APPEAL NO. 950315

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 24, 1995, a contested case hearing was held in(city), Texas, with (hearing officer) presiding as hearing officer to consider the single issue of whether appellant (claimant) was injured in the course and scope of his employment on (date of injury). The hearing officer determined that claimant was not acting in the course and scope of his employment when he was injured on (date of injury). Claimant's appeal essentially challenges the sufficiency of the evidence in support of the hearing officer's decision. Respondent's (carrier) response argues that claimant's request for review is untimely. In the alternative, carrier asserts that sufficient evidence supports the decision and order of the hearing officer and urges affirmance.

DECISION

Determining that the claimant's appeal was not timely filed and that the jurisdiction of the Appeals Panel has not been properly invoked, the hearing officer's decision and order have become final pursuant to Section 410.169 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(f) (Rule 142.16(f)).

Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was distributed to the claimant, at the address he used as his return address in mailing his appeal, on February 8, 1995, with a cover letter dated February 7, 1995. Claimant's request for review indicates that he received the hearing officer's decision and order on February 21, 1995. No further explanation was offered by the claimant as to why he did not receive the decision and order until almost two weeks after it was distributed. In Texas Workers' Compensation Commission Appeal No. 94117, decided March 3, 1994, we stated "[w]here Commission records show distribution on a particular day to the address confirmed by the claimant as being accurate, a mere statement that the decision was not received in the mail is not sufficient to extend the date of receipt past the deemed date of [receipt established by Rule 102.5(h)]." *See also* Texas Workers' Compensation Commission Appeal No. 93519, decided July 28, 1993 (where Commission records indicated distribution to carrier's representative's (city) Central office box in accordance with normal business practice and affidavit of carrier's representative that it did not receive decision until later date did not extend period for filing appeal.). We believe that our decision in Appeal No. 94117, *supra*, is controlling. Thus, claimant's unexplained statement that he did not receive the decision until two weeks after it was mailed is insufficient to extend the period for filing a timely appeal. This outcome is consistent with our unpublished decision in Texas Workers' Compensation Commission Appeal No. 94631, decided June 29, 1994, where we also determined that a represented claimant's unexplained assertion of delayed receipt of the hearing officer's decision was insufficient to excuse late filing of an appeal.

Under Rule 102.5(h), the claimant is deemed to have received the decision and order five days after the date it is mailed, or on February 13, 1995. Under Rule 143.3(c) a request

for review is timely if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision. In this instance, the 15th day after the deemed date of receipt was Tuesday, February 28, 1995. Claimant's appeal was mailed March 1, 1995, and is, therefore, untimely.

Although we have determined that the appeal was untimely filed, we note that even if our jurisdiction had been properly invoked, we would probably have affirmed the hearing officer's decision and order. There was stark contrast in the testimony from the claimant and the witnesses for the carrier. Claimant was involved in an automobile accident after he left his employer's office on (date of injury). Claimant testified that he had been instructed to go to the office to pick up a drill and some electrical switches to take to the job site. Claimant stated that while he was at the office, the secretary also gave him his paycheck. Employer's secretary, (Ms. R), specifically denied that she had asked claimant to come to the office to get the supplies. Likewise, claimant's supervisor, (Mr. P), denied that claimant had gone to the office to retrieve supplies. In addition, Mr. P noted that he took the paychecks to the job site; thus, claimant was not required to go to the office for his check. Finally, claimant testified that (Mr. M), removed the drill and the switches from his truck after the accident. However, Mr. M stated that when he looked in claimant's truck after the accident he did not find a drill or switches.

It is well-settled that the claimant has the burden of proving that he sustained an injury in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. A claimant's testimony is that of an interested party and only raises an issue of fact to be resolved by the hearing officer. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Under the 1989 Act, the hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given thereto. Section 410.165(a). As the fact finder, the hearing officer is required to resolve conflicts and inconsistencies in the evidence, weigh the credibility of the testimony and evidence, make findings of fact and enter conclusions of law. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. An appellate 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. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that claimant had not carried his burden of proving that he was in the course and scope of his employment, furthering the interest of his employer at the time of his automobile accident. As previously noted, there was substantial conflict in the evidence on whether or not claimant had gone to employer's office to pick up materials to take to the job site prior to his accident. The hearing officer resolved the inconsistencies in the evidence against finding that claimant was in the course

and scope of his employment at the time of his injury. It appears that the hearing officer was acting within his province as the fact finder in so finding. Thus, if we had had jurisdiction to consider the merits of claimant's appeal, we would likely have determined that there was sufficient evidence to support the determination that claimant did not sustain a compensable injury on (date of injury), and affirmed the hearing officer's decision and order.

Our jurisdiction not having been properly invoked, the hearing officer's decision and order have become final. Section 410.169; Rule 142.16(f).

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge