APPEAL NO. 93296

As a result of our reversal and remand in this case (Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992), a contested case hearing on remand was held in (city), Texas, on February 22, 1993, and March 19, 1993, (hearing officer) presiding as hearing officer. She determined that the correct impairment rating in the case is seven percent based upon the June 5, 1992, report of the Commission appointed designated doctor. Appellant (claimant) urges that the great weight of all the medical evidence is that claimant's impairment rating should be 29 percent as determined by his treating doctor. Respondent (carrier) argues that the designated doctor's impairment rating is correct, is entitled to presumptive weight, and that the hearing officer's decision should be affirmed.

DECISION

Finding error in the decision of the hearing officer, we reverse and render a new decision.

The only issue in the case at the original hearing and on remand was the claimant's correct impairment rating. There were two opinions rendered on the applicable impairment rating in this case: one by the claimant's treating doctor and one by a Commission appointed designated doctor. Because there was no explanation or rationale apparent from the record for the wide disparity between the ratings of similarly qualified orthopedic specialists (seven percent vs. 29 percent), we remanded for further consideration and development of evidence on this matter. The only new evidence brought forth at the hearing on remand was a deposition of the designated doctor, (Dr. P), who testified as to the reason for the significant disparity. Because of what is clearly developed as insufficient documentation and an erroneous application of the Guides to the Evaluation of Permanent Impairment, Third Edition, second printing, dated February 1989, American Medical Association (Guides), the decision cannot be sustained.

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.26(d) (Vernon Supp. 1993) (1989 Act), once an employee has been certified as having reached maximum medical improvement (MMI), the certifying doctor shall evaluate the condition of the employee and assign an impairment rating, "using the impairment guidelines referred to in Section 4.24 of this Act." Article 8308-4.24 provides that all determinations of impairment under the act must be made in accordance with "the second printing, dated February, 1989, of the [Guides]."

The guides are comprehensive, somewhat complicated and, as stated in Chapter 1, paragraph 1.2, "the design of the *Guides* requires integration of already existing medical and nonmedical information with the results of a current clinical evaluation, carried out in accordance with the protocols of the *Guides*, to characterize fully and assess medical impairment. Accomplishment of this objective is based on utilization of three powerful tools that make up the fundamental components of the *Guides*." These tools are set out and

involve the kinds of information needed, the definitive medical evaluation protocol to be used, and reference tables specifically keyed to the evaluation protocol. Good documentation and a clear explanation of how the rating was arrived at is essential to show substantive compliance with the Guides. Chapter 3, paragraph 3.3a, discusses the general principles of measurement for the spine. Under the "Principles for Calculating Impairment" the following is stated:

> Evaluation of impairment of the spine involves both diagnosis-related factors (i.e., structural abnormalities), and musculoskeletal/neurological factors that require physiologic measurements. These sections provide guidance in both areas: first, a comprehensive diagnosis-based table (Table 49) is presented. Second, the technique for performing range of motion measurements of the spine using inclinometers is described. In addition the evaluator should use the appropriate sections of the evaluation of the upper and lower extremities (Sections 3.1i, and 3.2f) for assessment of radiculopathies associated with spine impairment.

This paragraph goes on to specifically set out the protocol steps to be taken in calculating impairment. The entire protocol must be followed and one part of that protocol involves measurement of range of motion. Item number 7 of the protocol states: "[t]o obtain the impairment of the whole person due to the impairment of the region of the spine, use the Combined Values Chart to combine the diagnosis based impairment with the impairment due to limited range of motion or ankylosis." (It is recognized in the Guides that there is a possibility some range of motion measurements may reflect inconsistencies even after repeated measurements and the Guides provide in such situation that "if inconsistency persists, the measurements are invalid and that portion of the examination is then disqualified"). The Guides do not provide for distinct and separate protocols which would permit one evaluator to chose to follow one set of measurement protocols and another evaluator to use a completely different set of measurement protocols. Such would defeat the primary function of having objective Guides that enable similar results between different evaluators. Paragraph 2.0 of Chapter 2 clearly states:

> One major objective of the *Guides* is to define the process of measuring and reporting medical impairment in sufficient detail so that physicians have the capability to collect, analyze, and report information about the medical impairment of claimants in accordance with a single set of standards. As noted in Chapter 1, two physicians following the same medical evaluation protocol to evaluate the same patient and using the same reference tables and reporting protocol should report very similar results and reach very similar conclusions. Moreover, if the clinical findings are completely described in the report, then any knowledgeable observer may compare the findings to the tables to

determine the impairment rating.

In the deposition of Dr. P, he described two distinct "mechanisms" or "two different systems of assessment" under the Guides to use in determining impairment and stated he used one method (the "table that lists specific injuries and disorders") and that the treating doctor used the other (range of motion) and that accounted for the great difference in the impairment ratings. It is not difficult to understand that it is not only possible but probably likely that different results will occur if completely different protocols are used. This is precisely what the Guides were designed to preclude. Rather, the Guides require that all evaluators use the same protocol, that is, every evaluator using the same tools, same measurement methodology and following specifically defined steps in the process. That was not done here, and the results speak for themselves. Dr. P indicated that the range of motion assessment is very difficult to do and he preferred to use just the specific disorder table. Unfortunately, the result is an invalid impairment assessment and rating. Although Dr. P indicated in his deposition that the claimant had "limitation of motion," he stated that he does not use range of motion in his assessments and that "you can't use both" the table of specific disorders and range of motion. This is not in accord with the Guides and resulted in an invalid impairment rating. And, although it is open to question, the evidence does not establish that the treating doctor properly used the Guides in his assessment of impairment. Dr. P indicated in his testimony that the treating doctor used the other "mechanism." We also note that although there were other diagnostic tests such as an MRI and CAT scan, these were apparently not reviewed by Dr. P. The Guides clearly indicate that such previous medical information that is available should be examined and considered in the assessment of impairment.

For the foregoing reasons, the decision of the hearing officer is reversed and a new decision is rendered that the designated doctor did not correctly follow or apply the Guides in arriving at his impairment rating of the claimant and that his impairment rating is, accordingly, not valid. The Commission may appropriately undertake to obtain a valid impairment rating from a designated doctor correctly applying the protocol of the Guides.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill

Appeals Judge

Lynda H. Nesenholtz
Appeals Judge