APPEAL NO. 93835(A)

On November 3, 1993, this panel issued its decision in the above styled and numbered case. Texas Workers' Compensation Commission Appeal No. 93835, decided November 3, 1993. Our decision reversed the hearing officer and rendered a new decision. In our decision we noted that the respondent (carrier herein) did not file a response to the appellant's (claimant herein) request for review. After the issuance of our decision, the carrier forwarded to us a copy of its response to the claimant's request for review dated October 4, 1993, and file-marked as being received by the Texas Workers' Compensation Commission (Commission) on that same date. The original filed with the Commission never reached the Appeals Panel and remains missing.

The response for review filed by the carrier was timely filed under TEX. LAB. CODE ANN. § 410.202, and therefore, had it reached the Appeals Panel prior to the issuance of our decision would have been considered. The issues before us are whether or not we may now reconsider our decision, weighing the carrier's response in making our decision, and if we can do so, what effect this will have on our decision.

DECISION

We find that under the circumstances of this case, we can and will reconsider our decision, and having carefully reviewed and considered the position, argument, and authority cited by the carrier in its response, we adhere to and affirm our decision of November 3, 1993, in this case.

In Texas Workers' Compensation Commission Appeal No. 91096(A), decided January 31, 1992, (hereinafter Appeal No. 91096(A)), we were asked to reconsider our original decision in the case of Texas Workers' Compensation Commission Appeal No. 91096, decided January 17, 1992. In that case, as in the present case, we stated in our original opinion that there was no response to the request for review and after our decision was rendered the respondent provided evidence that a timely response had been filed. We stated in Appeal No. 91096(A) that since the response was entitled to appropriate consideration, and not having been advised of any request for judicial review being filed, we would exercise our necessary and inherent or implied authority to reconsider our decision and issue a new decision "under the particular circumstances present." Those circumstances involved a respondent who had filed a response with the Central Office of the Commission, but which response had not reached the Appeals Panel at the time Appeal No. 91096, *supra*, was decided. Thus a response which should have been considered was not, and the Appeals Panel felt that the appropriate remedy was to reconsider the case, taking into account the response.

In Texas Workers' Compensation Commission Appeal No. 91106(A), decided January 10, 1992, we denied a request for reconsideration where the appellant alleged that we failed to address a point which was claimed to have been raised in the request for review. Our decision does not clearly state the basis for denial of the motion. While Appeal No. 91106(A) does point out that the appellant's point was addressed in our original decision in

the case to the degree it was relevant, the decision is not clear as to whether this is the reason the motion was denied or mere dicta. The denial of the motion to reconsider in Appeal No. 91106(A) can be read as a refusal to consider the motion. A number of other requests for reconsideration and rehearing have been denied by the Appeals Panel in unpublished decisions and orders. Reasons for denial have included loss of jurisdiction due to filing for judicial review by a party, failure of the movant to establish that a request for review had been timely filed with the Commission, and refusal to reconsider a decision with which a party merely disagrees.

We do not believe that it is appropriate for us to grant a motion for reconsideration or rehearing to a party which has been afforded its right to Appeals Panel review. If a party is dissatisfied with our decision or believes that it is incorrect, the proper forum to seek relief is the courts. However, where a party has been denied full Appeals Panel review through no fault of its own, particularly if such denial was due to an error made by the Commission, and we retain jurisdiction to afford that review to the party, we feel that it is within our inherent or implied powers to do so. We believe that the present case fits into this ambit, and therefore, just as in Appeal No. 91096(A), we will consider the response to claimant's request for review.

The facts of this case are set out in original opinion in Appeal No. 93835. Briefly, the claimant injured her back when she slipped on ice while in the course and scope of employment with the carrier. During the course of her treatment, various doctors express differing, and in some cases varying, opinions concerning maximum medical improvement (MMI) and her impairment rating. The opinion of the treating doctor (Dr. S) was that MMI had not been reached and, therefore, impairment could not be rated. The company doctor (Dr. E) opined that the claimant had reached MMI on June 20, 1991, with no impairment. The original opinion of the carrier's medical examination order doctor (Dr. W) was that the claimant had reached MMI on August 13, 1992, with a seven percent impairment. The original opinion of the Commission-selected designated doctor (Dr. K) was that the claimant reached MMI on December 17, 1992, with a 26% impairment. The carrier sent Dr. W a copy of Dr. K's report for his critique and he criticized it, but after re-examining the claimant amended his impairment rating to 12%, still finding MMI on August 13, 1992. The carrier wrote a letter to the designated doctor concerning his impairment rating and in response he stated removing consideration of any portion of the claimant's condition which might predate her injury would lead him to recalculate her impairment to 16½%. The carrier also sent all the medical reports concerning the claimant to another doctor (Dr. P) for review. He agreed with the medical examination doctor's original seven percent assessment.

Dr. K, the designated doctor, stated in response to a deposition on written questions that he did not use an inclinometer to measure the claimant's range of motion. The hearing officer found that the opinion of the designated doctor was against the great weight of the evidence, and adopted the amended opinion of Dr. W as to MMI and impairment, finding that the claimant reached MMI on August 13, 1992, with 12% impairment.

The claimant appealed, arguing several points of error in her request for review.

First, the claimant contended that several determinations of the hearing officer, including his conclusion that Dr. K's original certification of MMI and assessment of 26%, were so against the great weight and preponderance of the evidence as to manifestly unjust. Second, the claimant argued that the hearing officer's reliance upon the carrier-selected doctor in determining the claimant's impairment rating arbitrarily denied the claimant the right to have an impairment rating assessed by a doctor in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, third edition, second printing, February 1989 (AMA Guides). Third, the claimant maintained that the opinions as to impairment and MMI of a number of doctors are invalid.

The carrier responds that the only opinion as to impairment which was proven to be invalid at the hearing was that of the designated doctor. The carrier defends the opinion of the other doctors, arguing that the hearing officer was correct in adopting the amended impairment rating of Dr. W. The carrier further argues that it did nothing to taint the revised opinion of the designated doctor through its communication with him.

The carrier does not in its response bring forth any additional authority concerning the point upon which our original opinion hinged--that the evidence that the designated doctor did not use an inclinometer in measuring range of motion does not invalidate his rating. Nor does the carrier address the error in the designated doctor's revised opinion as to impairment--his factoring out of the claimant's pre-existing condition in measuring her impairment rating. Further, the carrier makes no argument which convinces us that the great weight of the other medical evidence is contrary to the original opinion of the designated doctor as to impairment. Thus we believe our original opinion in this case to reverse and render a new decision that the claimant reached MMI on December 17, 1992, with a 26% impairment rating, based upon the original report of the designated doctor, was correct.

We reaffirm our original decision of November 3, 1993, in this case.

Gary L. Kilgore
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

CONCURRING OPINION:

I concur, except that I do not believe we have inherent or implied powers to reconsider under these facts. Aware of our previous decision discussing our powers under similar facts, I nevertheless feel that case law is solidly behind the proposition that we are creatures of statute, deriving our powers therefrom. *See* Sexton v. Mount Olivet Cemetery Ass'n, 720 S.W.2d 129 (Tex. App.-Austin 1986, writ ref'd n.r.e.). At best, this reconsideration bears resemblance to an implied power, found in the direction to this Panel to consider the response filed with the Appeals Panel, set forth in Section 410.203. A party that declines to file a lawsuit in district court in accordance with Section 410.252, but opts instead for filing a motion for reconsideration with us, might be doing so at its peril.

Susan M. Kelley
Appeals Judge