APPEAL NO. 94249

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 5, 1993, a contested case hearing (CCH) was held. The issues presented for resolution were:

1. Did the Claimant have disability resulting from the injury sustained on (date of injury), for the period of May 18, 1991 to May 28, 1991, entitling him to temporary income benefits?

2. What is the Claimant's impairment rating?

Subsequently, during the course of the CCH, the issue regarding disability was resolved and the party's stipulated that claimant's disability began on May 28, 1991. The only issue left was the claimant's impairment rating (IR).

The hearing officer determined that the appellant, claimant herein, reached maximum medical improvement (MMI) on June 2, 1993, that in accordance with the designated doctor's report claimant has an IR of 12% and that the designated doctor's report is not contrary to the great weight of the other medical evidence.

Claimant contends that the hearing officer erred in his determination that the designated doctor's opinion is "not contrary to the great weight and preponderance of the other medical evidence," pointing out that both the treating doctor and carrier's independent medical examination (IME) doctor agreed on a 17% IR and that the designated doctor failed to consider range of motion (ROM). Claimant requests that we reverse the hearing officer's decision on this point and that the IR "be set at 17%." Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are reversed and the case is remanded to allow the designated doctor one additional opportunity to validate his ROM measurements.

Claimant testified, through a translator, that he was injured on (date of injury), while unloading a piece of machinery, he slipped and fell approximately four feet to the floor injuring his back. Claimant testified he had never had back problems before. On the record the parties stipulated that statutory MMI (Section 401.011(30) 104 weeks from the date on which income benefits begin to accrue) occurred on May 28, 1993, however, the decision recites, both in the stipulations and the determinations, that "claimant reached statutory [MMI] on June 2, 1993." The June 2nd date is used throughout and is not appealed, however, we note that in this case, MMI was achieved by operation of law 104 weeks after income benefits began to accrue. (*See* Section 408.082 on accrual of right to income benefits.) Claimant underwent surgery in July 1992.

Claimant's treating doctor is (Dr. P), who in a Report of Medical Evaluation (TWCC-

69) dated May 3, 1993, certified MMI with a 17% IR. In an attached IR report dated April 8, 1993, Dr. P indicated measurements and how he arrived at a 17% IR. Dr. P stated:

> Impairment rating of ROM was taken using Tables 56 and 57 of AMA Guides to the Evaluation of Permanent Impairment-3rd Edition [AMA Guides]. Patient's trunk flexion is 18 degrees and trunk extension is 12 degrees. The sum of hip flexion and hip extension (54+4=60) is within 10 degrees of the tightest SLR which is 62 degrees. Lateral flexion to the right is 26 degrees and left is 19 degrees. Corresponding whole person impairment values of trunk flexion, extension and lateral flexion added togerther [sic] is 13%; Neurologic based is 0% and Diagnosis based is 5% giving a total whole person impairment of 17%.

Claimant was apparently seen by (Dr. S), carrier's IME doctor, on March 12, 1993. By report dated March 12, 1993, Dr. S indicated he did not believe claimant had reached MMI and would limit his "opinion as to his diagnosis and prognosis." Dr. S records claimant's extensive medical history and notes claimant's surgery on July 2, 1992, by Dr. P, "including a bilateral laminectomy at L5-S1, a posterior lumbar interbody fusion at L5-S1, with bilateral foraminotomies, and cable fixation of the spinal processes at the L5-S1 level only." Dr. S suggested a series of tests, "facet blocks at L3-4 and L4-5" and epidural steroid injection. By further report dated May 18, 1993, Dr. S indicated he had received Dr. P's report dated "04-13-93" with reference to Dr. S's previous IME. Dr. S disagreed with Dr. P on a number of points and concludes with a "final comment" (which is in part cut off with no other report in the file):

> I would agree with the p [missing words] permanent partial impairment that [Dr. P] has re [missing words] gentleman 17% of the man as a whole based on AMA guides [missing words] felt it was important to clarify the discrepancies in t [missing words] interpreted by [Dr. P].

After having allowed the parties 10 days to agree on a designated doctor, and the parties having failed to do so, the Texas Workers' Compensation Commission (Commission) by letter dated June 15, 1993, appointed (Dr. B) as a Commission selected designated doctor to examine claimant for purpose of determining MMI and the percentage of impairment. Dr. B in a TWCC-69 dated August 10, 1993, and narrative report dated June 30, 1993, certified MMI on May 17, 1993, with a 12% IR. In Dr. B's comprehensive June 30th report, after noting claimant's history, physical examination and the medical records he had reviewed, Dr. B gave as an impression and comment on ROM measurement:

> IMPRESSION: S/P laminectomy, diskectomy and fusion, L5-S1 for HNP, L5-S1 with recent development of pseudoarthrosis.
>
> MEASUREMENTS: None made inasmuch as he has been in a lumbar shell except at night, he is stiff and this would not represent maximal ROM.

In computing the IR, Dr. B stated:

1) For segmental instability due to pseudoarthrosis L5-S1, post diskectomy and fusion (P73, T49, IV, B) 12%

2) No impairment given for decrease ROM because reliable measurement not available at the time.

3) No indication of radiculopathy or residual therefrom so no impairment on this basis.

4) Therefore, percent Impairment of the Whole Person is 12%

Claimant's attorney apparently questioned Dr. B's comments regarding ROM, to which Dr. B replied, by letter dated September 7, 1993, that he did not believe ROM on June 30, 1993, would be reliable because claimant was "in a shell" for treatment of his pseudoarthrosis and that he had re-examined claimant on September 3, 1993, to do ROM measurements of the lumbar sacral spine. Dr. B stated that "The patient made a good attempt but he was quite stiff from being in a shell" and therefore, the ROM test was invalid. Dr. B also commented that " . . . this computer program gave impairment for decrease in lateral ends. The computer program is wrong so ignore this feature of the print out." Dr. B opined that "the 12% [IR] of 8/10/93 is unchanged."

After the CCH on October 5, 1993, the hearing officer wrote Dr. B a letter dated October 7, 1993, asking Dr. B to explain why the lumbar flexion and lumbar extension measurements were invalidated and clarification of the version of the AMA Guides Dr. B used. Dr. B reported by letter dated October 11, 1993, verifying use of "the AMA Guidelines, third edition, ... not . . . the revised Guidelines." Dr. B discussed his ROM measurements and how he obtained them, concluding " . . . lateral flexion deficit is not rated because the flexion/extension test is invalid." Dr. B concluded:

> One of the problems in this case is that we are trying to measure range of motion, and doing a valid test, when the patient is in an unstable state. I realize that this is being done because he is at two years post injury and required by law; however, it is not a situation where you expect to get reliable measurements. The patient was cooperative and I believe he made as good an effort as possible under the circumstances. If he were out of his shell and had been stretching for several weeks, I expect we would have obtained better, valid measurements.

The hearing officer determined that claimant's treating doctor, Dr. P had assessed a 17% IR, that Dr. B as a Commission selected designated doctor had assessed a 12% IR, that the designated doctor's opinion had presumptive weight and that IR was not contrary to the great weight of the other medical evidence.

Claimant contends that the designated doctor's opinion has been overcome by the great weight of other medical evidence, being Dr. P's report and as agreed to by Dr. S, the carrier's IME doctor. Claimant, in his appeal, recognizes that the hearing officer, as the

fact finder, is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility of the evidence. Section 410.165(a). Claimant also recognizes, in the appeal, that if an IR is disputed, and the parties are unable to agree on a designated doctor, the Commission shall direct the employee to be examined by a designated doctor chosen by the Commission (Section 408.125(b)) and the report of the designated doctor shall have presumptive weight "unless the great weight of the other medical evidence is to the contrary." (Section 408.125(e) formerly Art. 8308-4.26(g)). Claimant argues that the reports of Dr. P and Dr. S constitute such great weight of other medical evidence. Certainly, Dr. P's assessment of impairment is contrary to Dr. B's report. However, Dr. S's report of May 18, 1993, is something short of a ringing endorsement of Dr. P's report. Specifically, Dr. S disagrees with Dr. P on the interpretation of the discography, and Dr. S disagrees that claimant needs surgery. Dr. S believes, contrary to Dr. P, that stabilization of the lumbar spine can be obtained by an aggressive abdominal strengthening program as well as surgical means. The portion of Dr. S's report where Dr. S agrees with Dr. P's 17% IR is incomplete and we are unable to read the full text of that paragraph. In summary, Dr. P's 17% IR, which appears in part to be supported by Dr. S, is weighed against the designated doctor's 12% IR where the designated doctor invalidated the claimant's ROM because of the claimant's unstable back condition. This panel has commented many times upon the "unique position" and "special presumptive status" the designated doctor's report is accorded under the Texas workers' compensation system, and the fact that no other doctor's report, including that of a treating doctor, is entitled to such deference. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992; Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 931048, decided December 28, 1993.

Of some concern is the fact that the designated doctor was unable to validate a ROM. The designated doctor clearly believed claimant was being cooperative and "made as good an effort as possible under the circumstances" yet was unable to obtain reliable measurements, presumably because claimant had been in a "shell." In Texas Workers' Compensation Commission Appeal No. 931106, decided January 11, 1994, the Appeals Panel observed that "in the evaluation of a spinal injury for the assignment of an IR, consideration must be given not only to specific spinal disorders . . . but also to the existence and extent, if any, of abnormal [ROM] and neurological deficits." Dr. B initially was unable to obtain ROM measurements because claimant was in a lumbar shell and on subsequent re-examination found the ROM measurements to be invalid because the claimant "was quite stiff from being in a shell." Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993, discussed the purpose of using the AMA Guides and that ROM is an integral part of the impairment evaluation. We are mindful that there are cases where a valid ROM cannot be obtained and in those cases it may be appropriate to assign zero impairment for invalidated ROM testing. We do not believe, that as a matter of law, the Guides mandate that an IR involving ROM can never be rendered until, if ever, a valid ROM can be determined. *See* Appeal No. 92494, decided October 29, 1992, and Texas Workers' Compensation Commission Appeal No. 93681, decided September 20, 1993. In Appeal No. 92494, *supra*, decided October 29, 1992, the Appeals Panel reversed a hearing officer's decision returning a report to the designated doctor for retests "until valid results are obtained" when the doctor noted "obvious symptom magnification . . . and multiple inconsistencies." In Texas Workers'

Compensation Commission Appeal No. 94053, decided February 23, 1994, the Appeals Panel stated:

> However, it has never been the Appeals Panel's mandate that the trier of fact hold a case open indefinitely, affording the designated doctor unlimited opportunities to correct errors or re-evaluate the claimant, while the parties' cases hang in the balance.

We would distinguish those cases from the instant case based principally on the designated doctor's October 11, 1993, statement that claimant ". . . was cooperative . . . made as good an effort as possible under the circumstances. If he was out of his shell and had been stretching for several weeks, I expect we would have obtained better, valid measurements." Unlike the other cited cases, we are not remanding this case for the designated doctor to have unlimited testing to obtain validated results which may never occur. Rather, the designated doctor indicated on October 11, 1993, that after claimant had been out of his shell several weeks he would expect "better, valid measurements." We wish to grant the designated doctor one additional opportunity to obtain validated ROM measurements. Parenthetically, it appears somewhat incongruous to us that claimant, who was so severely injured that he was required to be in a lumbar shell, has invalid ROM testing because he is stiff from being in the shell, and therefore, has zero impairment because of the invalid ROM testing.

This case is being decided on its very specific fact situation and is not to be construed as authority to return cases to a designated doctor indefinitely where the doctor has invalidated ROM due to symptom magnification or where there are other reasons to believe that valid ROM measurements will likely never be achieved. Instead, we remand this case to have Dr. B re-examine claimant one additional time for purposes of completing his evaluation concerning impairment for abnormal ROM, if any. Dr. B has already determined claimant has a 12% impairment for a specific disorder pursuant to Table 49 of the AMA Guides and has assessed no impairment for neurological deficit. Our remand is for one additional opportunity for Dr. B to determine if validation of claimant's ROM measurements can be obtained based on Dr. B's statement that he might be able to obtain better, valid measurements at a later time. Not to allow the designated doctor one additional opportunity to attempt to "obtain better, valid measurements," we believe, would be manifestly unjust.

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 hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp

Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge