APPEAL NO. 93735

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX LAB CODE ANN § 401.001 *et seq*. On July 28, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) has an impairment rating of zero percent. Claimant asserts that the opinion of the designated doctor, (Dr. S), that the impairment rating was zero percent was not based on "Guides to the Evaluation of Permanent Impairment" third edition, second printing, dated February 1989, published by the American Medical Association (the Guides).

DECISION

Finding that the designated doctor should provide an impairment rating consistent with the Guides, we reverse and remand.

At the hearing the issue was stated as, what was the correct impairment rating for claimant. There was no issue as to injury.

Section 410.204 (a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

Claimant asserts that the the designated doctor's examination was very brief and not based on the Guides; she contrasted that evaluation to those conducted by the carrier's medical examination order doctor (MEO), who found six percent impairment, and her treating doctor, who found 24% impairment.

The Appeals Panel determines:

Since the claimant raised the issue at the hearing that the designated doctor did not use the AMA Guides, asserted that point on appeal, and the report itself of the designated doctor indicates that the Guides may not have been followed, the case is reversed and remanded to assure that an impairment rating is based on the Guides.

Claimant hurt her back moving cases of beer on (date of injury). Her treating doctor, (Dr. D) states that claimant has a "new injury to a pre-existent degeneration of the neck with radiculitis". He adds that her MRI is abnormal, the abnormality is older than "one to three years", but he "cannot say what a new injury has done to it". The MEO doctor, (Dr. H), saw the claimant on October 2, 1992, and June 28, 1993; his report is dated June 29, 1993, and states that claimant has some degenerative arthritis of all the cervical vertebrae and adds that there is "some reversal of the cervical lordosis at the C4-5 level, indicating a deep muscle spasm." At the end of his evaluation Dr. H says, "it is obvious that this woman is suffering from a degenerative cervical disc disease with a superimposed sprain that occurred in (date of injury)."

The designated doctor on March 29, 1993, reports certain results of his examination of the cervical spine, such as "flexion of about 65 degrees, extension of about 40 degrees, and lateral rotation of 30 degrees to either side". Dr. S also stated:

> I did not give her a disability rating with the information provided, as I am not convinced that her symptoms are a result of aggravation of a pre-existing mild disc pathology. This may solely be the result of a soft tissue strain, not preventing her from continuing to work on a full-time basis subsequent to that time. (emphasis added)

According to Texas Workers' Compensation Commission Appeal No. 92650, decided January 20, 1993, the assertion on appeal that the designated doctor's opinion was not based on the Guides is reviewable since the allegation was raised also at the contested case hearing. In addition, the designated doctor's report of Dr. S was in evidence at the hearing; parts of that report have been quoted herein and raise questions of whether ability to work was a factor in the designated doctor's opinion; whether the designated doctor's report, limiting the question of aggravation when no other medical report indicated that claimant had recovered from the aggravation aspect of the injury, should have been given presumptive weight; and whether the designated doctor should have applied some range of motion rating since he made certain range of motion evaluations that were less than "full" range of motion - the designated doctor did not report that range of motion measurements were invalid.

Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993, reversed and remanded a case for return to the designated doctor to provide a rating that was not based on claimant's ability to do his job. The panel in that appeal stated, "(t)he doctor should be advised that inability to return to claimant's old job or retraining for a new job are not factors which should be considered in assessing impairment." The converse should also be true - the ability to do one's work is not the criteria for determining what the correct impairment rating is under the Guides. The Guides at page two state in part, "impairment is a medical matter" and later, ""impairment" means an alteration of an individual's health status that is assessed by medical means..." (emphasis added).

When a designated doctor's rating was challenged as to his use of the Guides in regard to whether range of motion was considered, Texas Workers' Compensation Commission Appeal No. 92611, dated December 30, 1992, reversed and remanded to obtain a showing of how the Guides were used. The panel in that appeal stated:

> The claimant's contention that the AMA Guides were not properly used by the designated doctor are (sic) not contradicted by either the medical reports or other evidence.

Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992, said that designated doctor's opinions, "cannot rise to the level of presumptive weight unless they comply with the appropriate statutory requirements."

Presumptive weight is accorded to designated doctor's opinions by Sections 408.122 and 408.125 of the 1989 Act in regard to MMI and impairment rating, respectively. The 1989 Act contains no section which gives presumptive weight to the designated doctor in regard to whether or not there was an injury, the extent of injury, or aggravation of an injury. *See* Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993. *Also see* Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993, which pointed out that the designated doctor "does not decide whether an injury aggravated a prior injury--the hearing officer is the finder of fact." Note, however, in Appeal No. 93246 that the treating doctor felt the injury in question, a torn knee cartilage, was fully repaired by surgery, but that degenerative changes noted to other aspects of the knee would get progressively worse; the designated doctor agreed and found no impairment based on the compensable injury.

In the case under appeal, the designated doctor appears to have limited the extent of injury rendered by the trauma of (date of injury), when no other medical evidence indicates that the injury of (date of injury), has been successfully addressed and is no longer exerting an aggravating influence upon the degenerative changes that all medical evidence acknowledges. In addition, no party at the hearing raised a question that the (date of injury), trauma had been overcome by passage of time, therapy, surgery, or any other event.

As stated, the hearing officer is the finder of fact in regard to the injury. In Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, the hearing officer, after receiving a designated doctor's report covering more than one area of the back, determined at the hearing that the extent of the injury did not include all areas covered by the designated doctor; the hearing officer returned the opinion to the doctor with instructions to rate impairment only on the injury found at the hearing. As in the comment regarding inability to work and its converse, the hearing officer can return the designated doctor's report with instructions to include an aggravation or area of injury just as was done in Appeal No. 92617 with instructions to delete an area of injury. Another alternative open to the hearing officer is to consider all the evidence and find, with no presumption accorded any medical opinion, that the (date of injury), trauma has been overcome or neutralized. Such a finding would address one part of the reason for remand for an inquiry to the designated doctor.

Finally this case shows that the designated doctor did range of motion evaluations and some of the results he records appear to equate to certain impairment ratings as shown on pages 81-83 of the Guides. Texas Workers' Compensation Commission Appeal No.

93296, decided May 28, 1993, indicated that range of motion ratings are one of three factors to be added together to reach an impairment rating in regard to the spine; the other two to consider, and to add together when each has some rating, are the diagnosis based percentage and neurological deficits. *See* Principles of Calculating Impairment at page 71 of the Guides and step-by-step approach of paragraph 3.3a, pages 72 and 74 of the Guides.

Having determined that the hearing officer should question the designated doctor about his use of the Guides in the impairment rating of the claimant, we reverse and remand. The query to Dr. S should observe that ability to work is not a criterion in impairment under the 1989 Act; that if range of motion is restricted to an extent that applicable tables in the Guides provide an impairment rating therefore, then a rating for range of motion should be assessed to add, as applicable, to other ratings factors discussed herein; and to provide a rating under the Guides that includes aggravation of conditions existing prior to (date of injury), unless the hearing officer determines that the aggravation of (date of injury), does not affect claimant's condition at this time. The hearing officer may further develop the evidence, as she deems appropriate and necessary and make findings, conclusions and a decision based on the evidence of record. 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 Texas Workers' Compensation Commission's division of hearing, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge