APPEAL NO. 000518

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 11, 2000. The issue at the CCH was the appellant=s (claimant) impairment rating (IR). The hearing officer determined that the claimant=s IR is 25%, as assessed by Dr. K, a treating doctor. The claimant appeals, asking that his prior request for a designated doctor to determine his IR be honored by the Texas Workers= Compensation Commission (Commission). The respondent (carrier) replies that the decision is correct and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____, when he fell some 27 feet off a ladder. Although an IR must consider the entire compensable injury, the hearing officer only made findings that the claimant sustained a compensable injury without specifying the extent of the injury. The claimant testified that the injury included his spine (lumbar and cervical), his right heel, toes on both feet, and both arms (elbow fractures). The carrier did not dispute this extent of injury testimony and, for purposes of this appeal, we accept the compensable injury as described by the claimant. We further note that no finding of a date of maximum medical improvement (MMI) was made. Statutory MMI pursuant to Section 401.011(30)(B) was represented by the claimant to be March 22, 1994, and the carrier appears to have accepted this as the date of MMI in this case. For purposes of our decision, we assume that the claimant reached MMI by operation of law on March 22, 1994.

The claimant's first IR, assigned by Dr. K in a Report of Medical Evaluation (TWCC-69) on March 22, 1994, was 17% based solely on the spinal injuries. A Dispute Resolution Information System (DRIS) note in evidence reflects that on March 25, 1994, the claimant called the Commission to dispute this IR. The DRIS note further stated that the Commission employee "told clmt that I will notate his dispute, but we will not begin the designated dr process at this time**B**clmt said that he is certainly having another extensive back surgery, but not 'til 01 or 02 '95." The Commission employee also is reported to have told the claimant to have the three doctors treating the back, feet, and elbows "gather their med infor and confer" and then one would file a correct something.[1] On May 5, 1994, Dr. B completed a TWCC-69 in which he assigned a nine percent IR solely for the right heel and left foot. The next DRIS entry reflects that the claimant came to the Commission office on April 12, 1994, to discuss Dr. K's 17% IR and was advised of the dispute process. The author of this note stated that she "will hold off on dispute process 1 [month] until [claimant] is able to discuss" with the adjuster and his doctors. The note further states that the claimant would call to advise the Commission

[1]The DRIS note abruptly ends.

of the results of these discussions. On May 23, 1994, the adjuster called the Commission to say that no IR combining all the injured body parts had yet been received, but was expected. The Commission employee then agreed to call the adjuster in another month for a status report. On July 24, 1994, Dr. K completed a second TWCC-69 in which he added Dr. B's nine percent for a total whole body IR of 25%.[2] The carrier paid impairment income benefits (IIBs) based on this 25% IR. On November 1, 1994, the claimant is reported to have called the Commission "to make sure that his dispute" of the 17% IR was "shown in computer." Because surgery was scheduled for January 1995, no further action was taken by the Commission to appoint a designated doctor.

A DRIS entry of August 15, 1995, again reflects that the claimant called "to make sure all was ok. Clmt disputed % long ago-0394." It further stated that the adjuster was aware of the dispute, but it would take three to four months to determine if lumbar fusion was solid and "at that time would be able to give a good % . . . will note dispute to be resolved once fusion solid." Later entries reflect disputes over supplemental income benefits (SIBs)[3] and attorney fees.

The June 13, 1997, DRIS entry reflects a discussion between the claimant and the ombudsman about eighth quarter SIBs and the claimant brought up his dispute of "MMI/IR." The claimant wanted to know when he disputed and was told is was on March 25, 1994. Later DRIS notes deal with discussions about 12th quarter SIBs. For example, a DRIS entry of December 15, 1999, centered on a dispute over the amount of a check for SIBs and ended with the claimant=s being asked if there was anything else he wanted to address. In response, the claimant said he needed to check and "make sure that his dispute of his IR was still active.@ Later that day, the claimant said he wanted "to pursue" his IR dispute "at this time." By "this time," the claimant was in his 15th SIBs quarter. An entry on January 7, 2000, states that the claimant never called back after his January 1995 surgery to dispute the 25% IR, but did so in December 1999 because he "just thought abt it again once benefits stpd. Clmt states it is TWCC's fault becse we never acted on his dispute - advsd clmt that we did not act becse he advsed us he was not ready & was supposed to call back, but never did . . . clmt then stated that we shld have called him since he did not call back." At the CCH, the claimant

[2]In this second TWCC-69, Dr. K changed the date of MMI to July 14, 1994, the date he completed the form. Presumably, the carrier commenced the payment of IIBS based on a March 22, 1994, date of statutory MMI.

[3]Apparently SIBs were paid at least for some quarters up to the 401st week after the date of injury. *See* Section 408.043 then in effect which provided that the right to temporary income benefits, IIBs, and SIBs terminates on the expiration of 401 weeks after the date of injury.

testified that he did not call back because he was "too busy" with SIBs; was still facing another surgery as late as September 1999; and he only recalled his dispute when his wife mentioned it.

Section 408.121(a) states that IIBs are to begin on the day after the employee reaches MMI. In Texas Workers' Compensation Commission Appeal No. 950615, decided June 5, 1995, a case involving a designated doctor, we stated that an IR is to be assigned with reference to the date of MMI, and that the "resolution of IR cannot be indefinitely deferred to await the results of a potential lifetime course of medical treatment." We have also pointed out, primarily in the context of a dispute of the report of a designated doctor, that the challenging party may be estopped from raising a dispute by waiting too long. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 980101, decided March 4, 1998, and cases cited therein; *see also* Texas Workers' Compensation Commission Appeal No. 972021, decided November 19,1997, and Texas Workers' Compensation Commission Appeal No. 951494, decided October 20, 1995. In the case we now consider, the hearing officer noted the policy consideration of finality of an IR and that "such ratings cannot be revisited an indefinite number of times or over an indefinite time period.@ She further commented that the carrier paid IIBs based on the 25% IR and that on numerous occasions the claimant asked that the designated doctor process not be instituted in his case pending further stabilization of his spinal condition. After the claimant himself appeared to concede that his condition somewhat stabilized after his last surgery, he still waited about a year to reactivate his IR dispute and then only after the 401-week limitation on benefits applied. The hearing officer concluded that the delay was "a matter entirely of Claimant's own doing" and did not find persuasive his explanation of being involved in trying to work and coping with the pain as an excuse for not earlier pursuing a dispute of his IR. Thus, she found that the claimant was barred from further pursuing the appointment of a designated doctor.

In his appeal of this determination, the claimant expresses his disagreement with the fairness of the 1989 Act's provision establishing the concept of statutory MMI. He contends that his assertion of a dispute of the IR in 1994 required the Commission to resolve the issue through the appointment of a designated doctor no matter that the claimant repeatedly asked that no action be taken on the dispute and that his attention leading up to his request in December 1999 to have a designated doctor appointed was consumed by other matters about which he did not testify at the CCH. The provision of statutory MMI in the 1989 Act cannot be waived by the Commission and has been found to be constitutional by the Texas Supreme Court in Texas Workers' Compensation Commission, *et al.* v. Garcia, 893 S.W.2d 504 (Tex. 1995). While we may agree that as a matter of principle the Commission has certain obligations in insuring the statutory dispute resolution processes are expeditiously undertaken, the evidence in this case clearly supports the conclusion of the hearing officer that the claimant asked the Commission more than once to delay the appointment of a designated doctor. The Commission was thus placed in the position of waiting for the claimant to reactivate his request. He did not do so until after the carrier paid IIBs in reliance on the 25% IR and after the claimant was no longer entitled to income benefits. We have recognized that a

party may be estopped from asserting rights under the 1989 Act by waiting too long. *See* Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994. We find the evidence sufficient in this case to support the hearing officer's determination that the claimant's affirmative actions to delay the Commission's appointment of a designated doctor to resolve his dispute of the 25% IR now preclude him from pursuing this issue. In reaching this conclusion, we decline to consider factual assertions made by the claimant for the first time on appeal. *See* Section 410.203(a)(1) and Texas Workers' Compensation Commission Appeal No. 93943, decided December 2, 1993. We also stress that, consistent with our decision in Texas Workers' Compensation Commission Appeal No. 962247, decided December 23, 1996, we do not find waiver or estoppel simply in the acceptance of IIBs after statutory MMI, but in the totality of circumstances described in the DRIS notes and other evidence.

The claimant also appeals the hearing officer's determination that the claimant's IR is 25% as assigned by Dr. K, arguing essentially that Dr. K's IR did not rate the entire injury, specifically the injury to his "feet, ankles, and elbows." Dr. K specifically amended his initial TWCC-69 to add foot and ankle impairment as found by Dr. B. No mention is made of the elbows. The claimant, however, presented no objective medical evidence of impairment to the elbows. In addition, a chart of Dr. W examination of the claimant showed no limitations bilaterally on elbow range of motion. There was no evidence that Dr. K rejected this conclusion. Under these circumstances, we find the evidence sufficient to support the determination of the hearing officer that the claimant's correct IR is 25%.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore

Appeals Judge