

APPEALS PANEL NO. 94018
FILED FEBRUARY 11, 1994

This appeal arises pursuant to 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.*). This case is before us again following our remand in Texas Workers' Compensation Commission Appeal No. 93720, decided September 29, 1993. The remand was predicated on our ruling that the findings of the hearing officer were inconsistent and not supported by the evidence. We remanded the case to the hearing officer for further development and consideration of the evidence in deciding the issues in the case.

A contested case hearing (CCH) on remand was held on November 16, 1993, in (City), Texas, with _____ presiding as hearing officer. The issues at the CCH were whether the appellant (claimant herein) had timely disputed the first finding of maximum medical improvement (MMI) and assignment of impairment and the correct impairment rating. The hearing officer found that the appellant (claimant herein) reached MMI on April 3, 1992, with a 14% impairment rating based upon certification by his treating doctor. The hearing officer further found that the selection of a designated doctor by the Texas Workers' Compensation Commission (Commission) was a nullity since the certification of the treating doctor had become final because it was not disputed within 90 days.

The claimant appeals the decision of the hearing officer as to MMI and impairment, pointing to the fact that the treating doctor issued more than one finding in regard to MMI and impairment. The respondent (carrier herein) replies that the claimant's request for review is filed untimely and that even if timely the Appeals Panel should uphold the decision of the hearing officer because the claimant failed to timely dispute the treating doctor's original MMI date and impairment rating.

DECISION

Finding the appeal timely, we affirm the decision of the hearing officer.

The first question to determine is the timeliness of appeal. The decision of the hearing officer, signed November 23, 1993, was distributed under a cover letter dated December 14, 1993. The records of the Commission show that this decision was distributed to the parties on December 15, 1993. The claimant alleges that he received the decision by mail on December 27, 1993. The carrier contends that under our decision in Texas Workers' Compensation Commission Appeal No. 93519, decided July 28, 1993, we cannot accept the claimant's allegation of date of receipt, but must apply Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), which provides in part that "the commission shall deem the received date to be five days after the date mailed." The carrier contends that in Appeal No. 93519 we disregarded the affidavit of a carrier's representative as to the date of receipt, so we must now disregard the claimant's allegation as to receipt. The carrier contends that to do otherwise would deny carriers equal protection of law and due process.

We will not delve into the constitutional questions raised by the carrier because even were we to assume *arguendo* that the carrier was correct, applying Rule 102.5(h), the claimant's appeal is timely.

As stated earlier the decision was mailed by the Commission to the claimant on December 15, 1993. This means if applying Rule 102.5(h) we would deem that the claimant received the decision on December 20, 1993.

Rule 143.3(c) provides 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.

In the present case, the appellant's request for review was dated and postmarked on January 4, 1994, and received by the Commission on January 5, 1993. Pursuant to Rule 143.3(c) the claimant's appeal is timely.

The facts of this case were significantly clarified upon remand. Therefore, even though we discussed the facts as then developed in some detail in our prior decision, it would be well to go through the facts again incorporating the additional facts developed at the hearing on remand.

It is undisputed that the claimant was employed by the (City) from February 1955 to March 11, 1991, as a street sweeper. It is also uncontested that the claimant suffered a compensable injury in the course and scope of his employment on (date of injury), when, in climbing into his sweeper, he slipped and fell to the ground.

Both parties have submitted only a portion of the claimant's medical records. From the records which are in evidence it appears that at least as of May 7, 1991, the claimant was treating with (Dr. M), a spinal surgeon. Piecing together the partial medical records of Dr. M in evidence, along with medical records which summarize by (Dr. T), a doctor the claimant later saw, some of Dr. M's treatment, a chronology of the claimant's treatment may be developed.

After several months of treating the claimant, Dr. M expressed the following opinion in a report dated November 24, 1991, which states in part as follows:

I continue to feel that with the degree of symptoms he is having he would not

hold up on a regular work basis. His impairment rating is 15-20 percent of the whole body, taking into account three level disc disease.

Sometime in April of 1992 Dr. M certified in a Report of Medical Evaluation (TWCC-69) that the claimant reached MMI on April 3, 1992, with a 14 percent impairment rating. The carrier's attorney stated that the carrier did not receive this TWCC-69 until May 22, 1993, which is indicated by the carrier's date stamp on the face of the copy of this TWCC-69 the carrier offered into evidence. The carrier also placed into evidence records showing that the carrier mailed a copy of the TWCC-69 to the claimant on June 4, 1992.

In the meantime the claimant was examined by (Dr. N), a neurosurgeon, who the carrier stated at the hearing on remand was a second opinion doctor it chose and requested the claimant see.¹ Dr. N stated in his report of April 28, 1992, in part as follows:

I believe his total permanent disability is around 20% of his total bodily functions. I believe, if the case is closed, the medical should be left open for at least to three years in case he were to get worse and were to require surgery. At the present time, other than common analgesics and household remedies and limitation of activities, I believe he has received maximum benefits from medical attention.

Dr. T's records state that on June 6, 1992, Dr. M indicated that the claimant had a 20-25% impairment rating. In his July 22, 1992, report Dr. M stated:

I had alluded to a 14 percent impairment rating. I think with three level disease with herniations which are symptomatic, this is probably understated. Regardless of his impairment, he is 100 percent disabled from any manual type labor. He will only be fit for sedentary employment. With his age, background, training and geographic locality, it is unlikely he will be fit for any employment. [Dr. N] alluded to a 20 percent impairment and I feel that this is probably appropriate in general.

In a letter to the carrier dated August 17, 1992, Dr. M stated in part:

If Table 49 of the Impairments Due to Specific Spinal Disorders is reviewed in depth, the following percentages would be appropriate. He has a two level spinal stenosis which would give him an eight percent impairment rating for one level with an additional one percent for one other level, giving him nine percent for the spinal stenosis disorder. Under Part Two-C, he is unoperated with medically documented injuries with symptoms related to disc herniations. He gets five percent for that disorder with an additional two

¹While Dr. T's records reflect that Dr. M referred the claimant to Dr. N, the claimant's attorney at the CCH on remand stated that Dr. N was the carrier's choice or "MEO" doctor. Also Dr. N's report which the carrier offered into evidence at the hearing on remand thanks the carrier's adjuster for referring the claimant to him.

percent for having multilevel problems. The sum total of this is 14 percent, as I initially stated. This is straight out of the book.

As stated in my last report, [Dr. N]'s 20 percent impairment rating is probably more appropriate. I am using the strict guidelines outlined per the AMA and this the way these add up.

In a January 6, 1993, report Dr. M expressed the opinion that the claimant had an impairment rating of "20 percent of the whole body." Finally, in his report of April 7, 1993, Dr. M stated:

He has been seen by [Dr. N] at the insurance company's request and was given a 20% impairment rating. I had a very formal impairment rating done at [Assessment Center], including significant supportive documentation based on AMA guidelines and his impairment equated to 28%. Much of this was for loss of motion, which was accurate. He can only bend his fingertips to about mid-shin level. This was done with an inclinometer and more accurate devices. I would concur with this impairment rating, as it was done very professionally and accurately.

On a signed but undated TWCC-69, Dr. M certified the claimant reached MMI on January 6, 1993, with a 28% whole body impairment rating.

The claimant testified during the CCH that Dr. M had rated his impairment at 14% in April 1992, and that he had failed to dispute this rating within 90 days. The claimant also testified that he received a letter from the Commission to report to Dr. T and he did so. Dr. T, who all parties agreed was selected by the Commission on March 10, 1993, to be a designated doctor, certified on a TWCC-69 that the claimant had reached MMI on January 6, 1993, with seven percent impairment. None of the parties were certain as to what had triggered Dr. T's appointment as the designated doctor.

The carrier's position at the CCH was that the hearing officer should find that the claimant had failed to timely dispute Dr. M's 14% impairment rating given in April of 1992, and failing that, should give presumptive weight to Dr. T's seven percent rating since he was the designated doctor. The claimant argued that the hearing officer should adopt the 28% impairment rating given by Dr. M.

The hearing officer found that the claimant knew of Dr. M's April 3, 1992 certification of MMI and 14% impairment rating but did not dispute it within 90 days. He found that his rating became final and that the appointment of the designated doctor was a nullity.

The hearing officer's finding that claimant knew of, but failed to dispute Dr. M's April certification of MMI and impairment is supported by the claimant's own testimony. We have previously held that unless disputed within 90 days a certification of MMI and impairment rating becomes final. Texas Workers' Compensation Commission Appeal No.

93670, decided February 1, 1992. We have also indicated that the since a doctor may amend his report, such amendment may preclude his opinion from becoming final even if not disputed. See Texas Workers' Compensation Commission Appeal No. 93259, decide May 17, 1993. However, in the present case it is unclear as to whether Dr. M ever amended his original findings, at least prior to January 1993. In his August 1992 letter, cited above, he clearly states that his opinion is accurate under the Guides for the Evaluation of Permanent Impairment, third edition, second printing, published by the American Medical Association. The hearing officer apparently did not believe Dr. M amended his original certification of MMI and assessment of impairment. We cannot say his failure to do so, under the facts of this case, is against the great weight and preponderance of the evidence. Cain v. Bain 709 S.W.2d 175, 176.

While Dr. M's second TWCC-69 in January 1993 did provide a new MMI date and a higher impairment rating, it was issued a number of months after his original rating, there was not evidence of a new medical condition, or inadequate medical treatment, or a different criteria for the rating, and further, the hearing officer found that the testing upon which that rating was based was seriously flawed. See Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge