APPEAL NO. 93888

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*.). On August 26, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be determined were:

(1)Whether Claimant had disability related to the compensable injury sustained on or about (date of injury), and if so, for what period of time;

(2)Whether Claimant has reached maximum medical improvement (MMI) and if so, on what date;

(3)What is Claimant's correct impairment rating?

The hearing officer determined that the appellant, claimant, reached MMI on July 22, 1991, with zero percent impairment based on the presumptive weight of the designated doctor's report.

Claimant contends that the designated doctor's opinion is not entitled to presumptive weight in that the Texas Workers' Compensation Commission (Commission) had "properly" appointed a second designated doctor because the first designated doctor's opinion had become "tainted" by viewing a video sent him by the respondent, carrier herein. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Although not raised by the carrier, we find that the appeal in this matter was not timely filed within the time limits required by Section 410.202(a), that an untimely appeal is jurisdictional and that the decision of the hearing officer is the final administrative decision in this case. *See* Section 410.169. A review of the Commission records indicates that the decision of the hearing officer was distributed, by mail, on September 13, 1993. Claimant in his appeal does not assert when the decision was received, therefore, the provisions of Commission Rule 102.5(h) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h)) are invoked. Rule 102.5(h) provides:

(h)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.

In that the decision was mailed on September 13, 1993, the "deemed" date of receipt was five days later on September 18, 1993. As 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 Sunday, October 3, 1993. Rules 102.3 and 102.7 provide that if the last day of filing is a Saturday, Sunday, or legal holiday the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday, which in the instant case would be Monday, October 4, 1993. Although claimant's appeal is dated September 29, 1993, the postmark and certificate of service indicate the appeal was not mailed until October 6, 1993. The provisions of Rule 143.3(c) which allow until the 20th day after receipt of the decision for the Commission to receive the appeal are conditional on mailing the appeal no later than the 15th day after receipt of the decision. This was not the case here and the 20th day receipt by the Commission does not apply as the appeal was not placed in the mail by October 4, 1993.

Section 410.169 states the decision of the hearing officer is final in the absence of a timely appeal. Determining the appeal was not timely filed, as set forth above, we have no jurisdiction to review the hearing officer's decision.

Although the appeal cannot be considered, it does not appear that this has resulted in depriving claimant of relief to which he would otherwise be entitled. In informally reviewing claimant's appeal we would note some recent Appeals Panel decisions which might have bearing on the points raised by claimant in the appeal.

Regarding claimant's appeal of the hearing officer's determination that there is no provision for the selection of a second designated doctor, we have on a number of occasions addressed that subject. In Texas Workers' Compensation Commission Appeal No. 93706, decided September 27, 1993, we stated:

> . . . that the Act does not appear to contemplate appointment of a second designated doctor, although in an extraordinary circumstance, we could envision that a second appointment would be in order. *See* Texas Workers' Compensation Commission Appeal No. 93040, decided March 3, 1993. We believe the hearing officer may properly consider assertions that a designated doctor has a bias or prejudice that influenced his or her opinion, or did not perform an adequate examination, as part of the analysis of whether the "great weight" of other medical evidence is contrary to his or her opinion. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. Such a course of action should be considered before an appointment of a doctor is invalidated . . . .

In appeal No. 93040, *supra*, we held:

> . . . we do not say a second appointment of a designated doctor can never be made, but we do advance the proposition that when a designated doctor submits a report which is unclear or does not contain the required information, some effort be made by the Commission to seek clarification or obtain the required

information before appointing another designated doctor.

In Texas Workers' Compensation Commission Appeal No. 93622, decided August 31, 1993, we suggested instances in which a second designated doctor might be appointed to ". . . include the death or incapacity of the first designated doctor . . . ." In that case we cited language from Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, where we said the use of the designated doctor procedure was intended to finally resolve disputes, rather than creating situations where there are two, or more, so-called, "designated doctors whose opinions each are accorded presumptive weight."

Similarly, we have on a number of occasions addressed the effect of ex parte or unilateral communications by one of the parties with the designated doctor. In Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993, we reviewed several cases where there were ex parte contacts with the designated doctor and noted:

> . . . we have become increasingly critical of unilateral communications with the designated doctor by the parties in general. However, we observe . . . that there is no authority in the 1989 Act or the Commission rules which would prohibit or limit such contact by the parties . . . . Certainly we would not hesitate to take appropriate action were any prejudice, undue influence or other untoward action, to result from such a unilateral contact.

In the instant case the hearing officer specifically commented that " . . . there was no evidence of any bias or prejudice on the part of (the designated doctor)." It would further appear that the video which was provided to the designated doctor by carrier provided relevant information regarding claimant's condition, much as would a medical opinion by another doctor. It further appears the matter of bias or prejudice was explored by means of a written deposition and the doctor stated the video did not cause him to be biased or partial in favor of either party. Whether the doctor in fact had been prejudiced was a factual determination within the purview of the hearing officer to determine. *See* Section 410.165(a).

In summary, the appeal was not timely filed, the hearing officer's decision has become final and this panel does not have jurisdiction to review the case; however, it appears to us that even had we reviewed the case on its merits there was no reversible error readily apparent.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebasta
Appeals Judge

Gary L. Kilgore
Appeals Judge