APPEAL NO. 94537

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 15, 1993, with the record closing on December 29, 1993. The issues at the hearing were whether the appellant's (claimant) fractured collar bone which occurred on (Subsequent Date of Injury), was an extension of her compensable (Date of Injury), ankle injury; what the correct date of maximum medical improvement (MMI) and the correct impairment rating (IR) are; and whether the claimant had disability after June 19, 1992. The hearing officer determined that the collar bone injury was not an extension of the ankle injury; that in accordance with the report of the Texas Workers' Compensation Commission (Commission) selected designated doctor, the claimant reached MMI on June 10, 1992, with a zero percent IR; and that the claimant did not have disability after this date. The claimant appeals expressing her disagreement with the hearing officer's decision on the date of MMI and correct IR. The respondent (carrier) replies that the claimant's appeal is untimely and alternatively urges affirmance because the decision is based on sufficient evidence.

DECISION

Determining that the request for review was not timely filed and that the jurisdiction of the Appeals Panel has not been properly invoked, the decision of the hearing officer has become final pursuant to the provisions of Section 410.169.

Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." A request for review is presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and it is received by the Commission not later than the 20th day after the date of receipt of the decision. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)).

Records of the Commission show that the hearing officer's decision was mailed to the claimant on January 12, 1994, with a cover letter of January 11, 1994. The claimant does not indicate in her appeal the date she received the hearing officer's decision.[1] Rule 102.5(h) provides that the Commission will deem the received date for decisions mailed to claimants to be five days after the date mailed. Accordingly, the claimant is

[1]The claimant was sent a copy of the appeal to a street address in (city) even though she gave a post office box number as her mailing address at the hearing. There is no indication that the decision mailed to her was returned to the Commission or not received, nor does the claimant make such an assertion. Thus, this case is not one where there is evidence of a failure of a party to receive the decision of the hearing officer because it was mailed to the wrong address as a result of Commission error. *See* Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992. We are unwilling to conclude, based solely on the different addresses, that she did not receive the decision mailed to her on January 12, 1994, within five days of mailing.

deemed to have received the decision on January 17, 1994, which is five days after it was mailed, and her appeal was required to be mailed to the Commission not later than 15 days later, that is, not later than February 1, 1994. The claimant's appeal is postmarked May 2, 1994, and was received on May 4, 1994. Her appeal was thus not timely filed. We also observe that at the beginning of the hearing, the hearing officer advised the parties that any appeal must be filed no later than the 15th day after the date the decision was received.

Although not necessary to our decision, we have nonetheless examined the record in this case to determine whether there was sufficient evidence to support the hearing officer's determinations. *See* Texas Workers' Compensation Commission Appeal No. 92080, decided April 14, 1992.

It was undisputed that the claimant suffered a compensable left ankle fracture in the course and scope of her employment on (Date of Injury). At the hearing, the claimant's attorney stated that the only real issue in contention was the date of MMI and that the claimant's position was that she was not yet at MMI. Thus, an IR was premature. The claimant's treating physician for her ankle injury, Dr. D believed that she had not reached MMI and that this injury also included reflex sympathetic dystrophy (RSD) for which, he believed, "by itself probably will give her at least a 20% lower extremity rating."[2] The hearing officer clarified this and other points of possible disagreement with Dr. B who, as the parties agreed, was a Commission selected designated doctor. Dr. B affirmed his previously assigned date of MMI of June 10, 1992, and zero percent impairment rating stating his belief that the claimant showed no objective, consistent clinical evidence of RSD. He also addressed an additional concern raised by the hearing officer that the removal of fixation devices from the claimant's ankle after he certified MMI may impeach the validity of that earlier date of MMI. Dr. B responded that the removal of such devices is essentially an elective procedure that "does not appreciably change the MMI date."[3]

Pursuant to Sections 408.122(b) and 408.125(e) the report of a designated doctor has presumptive weight and the determination of MMI and IR shall be based on this report unless the great weight of the other medical evidence is to the contrary. Great weight means more than an equal balancing or even a preponderance of the evidence and whether the great weight of the other medical evidence is contrary to the report of a designated doctor is a factual determination to be made by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. In this case, even were we to consider the claimant's appeal, we do not believe that the opinion

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[2]Pursuant to Table 42 of the American Medical Association's Guides to the Evaluation of Permanent Impairment, 3d Edition, 2d printing, February 1989 (Guides), a 20% impairment of a lower extremity is equivalent to an eight percent whole body IR.

[3]A June 10, 1992, date of MMI appears somewhat implausible for a (Date of Injury) fracture. Dr. B does conclude in his TWCC-69 of June 10, 199<u>3</u>, that MMI was reached on June 10, 199<u>2</u>, and the report attached to the TWCC-69 confirms this. There was no explanation in the record of why there was exactly a one-year difference in the date of MMI and the date Dr. B signed the TWCC-69.

of Dr. D on the diagnosis of RSD amounts to the great weight of the medical evidence or that the decision of the hearing officer affording the opinion of Dr. B presumptive validity was not supported by sufficient evidence. Having reached MMI, the claimant was no longer entitled to temporary income benefits (TIBS). Section 408.101.

At the hearing, the claimant contended that as a result of her initial injury, her foot was in a cast almost to the knee. She said that approximately two months later she fractured her collar bone when she fell getting out of her car and the cast got caught on the emergency brake. It has been held that a subsequent or follow-on injury, in this case a fractured collar bone, is compensable when caused by an original compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993. The necessary causation has been described as the direct and natural result, or naturally flowing consequences of the original injury and is a question of fact for the hearing officer to decide. *See* Texas Workers' Compensation Commission Appeal No. 94067, decided February 28, 1994, and cases cited therein. The hearing officer found that causation between the ankle and collar bone fracture in this case had not been established. Our review of the record discloses no medical evidence or other support for this proposition beyond the contention of the claimant. Having reviewed the record, even were we to consider this appeal, we would not have concluded that the hearing officer's determination on this issue was so against the great weight and preponderance of the evidence as to require reversal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Having determined that the claimant's appeal was not timely filed, the decision and order of the hearing officer are final.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge