the decision of the hearing officer is final in the absence of a timely appeal. Determining the appeal was not timely filed, as set forth above, we have no jurisdiction to review the hearing officer's decision.

Although the appeal cannot be formally considered, it does not appear that this has resulted in depriving the claimant of relief to which he would otherwise be entitled. Claimant in his appeal states that his testimony was misunderstood and that the unrefuted testimony of his witness supports claimant. We would note that the hearing officer is the sole judge of the weight and credibility to be given to the evidence (Section 410.165(a)) and can believe all, part, or none of the testimony of any witness, refuted or not. Taylor v. Lewis, 553 S.W.2d 153 (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). The Appeals Panel does not normally pass on the credibility of witnesses or substitute its own judgment for that of the trier of fact on factual determination. Consequently, it would appear that the hearing officer decision regarding the weight to be given to the evidence would not have been overturned.

This appeal was not timely filed, the Appeals Panel does not have jurisdiction to consider the appeal, and the hearing officer's decision and order have become final. Section 410.169. Even if the appeal had been timely filed, it appears that the hearing officer's decision would have been affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge