

APPEAL NO. 050897-s
FILED JUNE 2, 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 (CCH) was held on March 14, 2005. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) compensable injury of _____, does not extend to or include his right hip. The claimant appealed, asserting that he has had hip pain since his surgery and requesting reversal of the hearing officer's decision. The respondent (carrier) asserts that the claimant's appeal was untimely filed and requests affirmance of the hearing officer's decision.

DECISION

Affirmed.

TIMELINESS OF APPEAL

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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)) effective August 29, 1999, provides as follows:

- (d) For purposes of determining the date of receipt for those written communications sent by the Texas Workers' Compensation Commission (Commission) which require the recipient to perform an action by a specific date after receipt, unless the great weight of evidence indicates otherwise, the Commission shall deem the received date to be five days after the date mailed; the first working day after the date the written communication was placed in a carrier's (City) representative's box located at the Commission's main office in (City) as indicated by the Commission's date stamp; or the date faxed or electronically transmitted.

Rule 143.3(d) effective May 9, 2004, provides as follows:

- (d) The Commission shall deem that the parties received the hearing officer's decision:

- (1) five days after the date the commission's letter was mailed to the parties, unless the great weight of evidence indicates otherwise;
- (2) the first working day after the date the written communication was placed in a carrier's (City) representative's box located at the commission's main office in (City) unless the great weight of evidence indicates otherwise;
- (3) the working day that it was faxed by the commission, if faxed during normal business hours as defined in § 102.3(c); otherwise, the next working day after the date faxed; or
- (4) the working day that it was electronically transmitted by the commission, if transmitted during normal business hours as defined in § 102.3(c); otherwise, the next working day after the date electronically transmitted.

Rule 143.3(e) 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. The Appeals Panel has held that both portions of Rule 143.3(e) must be complied with for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 041319, decided July 27, 2004.

Commission records reflect that the hearing officer's decision was mailed to the claimant on March 24, 2005. The claimant states in his appeal that he received the hearing officer's decision on March 28, 2005. The 15th day after March 28, 2005, excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, was Monday, April 18, 2005. The envelope in which the claimant's appeal was mailed to the Commission is postmarked April 19, 2005. Thus, if the date the claimant states he received the hearing officer's decision is used to determine the timeliness of his appeal, the appeal would be untimely.

Using the five-day deemed receipt provisions of Rules 102.5(d) and 143.3(d)(1), the deemed date of receipt of the hearing officer's decision would be Tuesday, March 29, 2005. Excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, the 15th day after March 29, 2005, was April 19, 2005, and the 20th day was April 27, 2005. The claimant's appeal was postmarked April 19, 2005, and was received by the Commission on April 22, 2005. Thus, if the deemed date of receipt is used to determine the timeliness of the claimant's appeal, the appeal would be timely.

The question before us then is, if a claimant states in the appeal that the hearing officer's decision was received prior to the deemed date of receipt, should the earlier actual date of receipt be used to determine the timeliness of the appeal, or should the

deemed date be used? As will be discussed below, in accordance with current Texas court decisions that address a similar situation with regard to the timeliness of an insurance carrier's appeal, the deemed date of receipt prevails as the date to be used.

The Appeals Panel has previously held that, although Rule 102.5(d) provides for a deemed date of receipt five days after the date of mailing, a signed acknowledgment of an earlier date of receipt prevails over the deemed date of receipt. *Texas Workers' Compensation Commission Appeal No. 001921*, decided September 25, 2000.

In *Texas Workers' Compensation Commission v. Harris County*, 132 S.W.3d 139 (Tex. App.-Houston [14th Dist.] 2004, no pet.), the Commission contended that the deemed date provisions of Rule 102.5(d) did not apply to the case because the great weight of the evidence indicated that Harris County had actual notice of the hearing officer's decision on December 22, 1999, the date its (City) representative received the decision. The court disagreed with that contention and held that County's administrative appeal to the Commission's Appeals Panel was timely filed under Rule 102.5(d). The court noted that there was no Commission date stamp on the hearing officer's decision showing when it was placed in the (City) representative's box. Harris County's attorney actually received the mailed copy of the decision on December 27, 1999, five days after it was mailed. The court held that the administrative appeal mailed on January 10, 2000, and received by the Commission on January 12, 2000, was timely.

In *Texas Workers' Compensation Commission Appeal No. 041253-s*, decided July 21, 2004, the majority decision discussed the *Harris County* case, but held that in those cases where the actual date of receipt is determined to be earlier than the deemed dates provided for by Rule 102.5, it is not necessary to apply its provisions to ascertain the date of receipt. The majority decision held the carrier's appeal to be untimely by one day based on the date the carrier's (City) representative signed an acknowledgment of receipt, which was the same date as the date on the cover letter distributing the hearing officer's decision. There was no Commission date stamp indicating when the hearing officer's decision was placed in the carrier's (City) representative's box. The majority decision stated that it had been longstanding practice of the Commission to consider notices provided in the (City) representative's box to be notice to the carrier for all purposes and that the dated signed acknowledgment of receipt by the carrier, as well as the claimant's acknowledgment of receipt in his or her appeal, will determine the date of receipt when it is earlier than the deemed dates as set forth in Rule 102.5(d). The brief dissenting opinion by the author judge of this opinion would have held the carrier's appeal to be timely under the *Harris County* case.

Subsequent to Appeal No. 041253-s, the El Paso Court of Appeals in *Trinity Universal Insurance Company v. Day*, 155 S.W.3d 337 (Tex. App.-El Paso 2004, pet. denied), applied the deemed receipt provisions of Rule 102.5(d) in determining that the carrier's appeal to the Appeals Panel was timely filed. In that case, it was undisputed that on July 24, 2002, the hearing officer's decision was placed in the carrier's (City) representative's box and that the (City) representative stamped the decision as received

on that same day. The court held that the deemed date of receipt under Rule 102.5(d) was applicable, and therefore, the carrier was deemed to have received the decision on July 25, 2002, which was the first working day after it was placed in the carrier's (City) representative's box, and its appeal to the Appeals Panel was timely filed based on the deemed date of receipt.

Both the Harris County case and the Day case stand for the proposition that a deemed date of receipt under Rule 102.5(d) will apply even where a carrier's (City) representative has acknowledged an earlier date of receipt.

Effective May 1, 2005, Rule 102.5(d) was amended to read as follows:

- (d) 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 evidence indicates otherwise, the Commission shall deem the received date to be the earliest of: five days after the date mailed via United States Postal Service regular mail; the first working day after the date the written communication was placed in a carrier's (City) representative's box; or the date faxed or electronically transmitted.

The preamble to amended Rule 102.5(d), which begins at 30 Tex. Reg 2397 (2005), reflects that a comment was made that Rule 102.5(d) does not address issues raised by the Appeals Panel and court decisions regarding actual receipt date, and that the commenter suggested use of the language, "unless the recipient acknowledges receipt at an earlier date." The Commission responded that it understood the commenter's points regarding the actual receipt date, but that no change to the proposed amendments to subsection (d) of Rule 102.5 would be made at this time, and that additional language to address the commenter's concerns will likely be proposed in the future as the Commission's transition to an electronic billing system progresses beyond the foundational level and further amendments are appropriate.

Because the courts in the Harris County and Day cases, *supra*, construed Rule 102.5(d) effective August 29, 1999, to be applicable even when a carrier's (City) representative acknowledged receipt of the hearing officer's decision on a date earlier than a deemed date of receipt, we believe that the same construction must apply in determining the timeliness of a claimant's appeal. In the instant case, the claimant states that he received the hearing officer's decision on March 28, 2005, which was prior to the five-day deemed date of receipt on Tuesday, March 29, 2005, as provided by Rules 102.5(d) and 143.3(d)(1). We hold that the claimant is deemed to have received the hearing officer's decision on March 29, 2005, and that his appeal was timely mailed on April 19, 2005, and timely received by the Commission on April 22, 2005. To the extent that Appeal No. 041253-s, *supra*, is inconsistent with this decision, it is overruled.

EXTENT ISSUE

It is undisputed that the claimant sustained a compensable right inguinal hernia injury on _____. The injury occurred when he lifted a 10-gallon water cooler. The disputed issue is whether the compensable injury includes an injury to the right hip. In September 2002, the claimant had an operation for his hernia. In March 2003, the treating doctor noted complaints of right hip pain and diagnosed the claimant's right hip condition as myofascial pain disorder. The treating doctor reported that the hip problems are a direct result of the injury. Another doctor reviewed the claimant's medical records at the carrier's request and that doctor reported and testified that the claimant's right hip complaints are not a result of his compensable injury. The hearing officer determined that the claimant's compensable injury does not extend to or include his right hip. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

We affirm the hearing officer's decision and order.

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

**GERALD BUTLER
2001 BRYAN STREET, SUITE 3400
DALLAS, TEXAS 75201.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge