

APPEAL NO. 050891
FILED JUNE 9, 2005

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 March 16, 2005. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, that the claimant did not sustain a compensable repetitive trauma injury with a date of injury of _____, and that the claimant did not have disability.

The claimant requested review principally on a sufficiency of the evidence basis. The respondent (carrier) responded, generally urging affirmance but also contending that the claimant's request for review was not timely, based on the deemed receipt rule. The claimant filed a "Claimant's Supplementation to Request for Review" (reply to a response) attaching a date stamped copy of page 2 of the cover letter of the hearing officer's decision and order and an affidavit from the claimant's attorney. The carrier filed a response to the claimant's supplementation (a response to the claimant's reply) contending that the claimant attorney's affidavit should not be considered because the "claimant should have foreseen the attack on jurisdiction" as the appeal was filed untimely using the deemed receipt date.

DECISION

The hearing officer's decision has become final pursuant to Section 410.169 because the claimant's appeal was not timely filed with the Texas Workers' Compensation Commission (Commission).

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 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 or a response. Section 410.202(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(e) (Rule 143.3(e)) (formerly Rule 143.3(c)) provides that a request for review shall be presumed to be timely filed 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. Rule 102.5(d) provides in pertinent part that, for purposes of determining the date of receipt for those written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of the evidence indicates otherwise, the Commission shall deem the received date to be 5

days after the date mailed. See *also* Rule 143.3(d)(1) which provides that the hearing officer's decision is deemed received 5 days after mailing, unless the great weight of the evidence indicates otherwise.

Records of the Commission reflect that the hearing officer's decision was mailed to the claimant on March 24, 2005. Pursuant to Rules 102.5(d) and 143.3(d)(1) the claimant is deemed to have received the hearing officer's decision on March 29, 2005, unless the great weight of the evidence indicates otherwise. The claimant's initial request for review, simply states; "Claimant received the Decision and Order of the Contested Case Hearing on March 30, 2005." The 15th day after the claimant's deemed date of receipt, excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, was April 19, 2005. The claimant filed one copy of his request for review by facsimile transmission (fax) on Wednesday April 20, 2005, received by the Commission the same day and another copy by certified mail also showing an April 20, 2005, postmark.

The carrier, in a timely response, among other things, contends that the claimant's request for review was not timely filed pursuant to Rules 143.3 (actually Rules 143.3(d)(1)) and 102.5(d) and therefore, the hearing officer's decision and order became final (pursuant to Section 410.169) and the Appeals Panel does not have jurisdiction to consider the claimant's appeal. The claimant filed a "Supplementation " to his appeal by fax on May 12, 2005, attaching as Exhibit A the claimant attorney's March 30, 2005, date stamped second page of the Commission's cover letter and an affidavit from the claimant's attorney stating that he (the attorney) did not get the decision and order until March 30, 2005, that the claimant, in fact, did not get the copy until March 31, 2005, and that neither "the claimant nor the claimant's attorney received the decision and order of the Commission on or before the 'deemed' date of receipt." The claimant contends that the affidavit is the great weight of evidence necessary to overcome deemed receipt date. The carrier, in a response (to the claimant's "supplementation," faxed and received May 16, 2005) asserts that the claimant attorney's affidavit contains hearsay and did not offer independent evidence that the claimant received the decision on March 31, 2005, as alleged. The carrier further asserted:

It is not appropriate for the Appeals Panel to consider new evidence not presented with the claimant's request for review. The claimant should have foreseen the attack on jurisdiction as the request for review was filed 15 days after the claimant was deemed to have received the decision and order. The claimant should have attached supporting evidence on the jurisdiction issue when he filed the request for review.

The Appeals Panel has frequently noted that the 1989 Act does not provide for replies to responses (or in this case supplementations). Texas Workers' Compensation Commission Appeal No. 001069, decided June 28, 2000, Texas Workers' Compensation Commission Appeal No. 991580, decided September 7, 1999. It is incumbent on the appellant to establish jurisdiction and timelines of the appeal at the time the appeal is filed. It is further well-settled that it is the date the party receives the

hearing officer's decision and not the date the representative receives the decision that triggers the 15-day appeal period. In this case the claimant's appeal recites a receipt date of March 30, 2005, with no information or evidence why the deemed receipt date of Rules 102.5(d) and 143.3(d)(1) should not be used or that the great weight of the evidence indicates otherwise. Consequently we will not consider the claimant's "supplementation" as it was not timely filed. As the carrier notes, the hearing officer's decision is clearly dated March 24, 2005. Applying the deemed receipt rules the claimant is deemed to have received the decision on March 29, 2005. We agree with the carrier that under the circumstances of this case the claimant could have reasonably foreseen an attack on jurisdiction as the appeal was not filed by April 19, 2005. None of the information indicates why the deemed receipt date of Rules 102.5(d) and 143.3(d)(1) should not be used. As the Appeals Panel has stated, the mere assertion that the decision was received after the deemed date of receipt is not sufficient to extend the date of receipt past the deemed date of receipt provided by Commission rule. Texas Workers' Compensation Commission Appeal No. 010379, decided March 22, 2001.

Since the claimant's request for review was filed with the Commission after April 19, 2005, it was not timely filed. Section 410.169 provides in pertinent part that a decision of a hearing officer regarding benefits is final in the absence of a timely appeal by a party.

The hearing officer's decision and order have become final under Section 410.169.

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

**PRENTICE HALL CORPORATION SYSTEM, INC.
800 BRAZOS
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge