APPEAL NO. 93869

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On August 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that claimant had not reached maximum medical improvement (MMI). Appellant (carrier) untimely asserts that a designated doctor found MMI was reached on April 8, 1993, with 14% impairment and that the great weight of other medical evidence is not contrary to that opinion.

DECISION

Finding that the appeal was untimely filed, the decision of the hearing officer is final.

I

Counsel for the carrier states in its appeal, "(a) copy of the decision of the hearing officer was received by counsel for the Appellant on September 16, 1993." Counsel then went on to state that it was required to file an appeal no later than October 1, 1993. The appeal was dated October 1, 1993, and was received October 1, 1993.

The decision of the hearing officer in this case was distributed to the parties on September 10, 1993. 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 September 10th, the deemed date of receipt was five days later on September 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 received . . . ", the last day on which an appeal could be filed was September 30, 1993. The provisions of rule 143.3(c), which allow the commission to receive an appeal not later than 20 days after the appellant received the decision, are conditional on mailing of the appeal no later than the 15th day after receiving the decision. In this case the 20 day provision does not apply since the appeal was not put into the mail within 15 days. Texas Workers' Compensation Commission Appeal No. 93327, decided June 3, 1993, re-affirmed that the date of receipt by the attorney for a party does not control. The time runs from receipt by a party. In the case on appeal, the counsel for carrier only recites when counsel received the decision and says nothing of when the carrier received it. Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992, considered a statement of actual receipt date in counting the period in which to file an appeal, but the stated receipt date therein reflected receipt by the carrier. With no showing that the provisions of rule 102.5(h) should not be applicable to the carrier in this case, the deemed date of receipt was September 15th. The last day to file an appeal was September 30th.

The appeal, dated October 1, 1993, was not timely filed.

II

While the decision of the hearing officer is final in this case, the decision would have been affirmed had there been a valid appeal.

Claimant had worked for a photography studio more than three years when, on (date of injury), she hurt her back attempting to catch a client who was falling off a stool while being photographed. She had a herniated disc at at least one level of her lumbar spine as shown by MRI. Disc bulges were also shown in the cervical area. She went to (Dr. D), but stated that testing was postponed because of her pregnancy. After asking to see another doctor, claimant then saw (Dr. M) in March 1993. Dr. M recorded that claimant should have a lumbar myelogram and CT scan, calls the lumbar herniated disc "a very significant lesion", and says, "(s)he may require some surgery for this lesion." He did call for her return in two or three weeks, which claimant apparently did not do.

The carrier introduced reports of medical evaluations (TWCC form 69) by Dr. D in which he found that claimant would reach MMI in "1 month" after seeing her on December 30, 1992, with a five percent impairment. (Dr. R) evaluated claimant for the carrier on October 14, 1992, and on February 4, 1993, reported that claimant reached MMI on October 28, 1992, with a five percent impairment. A designated doctor, (Dr. K), was then appointed, and he examined claimant on April 8, 1993. He provided two TWCC forms 69 (using the interim form which provides no date of signature). On one, Section 14 is blank as to MMI date and impairment with only the words, "see attached dictation" entered in that space. In the other TWCC form 69, Section 14 states that MMI was reached on April 8, 1993, with 14% impairment; within the same small area, Dr. K added the words, "if patient has surgery impairment will change See attached dictation". Dr. K's attached narrative states that claimant was sent to him "for an impairment rating". (The appointment letter was not made part of the record.) Dr. K also states, "(i)t is my opinion that she is going to need surgery in the long run." He says that without surgery he rates her impairment as 14% and adds, "(b)ut, if the patient decides to have surgery, then those numbers will change."

Claimant testified that both Dr. M and Dr. K said she needed surgery. She stated that she also believes that she needs it. She indicated her understanding that Dr. M's office would get back to her about when to have the myelogram, pointing out that she was breast feeding her new baby. She added that she was doing exercises she had learned in physical therapy and lays down when her back hurts. She plans to have surgery if it is still recommended after the myelogram. She believes her back is getting worse.

The hearing officer found that Dr. K conditioned his date of MMI on claimant not having surgery. The hearing officer also considered that claimant is willing to have surgery and found that Dr. K believes surgery will benefit claimant; she further found that Dr. K does not believe claimant has reached MMI and that the great weight of other medical evidence is not contrary to that opinion.

In Texas Workers' Compensation Commission Appeal No. 93705, decided September 27, 1993, a hearing officer was upheld when he found that a designated doctor's opinion as to MMI was not unconditional and concluded therefrom that MMI had not been reached. In that case, a neurologist was the designated doctor; he gave his opinion as "from a neurological standpoint she has reached maximal . . . " That designated doctor had called for a consult from another specialty which he had not received when he found MMI was reached. His opinion as to MMI was said to be "no more than equivalent to a consult from him as a neurologist."

The record contains evidence sufficient upon which to affirm the decision and order of the hearing officer had there been a timely appeal.

The decision and order of the hearing officer are the final administrative action in this case. *See* Section 410.169.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge