APPEAL NO. 94181

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 January 12, 1994. The sole issue at the CCH was the appellant's (claimant herein) impairment rating (IR). The hearing officer ruled that the claimant had a 14% IR based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals, contending that applying the designated doctor's own data, his IR should be 22% and this view is supported by his treating doctor. The respondent (carrier herein) argues that the decision of the hearing officer to give presumptive weight to the report of the designated doctor is correct.

DECISION

After reviewing the evidence, we reverse the decision of the hearing officer and render a new decision that the claimant's correct IR is 22%.

It was undisputed that the claimant suffered a compensable back injury on (date of injury). On about July 23, 1992, the claimant's treating doctor, Dr. S, performed a bilateral lumbar laminectomy on the claimant. The parties stipulated that on March 18, 1993, the claimant reached statutory maximum medical improvement (MMI). In May 1993 the claimant was examined by Dr. K,[1] who in a medical narrative assessed the claimant's IR as 10%. Dr. K's narrative lists as attachments "TWCC-69, Impairment Rating Sheet" but neither of these documents was placed into evidence. In any case the parties stipulated Dr. P was the Commission selected designated doctor.

Dr. P certified on a Report of Medical Evaluation (TWCC-69) dated October 1, 1993, that the claimant had a 14% whole body impairment. On October 20, 1993, Dr. S wrote a letter criticizing Dr. P's rating. Dr. S stated that he would assess the claimant's impairment at 41% and that even using Dr. P's findings, the claimant's rating would be 22%.[2] Dr. S stated in part as follows:

> If you go one step further and say we are only going to use what Dr. [P] measured, then the patient is at least due a 10 percent for specific disorder Table 49 and the 13 percent range of motion [ROM] which [Dr. P] himself measured with the spine 6000 analyzer. This would give a 22 percent [IR] and not a 14 percent [IR] as Dr. [P] has rendered.

---

[1]It is unclear from the record how Dr. K became involved in this case.

[2]We note that in arriving at his 41% rating Dr. S included impairment for factors not rated by Dr. P including sexual dysfunction as well as loss of neurological function. On appeal, the claimant is not urging us to adopt Dr. S's 41% rating, but the 22% rating to which Dr. S says the claimant is entitled based upon Dr. P's data. Thus the question of any impairment due to sexual dysfunction or loss of neurological function is not before us on appeal. Nor strictly speaking are we presented with a challenge of the presumptive weight to be given the report of the designated doctor since both parties are relying on calculations in the designated doctor's report.

The Benefit Review Officer (BRO) sent a copy of Dr. S's October 20, 1993, letter to Dr. P and requested his response. In his December 9, 1993, response Dr. P defended his 14% rating. He stated in relevant part as follows:

> The patient was assessed on the basis of his having had a single level disc surgically treated. Using Table 49, Paragraph 2, Subsection E [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)] that indicates the patient should be assessed a ten (10%) percent impairment to the whole person. Since only one joint is involved, that is, the L5-S1 joint, if we use Table 50 of [the Guides] that indicates that if one joint and/or any two lumbar vertebrae are absolutely immobile, totally ankylosed, unable to move whatsoever, that would represent an approximate three (3%) percent impairment of the whole person. Despite the computerized assessment having determined the patient having a thirteen (13%) percent loss of motion about his lumbar spine, that must be mitigated based on the guidelines established by Table 50. The patient only had one level operated on. That joint is still mobile. It has not been fused. It is not ankylosed. If it were, however, immobile and absolutely unable to move, that is, ankylosed, he would be assessed approximately a three (3%) percent whole body impairment by virtue of the immobility of that joint. His joint is not immobile. It is not normal, but it is still not immobile so that the assessment solely on the loss of [ROM] must be apportioned to the guidelines established by Table 50 which indeed was what was accomplished. I rated that at a four (4%) percent impairment.

The crux of the question here is whether it was proper, under the circumstances of this case, for Dr. P to use an impairment for ankylosis rather than an impairment for limitation of ROM in determining the claimant's IR. Section 408.124 specifically provides that the Commission shall use the Guides for determining the existence and degree of a claimant's impairment. The Guides provide specific protocols to be used in calculating impairment, including a protocol for determining impairment due to the spine. *See generally* Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993. Item number 7 of this 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 ROM **or** ankylosis." (Emphasis added) Guides at p. 74. The use of the word "or" here indicates that either [ROM] or ankylosis must be factored into impairment, but not both. This is further indicated by the Guides which state on p. 74: "Using an [IR] for ankylosis *excludes* the simultaneous use of the abnormal motion measurements from the same table." Here Dr. P, in sincerely attempting to reach what he felt was an equitable rating,

attempted to combine factors for both ankylosis and ROM. We do not find support for such a methodology in the Guides.

Nor are we able to validate Dr. P's rating solely on the basis of properly factoring in impairment for ankylosis alone. Obviously impairment for ankylosis can only be factored in if ankylosis is present. This is the reason the instruction at the bottom of the work sheet for figuring Lumbar ROM (Figure 83c, p. 77 of the Guides) states "use ankylosis impairment value if ankylosis is present." Ankylosis is defined on p. 74 of the Guides as follows:

> For the purpose of impairment evaluation, ankylosis is defined as either:
>
> > (a) complete absence of motion, or (b) planar restriction of motion preventing the subject from reaching the neutral position of motion in that plane.

Dr. P indicates in his report and in the letter quoted above that the claimant did not meet (a) of this definition. If the claimant met (b) of this definition it would not have been possible for Dr. P to have measured for loss of ROM since any such measurement would have had to begun in the neutral position. Also Dr. P states unequivocally in the letter quoted above that the claimant did not have ankylosis. This was in fact why Dr. P was trying to use a hybrid method of combining loss of ROM with ankylosis in determining the motion limitation component of claimant's whole body impairment. The use of such a hybrid method not authorized in the Guides cannot be permitted, no matter how well intended, in that it adds an element of subjectivity which reliance on the Guides was calculated to remove as much as possible from the process. As we stated in Appeal No. 93296, *supra*:

> The Guides do not provide for distinct and separate protocols which would permit one evaluator to choose 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.

We therefore must reverse the decision of the hearing officer since it is based upon a rating arrived at by means not provided for in the Guides. Since Dr. P did not invalidate his ROM measurements (as described in the Guides), these can be applied without adjustment in arriving at the IR. Using the Combined Values Chart to combine the 10% rating from Table 49 with the 13% ROM impairment (both found by Dr. P) results in a 22% whole body impairment. This is the correct IR accurately applying the AMA Guides to Dr. P's data. We adopt this corrected IR. *See* Section 408.125(e). We render a new

decision that the claimant's whole body IR is 22%, and the carrier should pay benefits to the claimant accordingly.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge