

IN THE SUPREME COURT OF TEXAS

=====
No. 98-0006
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ROSA RODRIGUEZ, PETITIONER

v.

SERVICE LLOYDS INSURANCE COMPANY, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS
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Argued on November 17, 1998

CHIEF JUSTICE PHILLIPS, joined by JUSTICE HECHT, JUSTICE HANKINSON and JUSTICE O'NEILL concurring.

I concur in the Court's decision to remand, but I disagree with the scope of that remand. I do not agree with the Court that Rule 130.5(e) invariably forbids any challenge to the first assigned impairment rating after the 90-day period provided in the rule. Although the rule "considers" an impairment rating final absent a timely dispute, it does not define that type of finality or otherwise explain the consequences of an untimely dispute. Because the rule's meaning is unclear, I would adopt the Commission's administratively developed construction to permit challenges after 90 days in limited circumstances.

Rule 130.5(e) provides:

The first impairment rating assigned to an employee is *considered* final if the rating is not disputed within 90 days after the rating is assigned.

28 TEX. ADMIN. CODE § 130.5(e)(emphasis supplied). Under the Court's view, that a doctor may have grossly erred when determining the employee's impairment rating or that the Act would permit

the employee a longer period to discover and contest this error, for example, is inconsequential. This application may be harsh, but to the Court “considered final” means absolutely final.

I disagree. We should not presume that “considered” is mere surplusage. The proper presumption is that every word in a statute or rule was deliberately chosen for a meaning and a purpose. *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 600 (Tex. 1975). As we said in *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963), “a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible.”

Moreover, when interpreting an administrative rule, we must consider the rule’s administrative construction. See TEX. GOV’T CODE § 311.023(6)(“The Code Construction Act”). The Commission’s interpretation of its own rule is entitled to deference by the courts so long as it is reasonable. See *Public Util. Comm’n v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991).

To assist us in this regard, the Commission has filed two amicus curiae briefs, explaining its application of Rule 130.5(e). The Commission advises that “considered final” cannot be equated with “absolutely final.” Instead, the Commission applies the rule according to the facts in each case. In this case, the Commission submits that Rodriguez had the right to avoid finality under the rule if she could prove by a preponderance of the evidence that either: “(1) there was a valid dispute [communicated to the Commission] within ninety-days from the date she received notice of her first assigned impairment rating; and/or (2) the first assigned impairment rating was invalid because it was based on a misdiagnosis or was due to a significant error.” Thus, the consideration of finality under Rule 130.5 is, under the Commission’s interpretation, subject to challenge both procedurally and substantively.

This Court recognizes that “finality” under the rule may be attacked procedurally, but it

rejects any notion that “finality” may also be challenged substantively. This conclusion, the Court says, is required by both the “clear” language of the rule and the Commission’s original intent, which the Court divines from a Commission statement published in the Texas Register eight years ago.

Prior to adopting its rules, the Commission published a draft for public comment. *See* 15 Tex. Reg. 6464 (1990). One critic complained that the 90-day rule was “unnecessary and would preclude the revisiting of the issue [of an employee’s impairment rating].” 16 Tex. Reg. 177 (1991). The Commission disagreed, and explained its view in the Texas Register. Here is the Commission’s complete response:

The commission disagrees because allowing the impairment rating to be revisited would only allow a doctor to assign an inappropriate impairment rating to begin with, which should be discouraged. Additionally, after the 104-week MMI [maximum medical improvement] threshold has been reached, MMI cannot be revisited.

16 Tex. Reg. 177 (1991). What does this mean? Clearly, the Commission thought the 90-day rule was needed to encourage doctors to use care in assigning impairment ratings, but its view regarding the preclusive effect of its rule is not so apparent. If the rule was intended to preclude any reconsideration of the assigned impairment rating after 90 days, why did the Commission immediately reference the two year period permitted under the Labor Code for determining an employee’s MMI, or maximum medical improvement? Because an injured employee’s impairment rating cannot be determined until that employee reaches maximum medical improvement, *see* TEX. LAB. CODE §§ 408.121 & .123, reference to this longer period suggests that the 90-day period is not absolute. Furthermore, if MMI can be revisited up to 104 weeks after income benefits begin to accrue (as the Commission’s comment suggests), is it not reasonable to infer that an impairment rating (premised on an earlier, erroneous determination that the employee had reached maximum

medical improvement) can also be reexamined?

Rather than this cryptic comment, I would rely on the Commission's established practice under the rule after years of practical experience. That practice, as explained in the Commission's amicus briefs, would permit a substantive challenge to the employee's impairment rating (and MMI) after the 90-day period under limited circumstances. Applying that construction to this case, I would remand to the trial court both Rodriguez' procedural claim that her objection to the assigned impairment rating was timely, and her substantive claim that, notwithstanding any procedural error, her assigned impairment rating of four percent was the product of misdiagnosis or other significant medical error. Not only does this construction properly defer to the Commission's established construction of its own rule, it also is supported by the liberal construction we apply to "workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents." *Alberston's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999).

Thomas R. Phillips
Chief Justice

OPINION DELIVERED: July 1, 1999