APPEALS PANEL NO. 94022
FILED FEBRUARY 16, 1994

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On November 3 and December 2, 1993, a contested case hearing was held in (City), Texas, with (hearing officer) presiding. She determined that (Dr. P) was the designated doctor and his opinion was entitled to presumptive weight as to maximum medical improvement (MMI) and impairment rating; MMI was reached on May 7, 1993, with seven percent impairment. Claimant appealed on January 4, 1994, stating a general appeal. Respondent (carrier) did not file a timely response.

DECISION

We affirm.

The decision of the hearing officer was distributed to the parties on December 23, 1993, with cover letter dated December 22, 1993. Claimant's notice of appeal dated January 4, 1994, was timely and invokes review by the Appeals Panel. Claimant's additional submission, which set forth particular points, was dated January 14, 1994.

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 December 23, 1993, the deemed date was five days later on December 28, 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 January 12, 1994. Claimant's additional submission was dated January 14, 1994, and was mailed on that date so it was not timely. *See* Texas Workers' Compensation Commission Appeal No. 92003, decided February 12, 1992; the Appeals Panel in that case only considered those submissions that were within the period for appeal, or for the respondent, within the period to respond. *Also see* Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. While the January 4, 1994, appeal did not contain a certification that it had been served on the carrier, the submission dated January 14, 1994, did certify service on that date. The response is dated February 4, 1994. Even if five days mailing time were allowed, 15 days to respond from the time service was certified, as set forth by Section 410.202(b), would end on February 3, 1994. Carrier's submission was mailed on February 4, 1994, and it too, is untimely.

Claimant worked for (employer) on (date of injury), when he hurt his back in a automobile accident. The parties stipulated that the injury was compensable. Claimant's

treating doctor has been (Dr. K). Testing, including MRI, myelogram and CT scan, showed disc herniation at L4-5 and disc bulge at L5-S1. Claimant was referred to (Dr. H) for a neurosurgical consult; Dr. H on May 13, 1991, felt that Dr. K should treat claimant conservatively. Dr. H again saw claimant on July 19, 1991, considered the tests previously referred to and the fact that claimant had not responded to therapy, and stated, "surgical intervention is indicated." His note also showed that Dr. K agreed with that advice.

Thereafter, claimant was seen by another neurosurgeon, (Dr. B) who in December 1991 said that therapy had failed and recommended a lumbar laminectomy. On May 18, 1992, (Dr. M) said that he had little optimism for improvement without surgery but that claimant wanted to try more therapy. Dr. B then called for another MRI in September 1992, and in October 1992, described the problem as a "surgically significant lesion." In September 1992, based on the need for surgery, Dr. K retracted his May 1992 opinion that claimant had reached MMI with 10% impairment. Dr. B again called for surgery in November 1992.

The Texas Workers' Compensation Commission (Commission) appointed (Dr. K) as designated doctor to give an opinion as to MMI "and/or impairment rating." On December 11, 1992, Dr. K acknowledged the possibility of surgery and did not disagree with it, but found MMI on December 11, 1992, with seven percent impairment.

On April 1, 1993, (Dr. Mc) agreed with surgery for claimant and on April 7, 1993, surgery was approved. The parties agreed (in writing on a TWCC form 24) on April 26, 1993, that claimant had not reached MMI on December 11, 1992. Another designated doctor was then appointed, Dr. P, to give an opinion as to MMI and impairment rating. Claimant saw Dr. P on June 22, 1993. Dr. P pointed out the long standing advice for surgery offered to claimant, noted claimant's recent weight loss, and added that claimant believed his weight loss was tied to his concern for surgery. Dr. P refers to the fact that claimant has not had surgery but "may well require surgery." He states that surgery "is his election;" Dr. P said that claimant has reached MMI "by statute" in May 1993 (Dr. P said that date was May 3, 1993) with seven percent impairment. He pointed out that if surgery had been accomplished, the impairment would be 10 or 11%.

The hearing officer observed that Dr. K again found that claimant reached MMI, this time on May 20, 1993, with 10% impairment. The hearing officer found that the opinion of Dr. P was entitled to presumptive weight but adjusted the statutory MMI date found by Dr. P from May 3, 1993, to May 7, 1993, referring to when the 104 weeks called for by Section 401.011(30)(B) began to run.

The decision of the hearing officer that the opinion of Dr. P is entitled to presumptive weight is sufficiently supported by the evidence. Dr. K, the treating doctor, had recently stated that MMI was reached; in addition the statute (Section 401.011) calls for MMI to have been reached when 104 weeks expired after temporary income benefits began to accrue. Dr. P saw the claimant after the statutory time limit and did not choose to impose an MMI date earlier than such time. In regard to the impairment rating, the previously

designated doctor, Dr. Ka, also assigned a seven percent rating. There appears to be no conflict in different doctors' opinions that if surgery were performed the rating would be approximately 10%. With no surgery performed more than a year and one-half after first called for, there is no basis for questioning the use of an impairment rating that is presently accurate at the time that MMI is reached by passage of the statutory period.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge