APPEAL NO. 000028

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 17, 1999. The hearing officer determined that the appellant (claimant) waived the right to dispute the designated doctor's report which assigned her a nine percent impairment rating (IR) and that her IR was nine percent. The claimant appeals this determination, expressing her disagreement with it. The respondent (self-insured) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed in part, and reversed and rendered in part.

The claimant worked as a school custodian. _____, she was thrown against a wall and assaulted by a coworker. The parties stipulated that she sustained a cervical and lumbar spine injury and injuries to the head, right shoulder, and elbow. She was also diagnosed with and treated for post-traumatic stress disorder (PTSD). The hearing officer commented that the PTSD was a "consequence of the attack" and that "there was no evidence offered that the Carrier ever disputed the condition." The carrier has not taken exception to this statement and, for this reason, we assume the compensable injury included the PTSD.

Dr. P was the designated doctor selected by the Texas Workers' Compensation Commission (Commission) in this case to determine IR only.[1] On May 15, 1994, Dr. P examined the claimant and on May 20, 1994, completed a Report of Medical Evaluation (TWCC-69) in which he certified an IR of nine percent, exclusively for the lumbar spine. The only other areas he considered as part of the injury were the cranium and cervical spine, which he considered soft tissue injuries without permanent impairment. However, in another part of his report, he invalidated cervical range of motion (ROM) testing. With regard to the lumbar spine, he assigned seven percent IR for a specific disorder and, according to the chart attached to the TWCC-69, eight percent for loss of lumbar ROM. This eight percent was transferred to the calculation page where it inexplicably became two percent. The two and seven percents were combined for a nine percent IR. There is no indication that clarification of this was ever requested of Dr. P.

The claimant testified that she was not satisfied with this IR and contacted the Commission's field office in City 1 to dispute it. A Dispute Resolution Information System (DRIS) note reflects that she requested a benefit review conference (BRC) on June 15, 1994, and also was concerned about the carrier not paying her medical expenses in a

[1]The parties agreed that the date of maximum medical improvement (MMI) was October 14, 1993, the date of statutory MMI. *See* Section 401.011(30)(B).

timely manner. The carrier postulated that a BRC was set for March 1995. The claimant denied ever getting notice of this BRC. She said she found out from the adjuster that the BRC had been set. Although unclear from the evidence, she apparently talked to the adjuster or Commission employees to find out what she could do and was told she needed to obtain her case file or to file a certain form. She then said she began, at an unspecified time, a multi-year effort to obtain her file from City 1 field office and was told they did not have the file. She said she was then referred to the City 2 field office and repository for retired files, but had no success. At the same time, she moved to join her family in (State 1). Eventually, according to the claimant, she spoke with the City 3 field office and was told they were obtaining the files. She said she finally "found" the file in City 3 and obtained a response to her request for a BRC from the City 4 field office. None of this activity is reflected in the DRIS notes. Rather, the first note on June 15, 1994, refers to the request for a BRC; the second DRIS note on June 24, 1994, was a request from the claimant for general information; the third DRIS note is dated November 6, 1998, some four and one-half years later, and dealt with an inquiry from the claimant about supplemental income benefits. There was no explanation for the lack of DRIS notes, if any, for the period from June 24, 1994, to November 6, 1998.

The issue reported out of the BRC was, what is the claimant's IR. The carrier's position was that the report of Dr. P was entitled to presumptive weight and that the claimant waited too long to challenge Dr. P's report, thereby waiving the right to do so. The Appeals Panel has held that an employee may waive the right to dispute a designated doctor's report by waiting too long to raise the dispute (Texas Workers' Compensation Commission Appeal No. 980355, decided April 6, 1998, and Texas Workers' Compensation Commission Appeal No. 981291, decided July 30, 1998. In Texas Workers' Compensation Commission Appeal No. 962247, decided December 23, 1996, we wrote that

> 73 TEX. JUR. 3d Waiver § 1 (1990) states:
>
> "Waiver" has been defined as an intentional release, relinquishment, or surrender of a right that is at the time known to the party making it. The term has also been defined as the relinquishment or refusal to accept a right, the intentional relinquishment of a valuable right, the voluntary or intentional relinquishment of a known right, or conduct inconsistent with a claim of such a right.
>
> A waiver takes place where one dispenses with the performance of something which he or she has a right to exact, or occurs where one in possession of any known right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or the intention to rely upon it.

> Section 4 provides that there must be an actual intention to relinquish the right or conduct that will warrant an inference of the relinquishment of the right. Section 9 states:
>
> To establish an implied waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or act amounting to an estoppel. In the absence of an express renunciation, waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his or her conduct the opposite party has been mislead to his or her prejudice into the honest belief that such waiver was intended or consented to. . . . Also, a waiver cannot be inferred from mere silence; there must be either express language to that effect, or acts from which an intention to waive may be inferred or from which waiver follows as a legal result.
>
> *See* 73 TEX. JUR. 3d *Waiver*, §§ 1 and 4 for case citations.

The carrier bases its waiver argument on the proposition that the claimant should have done something as simple as ask for another BRC in the more than four years after she first requested a BRC to get the process back on track. The claimant, of course, testified that she did do something, that is, repeatedly talk to adjusters and Commission employees in various field offices, but made no headway. The hearing officer considered the claimant's testimony and commented that while she, the hearing officer, recognized the problems the claimant had, "the evidence is unclear as to why it took five years for the matter to come up for a [BRC]." Later, the hearing officer stated that the claimant "failed to establish she used due diligence in disputing the [IR] assigned by the designated doctor." We construe these comments as, in effect, a determination by the hearing officer that she was not persuaded by the claimant's testimony that she did all these things without there being some reference to them in the DRIS notes. The hearing officer, as fact finder in this case, could accept the claimant's testimony as credible or reject it as not credible. Having rejected that testimony about her activities from 1994 to the end of 1998 to pursue her request for a BRC, there was virtually no evidence on which to find that the claimant did not waive her right to dispute Dr. P's report. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review, we find the evidence sufficient to support the waiver determination.

Section 408.125(e) provides that the report of a designated doctor on the question of IR is entitled to presumptive weight and the Commission is to base its determination of IR on that report unless the great weight of the other medical evidence is to the contrary. Having found a waiver, the hearing officer proceeded to also find that Dr. P's report was not contrary to the great weight of the other medical evidence. Two matters concern us with regard to this finding. First, it appears that Dr. P did not consider the entire compensable injury, specifically the PTSD. However, in Texas Workers' Compensation Commission

Appeal No. 980355, decided April 6, 1998, the Appeals Panel stated that an IR that does not rate an entire injury may not be correct, but is not necessarily invalid and a party can waive the right to dispute on this basis. Thus, we do not perceive that Dr. P's failure to rate the entire injury is fatal to the carrier's waiver theory.

Secondly, and of more concern, is the apparent clerical or typographical error in Dr. P's report whereby the eight percent for loss of lumbar ROM becomes two percent in the final calculation of whole body IR. There is no explanation for this and it appears that the real IR for ROM is eight percent. We have held that a hearing officer may apply a mathematical correction to a certification of IR when doing so simply corrects an obvious mathematical error and does not involve the exercise of judgement as to what the proper figures were. Texas Workers' Compensation Commission Appeal No. 992223, decided November 15, 1999. Because we construe the use of the two percent IR to be a simple error in the nature of a mathematical or clerical error, and that the correct figure is eight percent, we recalculate the claimant's whole body IR by combining the seven percent for a specific disorder of the lumbar spine with an eight percent for loss of lumbar ROM for a whole body IR of 14% under the Combined Values Chart of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association.

For the foregoing reasons, we affirm the determination that the claimant waived the right to dispute Dr. P's certification of IR. We reverse the determination that the claimant's IR is nine percent and render a decision that the IR is 14%.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

DISSENTING OPINION:

I am constrained to dissent in the present case for many of the same reasons I dissented in Texas Workers' Compensation Commission Appeal No. 961693, decided October 7, 1996. In Appeal No. 961693, the majority affirmed a hearing officer who found that a claimant was barred from disputing the date of maximum medical improvement (MMI) of her treating doctor because she failed to do so timely. In my dissenting opinion I

questioned what was the basis in the 1989 Act or the rules of the Texas Workers' Compensation Commission (Commission) for finding that MMI became final.[2] I raise the same question in the present case. What is the basis in the 1989 Act or the rules of the Commission for finding that the IR assessment of the designated doctor in the present case has become unassailable?

The only possible answer is that it has become final because of the application of an equitable doctrine whether we term it waiver, equitable estoppel, or laches. As I stated in my dissent in Appeal No. 961693, I am not inherently opposed to the application of the principles of equitable doctrines like estoppel to workers' compensation cases and have, in some circumstances, done so. However, we have recognized that, because of the inherent subjectivity involved in the application of equitable doctrines, they should be applied sparingly and with caution.[3] We stated as follows in Texas Workers' Compensation Commission Appeal No. 972021, decided November 19, 1997, in reversing a hearing officer who applied estoppel to the carrier's delay in raising the applicability of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 130.5(e) (Rule 130.5(e)):

> The doctrine of estoppel is an equitable doctrine and is not applied as a matter of law. As we have indicated, it is rarely applied and requires an analysis of the facts and circumstances rather than being imposed as a matter of law because of a deviation from a particular procedure.

We also noted in Appeal No. 972021 that Rule 130.5(e) provides no time limit for asserting its applicability.

There is no provision in the 1989 or the rules of the Commission that creates a time limit to disputing the IR assessment of a designated doctor. I would not create one in the present case. I think this is ill-advised for a number of reasons, not the least of which are the problems attendant in determining the length of such a time limit, which, in my view, in the end would only be as long as the chancellor's foot.

---

[2]The majority in this case did not find that MMI had become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because it was clear that the impairment rating (IR) had been timely disputed.

[3]The problems of the subjectivity of equity was probably best expressed by John Seldon in 1689 in *Table Talk* when he made the following comment about the chancellor, the traditional judge in a court of equity:

> Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one if they make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.

I think there are serious problems under the circumstances of the present case in applying equity to foreclose the claimant from challenging the designated doctor's report. First, the designated doctor's report is clearly flawed in that it fails to rate the claimant's entire injury. Second, the designated doctor clearly fails to follow the protocols of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). This is, in my view, only partly solved in the present case by the majority's admirable effort to mitigate the effects of the designated doctor's failure to properly use the combining tables of the AMA Guides. Finally, I have serious reservations about applying equitable estoppel or waiver to impose a time limit on a claimant whose injury undisputedly involves serious mental and emotional components. The basic purpose of equity is to insure fundamental fairness. Creating an artificial time limit not found in the law and applying it to a claimant with serious mental and emotional limitations does not comport to my view of fundamental fairness.

I would reverse the decision of the hearing officer and remand to have her insure that this claimant receives a rating of her entire injury and which is valid under the protocols of the AMA Guides. I note that in Texas Workers' Compensation Commission Appeal No. 941360, decided November 28, 1994, we reversed the decision of a hearing officer who had determined that a carrier, who failed to timely dispute an IR pursuant to Rule 130.5(e), was barred from doing so when it became apparent much later that the designated doctor had not properly used the AMA Guides in assessing IR. While the statute does not provide for a time limit for the claimant to dispute the IR of a designated doctor, it clearly does provide in Section 408.124 that she is entitled to an IR assessed pursuant to the AMA Guides.

Gary L. Kilgore
Appeals Judge