APPEAL NO. 931192

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On August 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) reached maximum medical improvement (MMI) on July 20, 1992, with 14% impairment, as stated by the designated doctor, (Dr. Y). She also found disability from March 29, 1992 to July 20, 1992. Claimant asserts on appeal that he was not understood at the hearing and that the interpreter at the hearing was biased; he adds that he is still hurting. Carrier replies that claimant did not timely file an appeal and that the hearing officer correctly gave presumptive weight to the opinion of the designated doctor.

DECISION

Finding that claimant's appeal was not timely filed, the decision of the hearing officer is final. *See* Section 410.169.

The decision of the hearing officer was distributed to the parties on November 10, 1993, by cover letter dated November 9, 1993. Claimant's appeal is dated December 29, 1993; the envelope with it is postmarked December 29, 1993. The Texas Workers' Compensation Commission (Commission) received it on December 30, 1993. In his letter of appeal claimant does not say when he received the decision of the hearing officer. (Below the typed date of December 29, 1993, at the top of claimant's appeal are the numbers "11/16/93" in handwriting; no explanation is given for this addition.) Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) provides:

> For purposes of determining the date of receipt for 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.

With a distribution date of November 10th, the deemed date of receipt was five days later on November 15, 1993. Since Section 410.202 requires a party to file a written request for review "not later than the 15th day after the date on which the decision of the hearing officer is reached . . .," the last day on which an appeal could be filed was November 30, 1993. Since claimant's appeal was mailed on December 29th and received by the Commission on December 30, 1993, it was not timely filed. (The file contains correspondence from (Dr. S), dated November 22, 1993, which asks that the claimant's case be placed "in line for appeal." The Commission replied to Dr. S on December 9, 1993, pointing out that he was not a party so his letter could not be considered an appeal. *See* Section 410.202, which calls for a party to appeal, and Section 401.011(37) which defines "representative" as one who is authorized by the Commission to represent an employee or carrier.) The decision of the hearing officer is final.

Had the appeal been timely made, a review of the decision and record of the hearing indicates that it would have been affirmed.

Claimant worked for (employer). On (date of injury), as a pipe inspector, he slipped and fell because of a cable lying across the pipe; later the same day, a forklift had a problem with some pipes and claimant fell again, hurting his back. After seeing his initial doctor a short period, he started seeing Dr. S because the first doctor said he just had a strain. Dr. S operated on claimant's back. (Claimant states he first saw Dr. S on April 11, 1991; Dr. S excised a herniated disc at L5-S1 on May 16, 1991, after a second doctor concurred. No medical records in evidence indicate what treatment was attempted prior to surgery.) Claimant testified that his condition is worse since he had the surgery.

Dr. S advised that more surgery was necessary. (Dr. T) saw claimant on March 11, 1992, to give a second opinion as to the need for more back surgery. Dr. T described claimant as having "[f]ailed back syndrome" and disagreed that surgery was needed. The carrier had claimant see (Dr. W) on March 26, 1992. Dr. W stated, "[h]e seems to have the same defect now that he had preoperatively." He found MMI on March 26, 1992 with 10% impairment, but we note that his narrative refers to MMI as being "from his previous surgery," not from the injury. A third opinion as to back surgery was requested by the Commission and (Dr. G) saw the claimant on August 12, 1992. Dr. G wrote a long report and two addendums dated August 17 and August 19, 1992. After reviewing test results of claimant, Dr. G did not change his original assessment that he did not recommend surgery. Claimant was critical of Dr. W, but not of Dr. T or Dr. G. Claimant stated that he is satisfied with the treatment received from Dr. S, but testified, "[w]ell, [Dr. S] says that I need surgery, but I'm afraid. I'm afraid that I will not get better. Possibly even get worse."

The Commission appointed Dr. Y as the designated doctor. He evaluated claimant on July 20, 1992, and found no objective evidence of recurrent herniated disc. He did not think additional surgery would significantly help claimant. He found MMI on July 20, 1992, with 14% impairment. Dr. S continues to believe that another surgery is needed, but observes that statutory MMI would have passed by May 18, 1993, when he wrote a letter to the Commission. Dr. Y's opinion as to the lack of necessity for more surgery was supported by other doctors. The evidence sufficiently supported the determination that Dr. Y's opinion be given presumptive weight.

Claimant's attack on the interpreter as being biased does not state how the interpreter acted in a biased manner or what testimony or other hearing development was affected by the alleged biased manner. Claimant does say he believes he was not understood; he may believe that the interpreter was not competent, although claimant does not say that he was not understood because of the interpreter. With no specific reference as to what the interpreter did and how this affected claimant negatively, this assertion would not have caused reversal of the decision. We observe that questions of MMI and impairment rating in most instances turn on medical evidence. *See* Section 401.011(30) which defines MMI in terms of "reasonable medical probability." Claimant does not indicate that any medical evidence he wanted to be considered was not admitted because of bias by the interpreter.

Claimant also says that he is still in pain. In Texas Workers' Compensation Commission Appeal No. 92686, decided February 3, 1993, the Appeals Panel said that MMI

does not necessarily mean that a claimant will be free of pain or able to work.

Had the appeal been timely, the determinations of the hearing officer would have been upheld. With no timely appeal, the decision of the hearing officer is final in accordance with Section 410.169.

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Joe Sebesta
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge