APPEAL NO. 93932

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On July 29, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer left the record open in order to correspond and obtain clarifying information from the designated doctor and to allow time for the parties to respond and comment on the additional information. The record was closed on September 7, 1993. The sole issue to be decided at the CCH was: "whether claimant has a 9% impairment rating as assigned by [Dr. PC]." The hearing officer determined that the designated doctor's nine percent impairment rating (IR) was invalid and his report was not entitled to presumptive weight and adopted the 19% IR of one of the other doctors.

Appellant, carrier herein, contends that the hearing officer erred in not according the designated doctor's report presumptive weight, that the hearing officer erred in stating that range of motion (ROM) had never been considered, that the hearing officer erroneously failed to return the designated doctor's report for correction or in the alternative appoint another designated doctor, and that the doctor's report adopted by the hearing officer should not be selected because it was based on a faulty diagnosis. Carrier requests that the hearing officer's decision be reversed and the designated doctor's report be accepted. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

It is undisputed that claimant injured his back on (date of injury), while lifting a sack of oysters in the course and scope of his employment. As a result of the injury claimant had spinal surgery in the form of a laminectomy at L4-5. Claimant's treating doctor was (Dr. JH) who by Report of Medical Evaluation (TWCC-69) and report dated August 21, 1992, certified maximum medical improvement (MMI) on August 21, 1992, with an 11% whole body IR. MMI was agreed upon and is undisputed as being August 21, 1992. Claimant was subsequently referred to (Dr. K). Claimant refers to Dr. K as "one of his treating health care providers . . ." while carrier refers to Dr. K as ". . . essentially a referral doctor." In any event, Dr. K by TWCC-69 and report dated September 23, 1992, certified MMI on the agreed date and a 19% IR. Carrier disputed this IR and requested that the Texas Workers' Compensation Commission (Commission) appoint a designated doctor. It is undisputed that Dr. PC was the Commission-selected designated doctor. By TWCC-69 and narrative report, both dated January 20, 1993, Dr. PC certified MMI and a nine percent whole body IR. At a benefit review conference (BRC) on June 1, 1993, the benefit review officer (BRO) questioned the fact that "no reference is made to range of motion" and noted an Appeals Panel decision ". . . that an impairment rating is invalid due to lack of consideration of range of motion . . . ." The BRO apparently wrote the designated doctor, Dr. PC, inquiring about the ROM and which version of the AMA Guides had been used. In response, by letter dated June 24, 1993, Dr. PC stated:

The patient was examined by me on January 20, 1993, regarding a back and hip pain, which resulted from an injury at work on (date of injury). I do not use the second printing, dated February 1989, of the Guides to the Evaluation of Permanent Impairment, third edition (Guides). I use the Guide to the Evaluation of Permanent Impairment, third edition, second printing 1990.

To answer your question regarding the range of motion testing, I do not use any machinery, only what the patient is able to do during the examination, and I do not think that the Guides mandate considering the range of motion, to determine impairment ratings.

By "machinery," Dr. PC is presumably referring to an inclinometer which, according to claimant and his wife, was not used during the examination.

The case proceeded to the CCH where Dr. K testified in person regarding how he reached his IR. Dr. K specifically testified he used ". . . the second printing, February 1989 (guides) that's currently required under the Texas Workers' Compensation Act of '91 (sic)" further identified in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(e) (Rule 130.1(e)). Dr. K was subject to extensive cross-examination on the use of the rating criteria contained in the second printing, dated February 1989, of the American Medical Association's Guides to the Evaluation of Permanent Impairment, third edition (Guides). Upon conclusion of the evidentiary portion of the CCH, the hearing officer expressed some concern regarding Dr. PC's "diagnosis" and exactly what Dr. PC was saying in his report. The hearing officer stated "I'm going to hold the record open . . . to pose any questions to [Dr. PC] that may be necessary (and may) pose some questions to [Dr. K] as well . . . ." The hearing officer stated she would send copies of any correspondence sent to or received from Dr. K and Dr. PC and give the parties adequate time to respond. The hearing officer, by letter dated August 2, 1993, asked Dr. PC the following questions:

1.Whether your impairment rating was based in whole or in part on a listing in table of specific spinal disorders (Table 49 of the Guides to the Evaluation of Permanent Impairment), and if so, what listing.

2.Whether your impairment rating included range of motion values of [claimant's] lumbar spine identified in the Guides to the Evaluation of Permanent Impairment, and if not, why range of motion values were not included in your assessment of [claimant's] impairment rating.

In addition to the specific questions listed above, your identification of each impairment value included in your 9% impairment rating would be extremely helpful to the resolution of the dispute in this claim.

The hearing officer, by letter dated August 24, 1993, advised the parties that Dr. PC's ". . . office notified me today that his June 24, 1993, letter also serves as his response to the questions asked in my August 2, 1993 letter."

The hearing officer determined in pertinent part:

FINDINGS OF FACT

6.[Dr. PC's] assessment of a 9% impairment rating was invalid, because he failed to measure claimant's range of motion as required by the Guides To The Evaluation of Permanent Impairment, Third Edition, second printing.

7.[Dr. JH] did not measure claimant's range of motion and consider range of motion in her assessment of an 11% impairment rating.

8.[Dr. K] correctly followed and applied the Guides To The Evaluation of Permanent Impairment in his assessment of a 19% impairment rating.

CONCLUSION OF LAW

3.[Dr. PC's] assessed 9% impairment rating was invalid, and his report is not entitled to presumptive weight.

As indicated in the initial paragraph, carrier appealed on four grounds: 1) that the hearing officer erred in not according presumptive weight to the designated doctor's report; 2) that the hearing officer erred in stating that ROM had never been considered; 3) that the hearing officer erred in declaring the designated doctor's report invalid instead of returning the report for correction or the appointment of another designated doctor; and 4) that Dr. K's ". . . opinion should not be selected because it is based upon a faulty diagnosis."

First of all, Section 408.124(b) (formerly Article 8308-4.24) and Rule 130.1(e), state the Commission shall use Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. We view these provisions as statutorily mandating that specific version of the Guides, which is not subject to change to a newer, more easily accessible or revised version.

We would also note that Section 408.125(e) provides:

If the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors. (V.A.C.S. Art. 8308-4.26(g)).

In reference to carrier's first contention of error we reaffirm, and do not retreat in any way from, our previous position that the designated doctor's report occupies a unique position and that no other doctor's report, including the treating doctor, is accorded this special presumptive status. Texas Workers' Compensation Commission Appeal 92417, decided September 28, 1992. Nonetheless, even a designated doctor is required to use the statutorily mandated version of the Guides. If the designated doctor has failed to use

the prescribed Guides, and that matter is not corrected or clarified, then the designated doctor's report is not entitled to presumptive weight. In this case the BRO apparently corresponded with the designated doctor inquiring as to which version of the Guides had been used and whether the designated doctor had considered ROM. Dr. PC very clearly in his June 24th response, quoted above, stated "I do not use the . . . 1989. . . (Guides)." Dr. PC was later again contacted by the hearing officer and asked if the designated doctor's IR was based on a specific table of the Guides. Dr. PC's office notified the hearing officer that Dr. PC was standing on his June 24th report which also contained the statement that he does not use the mandated version of the Guides. By contrast Dr. K testified he followed the mandated Guides "to the tee." Carrier argues that the hearing officer must detail the great weight of other medical evidence necessary to overcome the presumptive weight of the designated doctor's report, and that the hearing officer failed to do so. We would only note that where the designated doctor has only provided an invalid report, it is not necessary to do a detailed analysis and comparison of the specifics of the various doctor's reports.

Turning next to carrier's contention that if the designated doctor's IR is invalid it should have been returned to the designated doctor for correction (or have the claimant reexamined) or appoint a new designated doctor, we have on a number of occasions required the hearing officer to attempt to clarify a designated doctor's report before invalidating the report. Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993; Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992. We distinguish the instant case from those cited above, and others, on the basis that the BRO did go back to the designated doctor and ask for clarification, and apparently, which version of the Guides the designated doctor had used. The designated doctor clearly stated he did not use the mandated 1989 Guides (Dr. K speculated because they are hard to obtain and out of print) and that he uses the 1990 Guides and that he does not read those guides as requiring specific ROM tests using "machinery." The hearing officer, after hearing evidence from Dr. K, again went back to the designated doctor with very specific questions and the designated doctor merely referred the hearing officer to his previous response to the BRO. At this point, it would seem to us, the hearing officer had several different alternatives. She could: 1) go back to the designated doctor yet a third time insisting he either clarify his comments and/or reexamine the claimant; 2) appoint another, second designated doctor; or 3) declare the designated doctor's report invalid as being against the great weight of other medical evidence and in accordance with Section 408.125(e) "adopt the impairment rating of one of the other doctors." Based on the designated doctor's response to the hearing officer's questions by merely referring to a previous erroneous response, we do not find error in the hearing officer's decision not to pursue that alternative. We have on a number of occasions stated that although the 1989 Act does not appear to contemplate appointment of a second designated doctor, in extraordinary circumstances we could envision that a second appointment would be in order. Texas Workers' Compensation Commission Appeal No. 93888, decided November 12, 1993; Texas Workers' Compensation Commission Appeal No. 93706, decided September 27, 1993; Texas Workers' Compensation Commission Appeal No. 93040, *supra*. We suggested those instances might include circumstances of the designated doctor's death or incapacity, and/or inability or unwillingness to comply with

the 1989 Act. We believe the hearing officer could have appointed a second designated doctor upon Dr. PC's apparent unwillingness to comply with the Act. However, we do not find error in the hearing officer applying her discretion not to use this option and instead, upon finding the designated doctor's rating was invalid, adopting another doctor's rating as required by Section 408.125(e). We know of no authority nor does carrier cite any authority requiring the appointment of a second designated doctor when the first designated doctor fails to render a proper report.

Carrier also argues that the hearing officer erred in stating that ROM had never been considered when Dr. PC did mention "a full range of motion in (claimant's) neck" and that claimant was able to bend over. Carrier cites Texas Workers' Compensation Commission Appeal No. 92126, decided May 7, 1992, and Texas Workers' Compensation Commission Appeal No. 92689, decided February 8, 1993, for the proposition that the Appeals Panel had held a designated doctor ". . . is not required to perform testing with an inclinometer." Carrier contends ". . . the use of any particular machinery such as an inclinometer to verify that movement seems redundant." We disagree that the cited cases stand for the proposition carrier advances. In Appeal No. 92126, *supra*, the Appeals Panel affirmed the hearing officer's finding giving presumptive weight to the designated doctor's report in spite of extensive ROM testing by the treating physician. Similarly in Appeal 92689, *supra*, the Appeals Panel affirmed a hearing officer who gave presumptive weight to a designated doctor's report which showed extensive ROM testing using an "inclinometer method to measure (ROM)." In contrast to carrier's position is Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993, and which appears directly on point. That case involved a 22% disparity in the impairment rating between similarly qualified treating and designated doctors. The case had been remanded for some explanation or rationale for the significant disparity. The designated doctor indicated through a deposition that there were two distinct "mechanisms" to arrive at an impairment rating of the spine, that both could not be used and that he used one (specific disorder table) and the treating doctor used another (ROM). The Appeals Panel noted that 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.

The Appeals Panel reversed and rendered a decision that the 1989 Guides on impairment ratings had a single protocol for every evaluator to follow and the Guides were designated so everyone would use the same rules and follow the same procedures. Paragraph 3.3a General Principles of Measurement of the 1989 Guides provides ". . . measurement techniques using *inclinometers* are necessary to obtain reliable spinal mobility measurements." We are mindful of the Addendum to Chapter 3 of the Guides which allows

the use of a goniometer for one year after the Guides were published and "[a]fter that time only the inclinometer will be valid . . . ." Consequently Dr. PC, even if he had used the correct version of the Guides also was very definite he does not use "machinery" in evaluation of ROM and therefore his twice confirmed report was not in compliance with the Guides.

Although the above holdings clearly support the hearing officer's "invalidation" of the designated doctor's report, we briefly will address carrier's contention that Dr. K's opinion was based on a faulty diagnosis. Carrier's contention is apparently that claimant's condition and impairment was based on stenosis and that Dr. K gave his IR based on a disc lesion. It is undisputed, however, that claimant had second opinion approved surgery and that it was claimant's unrefuted testimony that he had continued to have pain, therefore there were residual symptoms. Whether the surgery was based on stenosis or constituted a disc lesion was within the discretion of the hearing officer, as the sole judge of the relevance and materiality of the evidence as well as the weight and credibility to be given evidence, to resolve. Section 410.165(a) (formerly Article 8308-6.34(a)). Similarly the hearing officer resolves conflicts and inconsistencies in the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings Estate, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986). We do not so find and consequently the decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge