

## APPEAL NO. 93216

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On February 16, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that claimant Mr. R, who is the appellant in this case, had reached maximum medical improvement (MMI) with a 0% impairment rating, in accordance with the report of the designated doctor, effective December 3, 1992. The claimant had been injured on (date of injury).

The hearing officer also determined that the claimant had no current disability at the time of the hearing, because his present inability to obtain and retain employment equivalent to his preinjury wage was due to his incarceration. He was incarcerated beginning July 17, 1992. The hearing officer's decision does not purport to rule on disability for time periods not related to claimant's incarceration.

The claimant appeals these determinations of the hearing officer; the carrier responds by citing the merits in favor of the decision, but also opines that the appeal was not timely.

### DECISION

Finding that appellant's request for review was not timely filed, the decision of the hearing officer has become final by operation of the law.

At the hearing, the claimant, who was accompanied by a deputy sheriff from (County), stated that his address was P. O. Box 2990, Beaumont, Texas 77701. This was the address where the hearing officer's decision was sent on February 25, 1993.

The 1989 Act, Article 8308-6.41(a) (1989 Act) provides in part as follows:

"A party that desires to appeal the decision of the hearing officer shall file a written 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 of hearings and shall on the same date serve a copy of the request on the other party . . . ."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (TWCC Rules) provides that a request for review of the hearing officer's decision shall be filed with the Commission's central office in Austin "not later than the 15th day after receipt of the hearing officer's decision; . . . ." Rule 143.3(c) goes on to provide the following:

"(c)A request made under this section shall be presumed to be timely filed or timely served if it is:

- (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and
- (2) received by the commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision."

No court has yet reviewed the 15-day appeal time requirement of Article 8308-6.41 (1989 Act). However, cases concerning appeals from the former Industrial Accident Board, as provided for by Section 5 of Article 8307 of the Texas Revised Civil Statutes Annotated (Vernon Supp. 1990), treated such limits as jurisdictional. Texas Workers' Compensation Commission Appeal No. 91070 (Docket No. DA-00009-91-CC-1) decided December 19, 1991. See also Taylor v. Argonaut Southwest Ins. Co., 817 S.W.2d 722, 723 (Tex. App.-Amarillo 1991, writ granted, order withdrawn; writ den'd) which held that the time limits provision of Section 5 of Article 8307, *supra*, "is mandatory and jurisdictional to a review of the Board's action . . . ."

At the end of this hearing, the hearing officer checked again with the claimant that the post office box he gave was correct (the record indicates that there were earlier problems in the history of the claim with sending mail to claimant's correct address). She also stated to claimant, both in a general statement to the parties and in specific answer to his questions, that he would have fifteen days from the date he received the decision to appeal it, if that was his desire.

There were two appeal documents filed; neither appeal states when the hearing officer's decision was received. One appeal document is dated March 17, 1993; however, it was postmarked March 19, 1993 and received by the Appeals Clerk March 23, 1993. The second is dated March 4, 1993, but postmarked March 26, 1993 and received March 30, 1993 by the Appeals Clerk.

Accordingly, we apply the provisions of Rule 102.5(h) (TWCC Rules) providing that "the Commission shall deem the received date to be five days after the date mailed." The Commission's decision was mailed on February 25, 1993, so the claimant is deemed to have received the Decision and Order it enclosed on March 2, 1993. Appellant was required to file his appeal not later than 15 days from March 2nd, that is, by March 17, 1993. However, his appeals were not mailed until March 19th and March 26th, and were not received until March 23rd and March 30th. Claimant's appeal was therefore untimely, and the hearing officer's decision has become final.

While we cannot officially consider the appeal, we would note that the claimant has had at least one other hearing as well as a remand hearing in which the designated doctor,

at that time, did not agree that MMI was reached effective in either July or October 1992; the hearing officer ruled then in accordance with the designated doctor's opinion, and the decision on remand was not appealed.

This current hearing involved review by the designated doctor of additional tests, a myelogram and CT scan, that he performed. Based upon the results, the designated doctor determined that his earlier suspicions of scar tissue or recurrent herniated disc were not confirmed and, after considering the results of those tests, determined that the claimant had at last reached MMI, effective December 3, 1992, with 0% permanent impairment. It does not appear that we would have reversed the hearing officer's determination in this hearing to adopt the designated doctor's conclusion, by giving it presumptive weight in accordance with Article 8308-4.25 and 4.26, or that we would have reversed her decision that claimant did not have disability for his period of incarceration, even if the appeal had been timely filed. Both conclusions are supported by the evidence.

The hearing officer's decision has become final by operation of law, pursuant to Article 8308-6.34(h).

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge