

APPEAL NO. 011409
FILED JULY 30, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on April 5, 2001. The hearing officer resolved the sole disputed issue by determining that the appellant's (claimant) correct impairment rating (IR) is 13% based on the report of the designated doctor (which he found not contrary to the great weight of the credible medical evidence). The claimant appeals this determination, asserting that the designated doctor could not measure his range of motion (ROM) at the examination because he was wearing a "mandated 24-hour lumbar brace" and that his treating doctor determined his IR to be 18% using Table 50 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) to assign a rating for ankylosis in lieu of a ROM rating. The respondent (carrier) urges affirmance and contends that the claimant waited too long to dispute the 13% IR, that the designated doctor does not feel that the claimant should have a rating from Table 50, and that the claimant has since had another low back injury which would make it impossible to assign ROM impairment for the compensable injury.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable injury in a motor vehicle accident on _____, while employed by (employer). He testified that he hurt his neck and back. The medical records reflect that on February 4, 1997, Dr. W assigned a zero percent IR. An August 10, 1998, follow-up report of Dr. R, a neurosurgeon, stated that the claimant has internal disc disruption syndrome at L4-5 and L5-S1; that he has reached statutory maximum medical improvement (MMI) and an IR needs to be prepared; and that spinal surgery is scheduled for September 10, 1998. In an IR report of August 10, 1998, Dr. R assigned an 18% IR consisting of 13% from Table 49 (Impairment Due To Specific Disorders of the Spine) of the AMA Guides and 6% from Table 50 (Impairment of Cervical, Thoracic and Lumbar Regions Due to Ankylosis, Determined by Radiographic Methods). Concerning this IR, Dr. R stated that the claimant's lumbar ROM measurements were not reliable because he had a lot of guarding due to pain and spasm which will continue until after surgery and that a 6% rating is assigned under Table 50 since the claimant has radiographically determined ankylosis and will have a two-level fusion which will fuse three lumbar vertebrae. Dr. R's operative report reflects that the claimant underwent the diskectomy and interbody fusion surgery on September 10, 1998.

The medical records further reflect that Dr. C, the designated doctor appointed by the Texas Workers' Compensation Commission (Commission), signed a Report of Medical Evaluation (TWCC-69) on November 11, 1998, certifying that the claimant had a 13% IR. In his accompanying narrative report of November 20, 1998, Dr. C stated that the claimant underwent spinal surgery two months earlier, is to enter a course of rehabilitation and work

hardening, and is required to wear a lumbar support brace; that he examined the claimant in accordance with the AMA Guides; that the claimant has no neurologic deficits; that the claimant is assigned 12% under Table 49 IVB and 1% under Table 49 IVC; that ROM testing could not be performed because the claimant was wearing "a mandated 24-hour lumbar brace"; and that the claimant had involuntary restriction on flexion and extension though close to normal lateral flexion. Concerning a rating under Table 50, Dr. C stated that "with ankylosing being involved in the lumbar spine due to surgical intervention, this would not apply since the complete fusion is not an ankylosing, but an incurred fusion defect, and therefore, he would be at 0% for ankylosing, in my opinion." Dr. R wrote on March 31, 1999, that while he agrees with Dr. C's 13% rating, he disagrees with Dr. C's not having assigned an additional rating under Table 50 and feels that Dr. C's interpretation of Table 50 and rationale for not using it are erroneous; that Table 50 is used where there has been a fusion performed and lumbar ROM testing cannot be done; that Table 50 deals specifically with fused spinal segments; and that it would be wrong and unethical not to use Table 50 for the claimant's IR. In a May 17, 1999, report, Dr. R iterated the views he expressed in his March 31, 1999, report, stressing that it was error not to obtain a rating under Table 50 to reflect the ankylosis from the claimant's surgically fused vertebrae.

The Commission wrote Dr. C on November 2, 1999, asking Dr. C to review a letter from Dr. R and advise if his opinion on the IR was changed. Dr. C responded on December 9, 1999, stating that he had reviewed Dr. R's March 31, 1999, letter; that Table 49 has a footnote stating that "all impairment ratings should be combined with appropriate values or residuals such as Item I, ankylosis or effusion in the spinal area or extremity"; and that he did not feel that an additional 6% rating under Table 50 is appropriate "since it would duplicate the impairment awarded for IV-B and C under Table 49 on Page 73."

In Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993, the Appeals Panel discussed the provisions of Chapter 3, paragraph 3.3a, of the AMA Guides relating to the calculation of spinal impairment, which includes ascertaining the loss of ROM, if any. *And see* Texas Workers' Compensation Commission Appeal No. 931106, decided January 11, 1994. In Texas Workers' Compensation Commission Appeal No. 94249, decided April 14, 1994, the designated doctor determined the injured employee's IR for a lumbar spine injury under Table 49 but did not include a rating for loss of ROM because at the time of the first examination the employee was in a "body shell" and when examined a second time the employee was still stiff from having been only recently released from the body shell. The Appeals Panel remanded for a third examination so that the employee's loss of ROM, if any, could be determined by the designated doctor and noted that the situation was not one in which there was a problem with valid measurements for reasons other than the effect of the body shell.

In Texas Workers' Compensation Commission Appeal No. 961324, decided August 16, 1996, the Appeals Panel remanded, in part, for the hearing officer to inquire from the designated doctor whether in her opinion ankylosis of the lumbosacral spine, including hip immobility, was present and, if so, what rating is appropriate, advising that if the designated doctor finds no ankylosis, then repeat ROM testing is appropriate. That decision makes

clear that a rating for ankylosis under Table 50 is not a “fall back” method to add to the Table 49 rating of an employee who has undergone a lumbar spine fusion when the ROM testing is invalid, and that ankylosis, determined radiographically, must be present. In the remand decision, Texas Workers’ Compensation Commission Appeal No. 962094, decided December 6, 1996 (Unpublished), we commented on the decision in Appeal No. 961324, *supra*, stating that “[t]he important legal point made was that a rating could be assigned for ankylosis if present, but that a rating for ankylosis could not be given 'to make up for invalid measurements of ROM' and that “under Table 50, ankylosis of the lumbosacral spine required a hip fusion or immobility,” citing page 91 of the AMA Guides, and we did not equate the presence of a fixation device in the spine with ankylosis.

Under the circumstances of this case, Dr. C’s report itself constitutes the great weight of the medical evidence contrary to the assignment of the 13% IR. We reverse and remand for the hearing officer to have the claimant reexamined by the designated doctor for ROM impairment because at the time of the designated doctor's exam, the claimant was still wearing a 24-hour lumbar brace. The designated doctor may elect to assign a rating under Table 50 if the claimant is determined by radiography to actually have ankylosis as discussed in our decisions, namely, immobility of both the lumbar spine and the hips.

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 Commission’s Division of Hearings, pursuant to Section 410.202. See Texas Workers’ Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O’Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge