APPEAL NO. 931172

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing was held in (city), Texas, on November 5, 1993, with (hearing officer) presiding, to determine whether the appellant (claimant) had reached maximum medical improvement (MMI) and if so, on what date, and also to determine his correct impairment rating (IR). According presumptive weight to the report of the designated doctor, the hearing officer determined that claimant reached MMI on January 14, 1993, with an IR of 11%. Claimant, who did not appear at the hearing, has appealed the hearing officer's decision and also asserts error in the hearing officer's refusal to grant a second continuance so that claimant could see another doctor and gather more information for his case. The respondent (carrier) contends that the hearing officer correctly determined the MMI and IR issues and also correctly denied claimant's second request for a continuance.

DECISION

Determining that the request for review was not timely filed and that the jurisdiction of the Appeals Panel has not been properly invoked, the decision of the hearing officer has become final pursuant to the provisions of Section 410.169 (1989 Act).

Section 410.202(a) provides, in part, that a party desiring to appeal the decision of a hearing officer, shall file a written request for review with the Texas Workers' Compensation Commission (Commission) Appeals Panel not later than the 15th day after the date the hearing officer's decision is received from the Commission's hearings division. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (Rule 143.3(a)(3)) provides that a request for review be filed with the Commission's central office in (city) not later than the 15th day after the date of receipt of the hearing officer's decision. Rule 143.3(c) provides that a request shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision and is received by the Commission no later than the 20th day after such date. The hearing officer's decision, signed on November 10, 1993, was distributed to the parties by the Commission's hearings division on November 23, 1993. Claimant does not indicate the date he received the decision and thus we apply Rule 102.5(h) which provides, in part, that "the commission shall deem the received date to five days after the date mailed." Accordingly, claimant is deemed to have received the decision on November 28, 1993, and his appeal was required to be filed with the Appeals Panel not later than 15 days thereafter, that is, on December 13, 1993. The Commission's letter of November 22, 1993, forwarding the hearing officer's decision to the claimant stated, in part:

"To expedite the handling of requests for appeal and responses to requests for appeal, all correspondence should be addressed to the:

Appeals Clerk, Hearings
Texas Workers' Compensation Commission
Post Office Box 17848
(city), Texas 78760-7848."

Claimant's request for review is dated December 2, 1992, and its certificate of service shows it was served on counsel for the carrier on December 3, 1993. According to one of the two envelopes accompanying claimant's appeal, it was first mailed on December 3, 1993, addressed as follows:

Appeals Clerk, Hearings
Texas workers Compensation Commission
Post Office Box 178 (numbers crossed out)
78760-7848.

No City and State were included in the address on this envelope and it showed that the U.S. Postal Service returned the envelope to sender due to "insufficient address." Claimant wrote on that envelope that it was returned to him on December 29, 1993. Claimant also wrote on his request for review: "You are receiving this late because it was returned due to incorrect address. [Attorney] from [carrier] has received a copy and responded." Claimant remailed his appeal, correctly addressed, on December 30, 1993, and it was received by the Commission on January 3, 1994, a date well beyond the 20th day after claimant was deemed to have received the hearing officer's decision.

Since claimant's appeal was not correctly mailed to the Commission within 15 days of the date he was deemed to have received the hearing officer's decision and was not received by the Commission within 20 days from such date, his appeal was untimely. Claimant does not contend that the U.S. Postal Service erroneously returned his request for review and thus his case is distinguishable from the situation the Texas Supreme Court considered in Ward v. Charter Oak Fire Insurance Company, 579 S.W.2d 909 (Tex. 1979).

In Ward, the claimant had timely deposited in the U.S. mail her notice of intention to appeal from a ruling of the Commission's predecessor, the Industrial Accident Board, as was required by Section 5 of Article 8307 of the Texas Revised Civil Statutes. However, when the envelope reached the (city) post office, it was returned to the claimant for additional postage when, in fact, no additional postage was due. The claimant then remailed her notice on the same day she received it back from the post office and it was accepted by the Board two days after the expiration of the 20-day filing period then allowed by the Workers' Compensation Law. The Court noted that Section 5 of Article 8307 had previously been construed strictly in situations where the appeal notice arrived late because of a mistake of the post office or because the 20th day fell on a legal holiday. The Court said the rationale for such strict construction was that the post office is the agent of the party that selects the mail as the vehicle of delivery and thus any delay caused by the negligence of the post office was attributable to the sender. However, the Court felt that such construction would lead to a harsh and inequitable result in that particular case because the post office's mistake which resulted in the notice of appeal being two days late was beyond the claimant's control. The Court concluded that a notice of intention to appeal to the Board would be "deemed timely filed " if it is sent to the Board "by first-class United States mail in an envelope or wrapper properly addressed and stamped (emphasis supplied)" and is deposited in the mail one day or more before the expiration of the 20-day statutory period and is received by the

Board not more than 10 days after the expiration of that period. The Court also noted that such construction of Section 5 of Article 8307 coincided with Rule 5 of the Texas Rules of Civil Procedure (Tex. R. Civ. P) and thus would promote uniformity.

In Tamez v. Texas Employers Insurance Association, 599 S.W.2d 115 (Tex. Civ. App.-Dallas 1989, no writ), the court did not find the claimant's appeal to come within the Ward exception because it was not mailed until the 20th day after the Board's decision was rendered. The Tamez court stated the following: "According to *Ward*, the construction of Section 5 of Article 8307 is to coincide with the construction of Tex. R. Civ. P. 5. 579 S.W.2d at 911. Under Tex. R. Civ. P. 5, the notice is not timely filed if it is mailed on the last day of the time period. In order to be timely filed the notice must be mailed by first-class mail, properly addressed and stamped, at least one day before the last day of the time period. (Citation omitted.)" The Tamez court also noted that Section 5 of Article 8307 was "mandatory and jurisdictional to a review of the Board's action in the district court." *See also* Taylor v. Argonaut Southwest Insurance Company, 817 S.W.2d 722, 724 (Tex. App.-Amarillo 1991, writ denied) where the court of appeals characterized Ward as preventing an injustice where "[t]he untimely delivery was caused by the Postal Service, through no fault of the complainant, who had no control over the Postal Service's error."

While Section 410.202(a) (formerly Article 8308-6.41(a)) obviously differs from Section 5, Article 8307, in providing for the filing of appeals in 15 rather than 20 days and so forth, there is nothing in the current statute suggesting that the Ward requirement that an appeal filed through the United States Postal Service be "properly addressed and stamped" no longer obtains. In Texas Workers' Compensation Commission Appeal No. 92172, decided June 19, 1992, we stated that "it is presumed that a statutory amendment that does not change language interpreted by Texas courts indicates that the Legislature knew and adopted the interpretation placed on such language and intended the new statute to receive the same construction. *See* City of Lubbock v. Knox, 736 S.W.2d 888 (Tex. App.-Amarillo 1987, writ denied)." *And see* Texas Workers' Compensation Commission Appeal No. 92540, decided November 19, 1992. Regrettably, in the case we here consider it does not appear that the fault for claimant's untimely appeal can be laid at the doorstep of the United States Postal Service.

Notwithstanding that we do not decide this appeal, we have reviewed the evidence and were we to decide the appeal, recognizing that claimant was absent and did not testify, we would nonetheless be satisfied that the great weight of the other medical evidence is not contrary to the report of (Dr. W), the designated doctor. The determination of IR by the Commission must be based upon medical and not lay evidence. Texas Workers' Compensation Commission Appeal No. 93518, decided August 5, 1993. According to the Initial Medical Report of (Dr. CM), who saw claimant on (date of injury), the date of his injury, claimant stated he "got pinched between forklift and rack." This record indicated that Dr. CM diagnosed "contusion chest and lower ribs" and that claimant failed to return for a follow-up appointment the next day. Thereafter, according to the medical records, claimant received chiropractic treatment from (Dr. B) and (Dr. D).

On January 12, 1993, (Dr. M) examined claimant and reviewed his medical records and diagnostic test results. Dr. M stated in his report of that date that Dr. D had felt claimant had reached MMI as of January 11, 1993, and was ready for an IR, that claimant had been referred to him (Dr. M) for an independent medical examination, and that his assessment was that claimant "appears to have sustained a strain or similar soft tissue equivalent involving neck, thoracic, and lumbar areas." Dr. M determined that claimant reached MMI on January 12, 1993, with a 23% IR which included components for cervical, thoracic and lumbar spine soft tissue injuries as well as values for cervical, thoracic and lumbar spine range of motion (ROM) impairment.

(Dr. C), in a report of February 10, 1993, diagnosed claimant with cervical disc disease at C6-7 and lumbar disc disease at L3-4 and L4-5, and assigned an IR of 14% which included components for both unoperated disc disease and for abnormal ROM of the cervical and lumbar spines. Dr. C also reported that claimant did not wish to pursue surgery. In a letter of March 2, 1993, Dr. D stated his agreement with Dr. M's IR and his disagreement with Dr. C's IR.

In his report of June 2, 1993, Dr. W indicated that he had examined claimant, had reviewed his medical records, and that he was aware of Dr. M's 23% IR and Dr. C's 14% IR and the respective components of those IRs. His impression was cervical, thoracic and lumbar strain and he stated that claimant had reached MMI and that his IR was 11% for specific disorders of the cervical, thoracic and lumbosacral spine. He assigned no IR for any abnormal ROM. The Commission subsequently asked Dr. W to re-examine claimant, to determine not only his IR but also when he reached MMI, and also to evaluate claimant for ROM impairment. Dr. W re-examined claimant on September 29, 1993, and reported on that date that claimant had reached MMI on January 12, 1993, the date previously determined by Dr. M. Dr. W also reported that claimant had neither worked nor had further treatment since he was evaluated by Dr. W on June 2nd. Dr. W once again assigned an IR of 11% which included values for specific disorders of the cervical, thoracic and lumbar spines and which again did not include values for ROM. Dr. W also reported that he had used the two inclinometer method for measuring ROM and he attached charts reflecting the results of his multiple measurements of the three spinal regions. Dr. W further stated that his IR was based on the "AMA Guides to the Evaluation of Permanent Impairment, February, 1989, Third Edition, second printing."

We have held that the "great weight" of the medical evidence required to rebut the presumptive weight accorded the designated doctor's report by the 1989 Act (Sections 408.122(b) and 408.125(e)) is more than a mere balancing or preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided December 2, 1992. A designated doctor's report should not be rejected "absent a substantial basis to do so." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. Medical conclusions are not reached by counting the number of doctors who take a particular position. The opinions must be weighed according to their "thoroughness, accuracy, and credibility with consideration given to the basis it provides for

opinions asserted." Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993.

The hearing was first set for October 22, 1993, and on September 26th claimant wrote the Commission requesting a continuance for "time to see the doctor and to gather all the information required for my hearing." The continuance was granted and the hearing continued to November 5th. Claimant wrote the Commission again on November 1st requesting another continuance to see a doctor and gather information for the hearing. Section 410.155(b) provides that the Commission may grant a continuance only upon a determination of good cause. The hearing officer called claimant on November 1st advising that he had not shown good cause for another continuance and further advising that the hearing record could be kept open after the hearing on November 5th if claimant needed additional time to provide evidence not available by November 5th. According to the hearing officer, claimant then agreed to come to the hearing. The hearing officer said he also explained to claimant that he was required to attend the hearing. Section 410.156 requires parties to attend contested case hearings and provides that failure to attend without good cause constitutes a Class C administrative violation. Appeal of a hearing officer's ruling denying a continuance is reviewed by the Appeals Panel for abuse of discretion and were we deciding claimant's appeal we would find none here. *See* Texas Workers' Compensation Commission Appeal No. 91041, decided December 17, 1991.

Because claimant's appeal was untimely and, consequently, the jurisdiction of the Appeals Panel was not properly invoked, the decision of the hearing officer has become final pursuant to Section 410.169 and Rule 142.16(f).

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge