APPEAL NO. 94104

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 2, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue presented to the hearing officer for resolution was: "What is CLAIMANT'S correct impairment rating?" The hearing officer determined that the appellant's (claimant herein) correct impairment rating (IR) was 17% as determined by a designated doctor selected by the Texas Workers' Compensation Commission (Commission).

Claimant contends that the 17% IR is incorrect and the IR of the treating doctor is actually the correct rating. Respondent (carrier herein) responds that: 1) claimant's appeal is untimely; 2) claimant's "appeal does not `clearly and concisely rebut the decision of the hearing officer as required by section 6.41(b) [since recodified as Section 410.202(c) of the Texas Labor Code] of the Texas Workers' Compensation Act;" 3) the hearing officer's decision is not contrary to the great weight and preponderance of the evidence; and, 4) the designated doctor's findings are not contrary to the great weight of the medical evidence. Carrier requests we affirm the hearing officer's decision.

DECISION

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.

Procedurally, addressing carrier's contention that claimant did not clearly and concisely rebut the hearing officer's decision pursuant to Section 410.202(c), we note claimant clearly specifies that he believes the IR to be incorrect. Further, we have early and repeatedly held that no particular form of appeal is required and that an appellant's appeal, even though terse or inartfully worded, will be considered. *See* Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992; Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992; Texas Workers' Compensation Commission Appeal No. 92292, decided August 17, 1992; Texas Workers' Compensation Commission Appeal No. 92079, decided April 14, 1992; and Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993.

As to the timeliness of the appeal, a review of the Commission records indicates that the decision of the hearing officer was distributed to the parties by a cover letter dated November 23, 1993, which was distributed, by mail, on November 24, 1993. The copy to claimant was addressed to the same address that claimant used as a return address on his untimely appeal (noting the "l" was left out of claimant's last name). Claimant's file, and a double-check by the Appeals Panel administrative personnel, contains no indication that this decision was returned to the Commission as being undeliverable or otherwise not delivered. Claimant's appeal is dated January 24, 1994, and postmarked January 25, 1994. In the

appeal claimant states that "I never received a copy of the decision. I went to the [Commission's] field office on 1-24-94 to ask for assistance . . . At this time I was informed of the decision. . . ." No further explanation, such as theft of mail at claimant's residence or problems with the U.S. mails was offered, nor was any inquiry of postal authorities reported by claimant. Carrier, although not specifically stating when it received its copy, obviously had received it some time before.

With no explanation offered, with the appeal filed 41 days late, and no return to the Commission of the decision in question, the provisions of Commission Rule 102.5(h) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h)) are invoked. Rules 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.

Texas Workers' Compensation Commission Appeal No. 92090, dated April 24, 1992, as well as the very recent Texas Workers' Compensation Commission Appeal No. 94117, decided March 3, 1994, held that the word "deem" in this rule means "hold." Where the Commission records show distribution on a particular date to the address confirmed by claimant as being accurate, a mere statement that the decision was not received in the mail is not sufficient to extend the date of receipt past the deemed date.

In that the decision was mailed on November 24, 1993, the "deemed" date of receipt was five days later on November 29, 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 Tuesday, December 14, 1993. Claimant's appeal is dated January 24, 1994, and the postmark indicates the appeal was mailed on January 25, 1994, consequently the appeal was not timely filed.

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 the Appeals Panel position regarding the presumptive weight given to a designated doctor's IR.

The record indicates claimant injured his back on (date of injury), and began seeing an employer-recommended doctor four months later. Claimant then saw a doctor in (city) who diagnosed a fractured coccyx. Eventually claimant began treating with (Dr. H), who is claimant's treating doctor. Another doctor performed a lumbar laminectomy and discectomy on May 20, 1992. Although claimant did not acknowledge substantial improvement from the surgery, Dr. H apparently felt claimant had a satisfactory result from the surgery. By an undated Report of Medical Evaluation (TWCC-69), Dr. H certified maximum medical improvement (MMI) on November 10, 1992, with a 34% IR. Subsequently, the Commission appointed (Dr. A) as a Commission-selected doctor to resolve the IR dispute. By TWCC-69 and narrative report dated January 19, 1993, Dr. A certified MMI on January 18, 1993, with a 17% IR. Claimant contended at the CCH that the designated doctor did not consider range of motion (ROM) required by the mandated Guides for the Evaluation of Permanent Impairment, third edition, second printing, published by the American Medical Association (AMA Guides). (Section 408.124(b)). It would appear from the record that the mandated AMA Guides were used and that after repeated ROM testing, Dr. A considered the ROM tests invalid.

The 1989 Act provides that the opinion of the designated doctor is to be accorded "presumptive weight," Sections 408.122(b) and 408.125(e); we have held that overcoming this presumption requires more than a mere balancing of the evidence. The Appeals Panel has also frequently noted the important and unique position occupied by the designated doctor in the resolution of disputes over MMI and IRs. *See e.g.*, Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. And we have stated that a "great weight" determination amounts to more than a preponderance of the medical evidence (Appeal No. 92412, *supra*), and is clearly a higher standard than that of a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 93432, decided July 16, 1993. Similarly, we have observed that no other doctor's report, including a report of a treating doctor, is accorded the special presumptive status of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

In summary, the appeal was not timely filed, but even if it were, it appears that the evidence supports the hearing officer's decision finding that the designated doctor's opinion on the IR was not overcome by the treating doctor's assessment, and that claimant had a 17% IR, as assigned by the designated doctor.

The appeal not having been timely filed, the Appeals Panel has no jurisdiction to consider the appeal and the hearing officer's decision has become final pursuant to Section 410.169 of the 1989 Act.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Susan M. Kelley
Appeals Judge