APPEAL NO. 002069

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 August 9, 2000. The issues at the CCH were the date of maximum medical improvement (MMI) and the proper impairment rating (IR). The hearing officer determined that the appellant (claimant) had reached MMI on April 21, 1997, with an 11% IR, as certified by a Texas Workers' Compensation Commission (Commission)-selected designated doctor. The claimant appealed the hearing officer's determinations, asserting that the designated doctor had failed to properly apply the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and requested that the IR assigned by her treating doctor be adopted or, in the alternative, that a new designated doctor be appointed. The respondent (carrier) responds that the designated doctor properly applied the AMA Guides, that the great weight of the other medical evidence is not contrary to the designated doctor's report, that the hearing officer properly accorded the designated doctor's report presumptive weight, and that the hearing officer's decision should be affirmed.

DECISION

Reversed and remanded.

On _____, the claimant sustained compensable injuries when she was rear-ended while sitting at a stop sign. The claimant's injuries include a cervical spine injury, a lumbar spine injury, and a brain injury. Ultimately the claimant was assigned an IR, it was disputed, and Dr. D, was appointed to serve as a Commission-selected designated doctor. Dr. D has seen the claimant on several occasions and has revised her IR a number of times.

On May 6, 1997, Dr. D submitted a narrative report to the Commission regarding his determination of the claimant's IR. The introductory paragraph of that report stated:

> As we informed you on 4/21/97, we did not have all of the medical records to take into consideration. The exam started on 4/21/97 and finished on 5/6/97. The following are results of our evaluation of the above mentioned, on [sic] **based on the [AMA Guides] as well as the Spinal Treatment Guideline TWCC Rule 134.1001** [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 134.1001 (Rule 134.1001)] **as well as Mental Treatment Guideline. This claimant has reached** [MMI] **as of 4/21/97 with an** [IR] of 11% WP. [Emphasis in the original.]

In his report, Dr. D noted that the claimant's past medical history included a previous low back injury for which an MRI was positive for lumbar discogenic spondylosis. Dr. D's report concluded:

> The [IR] was calculated from Table 49 II C, page 73 of the AMA Guides, which grants the claimant 6% WP as a result of cervical herniated disk. ROM [range of motion] of the cervical spine was evaluated from Chapter 3, Tables 51-53 since it was invalidated as a result of non-consistency, no [IR] was granted. There is a lot of symptoms of post-stress syndrome. As a result of reviewing all of the medical records, it was calculated from Chapter 4, under the nervous system on Table 1, Spinal Cord and Brain Impairment Value, Section B under the Brain Emotional Disturbances, page 101 of AMA Guide, which grants claimant an addition 5% impairment. Combined value grants claimant 11% Whole Person.

On November 4, 1997, Dr. D sent another narrative report to the Commission. That report stated:

> Based on new evidence and information we obtained, it appears that the lumbar spine was included during the benefit review conference as a part of the compensable injury of _____. Based upon review of this additional medical record, a diagnosis of lumbar discogenic spondylosis is included in this [IR] with the following recommendations:
>
> 1. The MMI date should remain as 4/21/97.
>
> 2. The IR should change since we did take into consideration the [ROM] of the lumbar spine during the examination of 11/3/97 and recalculated from Table 56-57 of the AMA Guide, which gave her a rating of 0% WP.
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> 3. As a result of the discogenic spondylosis of the lumbar spine over a 6-month period, Table 49 II B, page 73 of the AMA Guide, as applied and included in the total IR, grants her a final IR of 15% WP. A new TWCC 69 [Report of Medical Evaluation] has been drafted.

On November 13, 1997, Dr. D amended his report yet again. Dr. D again certified that the claimant had reached MMI on April 21, 1997, but reduced the IR from 15% to 11%. Dr. D's report indicated that he had subtracted the 5% impairment for lumbar spondylosis that he had only recently included. On March 3, 1998, a benefit review officer (BRO), wrote to Dr. D and requested clarification of his IR report. That letter posed the following questions to Dr. D:

> 1) Will you please review [Dr. F] report of January 3, 1997 and [Dr. B] report of February 9, 1998? After review of this additional information, do you still opine that [the claimant] has reached [MMI]? If so, what date?

2) If you still opine that [the claimant] reached [MMI] and after review of the additional information, do you opine that [the claimant] may be entitled to an impairment from Table I.B. on page 101 of the "Guides"? Please state the basis for your opinion.

3) After the re-examination on November 3, 1997, you assessed a 5% impairment for specific disorders of the lumbar spine for discogenic spondylosis of the lumbar spine. You later amended your report and assessed a 0% impairment for specific disorders of the lumbar spine. You had [Dr. S] read a craniocerebral MRI and a cervical spine MRI. The report does not indicate that Dr. S reviewed any lumbar testing. Why would it not be appropriate to include a 5% lumbar impairment from Table 49.II.B? Please give the basis for your opinion.

4) After review and consideration of the additional information, if you opine that [the claimant] has reached [MMI], what is her [IR]?

On March 16, 1998, Dr. D responded to the BRO, stating:

> All the additional medical records that you submitted which included reports, from [Dr. F], dated January 3, 1997, as well as a report from [Dr. B], dated February 9, 1998, have been reviewed for consideration. The following recommendations were made:
>
> 1. The MMI date remains April 21, 1997.
>
> 2. The [IR], based on the *AMA Guide*, 3rd Edition, 2nd Printing, February 1989, is 11% whole person, for the injury dated June 4, 96.

And, in response to the BRO's third question, Dr. D wrote:

> [A]fter reviewing all the medical records that we have obtained for this injured worker, she had previous injury to the lumbar spine, and according to the guide the [ROM] of the lumbar spine is appropriate for evaluation in the report dated November 4, 1997, that we sent to [Ms. B], the dispute resolution officer. We did take into consideration table 49 II-B, page 73; however, additional medical records obtained at that time and according to the guide, [ROM] of the lumbar spine should be only applied. In review of the medical records, we performed [ROM] of the lumbar spine twice and the results were indicative, as I stated in the report, dated November 13, 1997, lack of consistency and a high coefficient variant for validity criteria which is mandated by *AMA Guide*. Consequently, we cannot apply table 49, page 73 according to the clinical evidence. As a result [IR] of the lumbar spine equals 0% whole person.

The claimant appeals Dr. D's failure to rate her cognitive dysfunction. A review of the evidence reveals that Dr. D assigned an IR for the cognitive dysfunction but did not assign a specific impairment for the lumbar spondylosis. In light of the diagnosis of spondylosis, the evidence is not sufficient to determine whether Dr. D properly applied the AMA Guides in failing to assign an IR for that condition and clarification by the designated doctor is necessary. On remand, the hearing officer should query the designated doctor and ask the doctor to specifically state why he believes, if he does, that the compensable lumbar injury is not ratable as a specific disorder under Table 49 of the AMA Guides. The hearing officer should advise the designated doctor that if the doctor is unable to separate the impairment from the preexisting condition from the aggravating injury to the same part of the body, the IR is to be based on the present condition of that body part (*see* Texas Workers' Compensation Commission Appeal No. 94392, decided May 13, 1994) but if the doctor can separate the impairment from the preexisting condition from the impairment for the injury to be rated, the impairment from the preexisting condition should not be included in the IR for the injury being rated (*see* Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993). If the designated doctor articulates his rationale for failing to rate the specific disorder, then the hearing officer may or may not find the doctor's reasoning sufficient and to render a new decision in accordance with that determination.

The claimant urges that by failing to request an issue on her alleged failure to diligently urge her dispute of the designated doctor's IR, the carrier has waived the right to a determination that she should not be allowed to contest the designated doctor's report by operation of laches. The hearing officer found that the claimant waited too long to renew her pursuit of additional impairment and did not have a good reason for her failure to do so. Evidence had been presented on the delay in urging the dispute of the designated doctor's IR and both sides had argued the question. However, no issue was requested by either party nor was one added by the hearing officer on the basis that the issue had actually been litigated. Nor did the hearing officer make a conclusion of law on the issue. However, the hearing officer did make findings of fact relative to the claimant's delay. Had the hearing officer found that the issue had been tried by consent, we would be hard-pressed to disagree with him, but he did not. The issue of waiver of the right to contest the designated doctor's report is not subsumed in a contest of that report. *Compare* Texas Workers' Compensation Commission Appeal No. 990836, decided June 4, 1999 (waiver of right to dispute and existence of newly discovered evidence are not subsumed in the issue of compensability), and Texas Workers' Compensation Commission Appeal No. 981714, decided September 10, 1998 (issue of whether carrier was estopped from raising issue of finality of an IR was not subsumed in the issue of whether the IR had become final under Rule 130.5(e)). Since neither party requested that the issue be added, we find that the argument on appeal by both the claimant and the carrier on this point has been waived and we decline to address it. However, we find that the hearing officer's findings of fact on the issue of laches to be suggestive of a consideration of laches in determining the outcome of this case. While we are confident that the hearing officer did not consider the issue which was not properly before him, in order to prevent the

appearance of an inappropriate consideration of the equitable doctrine of laches we strike the following findings of fact:

10. Under the principal of Laches Claimant waited too long to renew her pursuit of additional impairment.

11. Claimant does not have a good reason for the delay in pursuing this claim.

We reverse the hearing officer's decision and remand for clarification by the designated doctor. If after receiving clarification from the designated doctor the hearing officer determines that the claimant is entitled to an IR for the lumbar spondylosis, the hearing officer should render a decision that the claimant's IR is as set forth in the designated doctor's report, including that impairment. If the hearing officer determines that the claimant is not entitled to an IR for the lumbar spondylosis, he should render a decision that the claimant's IR is as set forth in the designated doctor's report which excludes the IR for that condition. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge