APPEAL NO. 94689

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 April 29, 1994. The issues at the CCH were the appellant's (claimant herein) correct impairment rating (IR) and whether she was entitled to lifetime income benefits (LIBS) as a result of her injury. The hearing officer found that the claimant's correct IR was 47% based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission), but concluded that the claimant was not entitled to LIBS, finding that the claimant had not suffered permanent and complete paralysis of both legs. The claimant appeals arguing the 47% rating of the designated doctor is contrary to the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the Guides) in that it fails to include any rating for her incontinence and that the hearing officer failed to apply the correct standard in determining whether the claimant had suffered total loss of use of her legs. The respondent (carrier herein) replies that the decision of the hearing officer is supported by the evidence.

DECISION

Uncertain as to whether the hearing officer applied the correct legal standard in determining whether the claimant had suffered total loss of use of her legs, we reverse the decision and order of the hearing officer and remand the case for specific findings by the hearing officer as to whether the claimant's legs by reason of her injury no longer possess any substantial utility and whether by reason of her injury the condition of her legs are such that the claimant can get and keep employment requiring the use of her legs.

The claimant, who testified through a translator due to her limited facility in English, stated that she had a sixth grade education and was a 15-year employee of (employer) working in the janitorial department, and that she slipped and fell on a wet floor at work on (date of injury), injuring her low back and left wrist. She underwent back surgery by her original treating doctor, Dr. T, on December 26, 1991. The claimant testified and the medical reports indicate that the claimant lost feeling in her lower extremities and was unable to stand after surgery, and therefore underwent a second surgery. After the second surgery and extensive rehabilitation, the claimant has only very limited use of her lower extremities because of sensory losses due to denervation in the muscles served by the right L5 and S1 nerve roots. The claimant testified that this has also resulted in loss of sensation in her bowel, bladder and sexual functions leading to incontinence and sexual dysfunction. The partial loss of use of her leg muscles has also led to the progressive turning in of her toes and rotation of her feet due to the imbalance of the muscle pull in her legs. The claimant has been fitted with ankle foot orthoses (AFO) and testified that with these she can walk short distances on level surfaces on crutches.

Dr. T certified on a Report of Medical Evaluation (TWCC-69) dated December 31, 1992, that the claimant had reached maximum medical improvement (MMI) on December 30, 1992, with an IR of 75%. The carrier disputed Dr. T's IR assessment and the Commission appointed Dr. O as the designated doctor. On an undated TWCC-69

reflecting an examination date of May 19, 1993, Dr. O certified that the claimant reached MMI on December 30, 1992, with a 47% IR. In a letter of September 9th, which states it is in response to a September 7, 1993, letter from claimant's attorney,[1] Dr. O defends his rating which the claimant's attorney has apparently questioned, stating in relevant part:

> What you should know is that [claimant] did not suffer a spinal cord injury. Her disc disease, it's surgery and complications relate to the L5 and S1 nerve roots. As such, the sequale [sic] of nerve root injuries are addressed in the Guides in section 3.2f (page 69), tables 45, 47, 10 and 11. Your attempts at diagnosis and impairment are misplaced.
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> I am quite aware that [claimant] requires the use of adaptive devices (AFO splints) to ambulate. These devices *assist* her with the residual function that she has. I observed her as she entered the waiting room, the examination room and her climb onto the examination table. There is motor function that allows her to ambulate, therefore there *is* residual motor function.
>
> In the one and a half hours I spent examining [claimant], there was no physical evidence of loss of control of bowel or urinary sphincter. Moreover, there was no evidence of an "accident" within her clothes to document such events as you described. [Claimant] has not "lost all control over her bladder functions." Of the records presented, [Dr. V] on February 24 and July 22, 1993 did not document any specific pathology. His impression was of a "mild uninhibited contractures, otherwise negative." In his TWCC-64 dated 4/22/93 [Dr. T] notes, "She is able to have normal bowel movements and normal urination." All of these issues are addressed on Table 44 (page 67) and I have impaired the L5 and S1 nerve roots.
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> In my evaluation of this lady, I can assure you the motor function and sensory function was tested without the AFO splints in place. In your medical education I would have guessed that you would have learned that one cannot have complete loss of both lower extremities and use AFO splints for ambulation. There is residual motor and sensory function within both legs. Dr. T, in his TWCC-64 dated 2/24/93, as well as I have documented the existence of residual function. I would like to point out a statement that is on every TWCC-69. That an impairment rating be based on competent objective medical evidence, "without reliance on the

[1]We once again voice our strong disapproval of any unilateral communication by the parties with the designated doctor. As we have stated, such communication compromises the appearance of impartiality of the designated doctor and if a party requires clarification of a designated doctor's opinion this can be accomplished by requesting that Commission personnel request clarification or by deposition on written questions. *See* Texas Workers' Compensation Commission Appeal No. 93455, decided July 22, 1993; Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Further, such contacts have been disapproved in TWCC Advisory 94-02, dated March 14, 1994. Finally, the tenor of Dr. O's response, quoted in part *infra*, shows that such improper contact may also prove inopportune.

> employee's subjective symptoms." The question of her lack of feeling during sexual intercourse has not been objectively proven, therefore cannot be included in the rating.

The claimant appeals the decision of the hearing officer upon two grounds. First, the claimant argues that the hearing officer should not have adopted the rating of the designated doctor because it did not rate the claimant's entire injury in that no impairment rating was assessed for her bowel and bladder dysfunction. The claimant takes exception to the designated doctor's statements indicating that the claimant is not incontinent pointing to medical evidence from three doctors, including two urologists, and the claimant that she is incontinent. The hearing officer finds in his Finding of Fact No. 6 as follows:

> Claimant suffered denervation in the muscles served by the right L5 and S1 nerve roots which resulted in loss of function in those muscles as well as sensory loss in her bowel and bladder functions.

The hearing officer recognizes that the claimant's bowel and bladder function are impaired. The real question is whether or not Dr. O properly rated the loss of these functions under the Guides. The designated doctor stated in his letter of September 9, 1993, that the claimant's bladder dysfunction is subsumed under Table 44 of the Guides in the impairment he rated for the L5 and S1 nerve roots. The claimant provided no expert testimony that this was incorrect nor points to any provision of the Guides themselves that would tend to show this was an incorrect methodology. The hearing officer accepted the explanation of the designated doctor regarding this. Without evidence to the contrary, we cannot say that the designated doctor did not properly apply the Guides. This is not to say that Dr. O's methodology was necessarily correct, but merely that the claimant has failed to establish that it was incorrect.

The claimant's second ground of appeal is that the hearing officer applied the wrong legal standard in determining that the claimant was not entitled to LIBS. From the hearing officer's discussion, findings and conclusions it is clear that the hearing officer believed that to qualify for LIBS the claimant had to show paralysis of her lower extremities. In fact he explicitly stated as follows in Conclusion of Law No. 4:

> Claimant's injuries do not entitle her to lifetime income benefits because she has not suffered permanent or complete paralysis of both legs.

The claimant contends that case law under pre-1989 Act establishes that total loss of use of a member can exist when such member is such that a workman cannot procure and retain employment requiring the use of the member or when such member no longer possesses any substantial utility as a member of the body. The claimant argues that using this standard of loss of use in regard to the claimant's lower extremities that the claimant is entitled to LIBS.

The first question here is the applicability of the case law under the prior Act to

establishing the standard for LIBS. One method of statutory construction to determine whether the legislature intended to change the substantive law in an area is to compare the corresponding provisions of the present with the prior statute. The provision of the 1989 Act controlling LIBS is Section 408.161 which provides as follows in relevant part:

> LIFETIME INCOME BENEFITS. (a) Lifetime income benefits are paid until the death of the employee for:
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> (1) total and permanent loss of sight in both eyes;
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> (2) loss of both feet at or above the ankle;
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> (3) loss of both hands at or above the wrist;
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> (4) loss of one foot at or above the ankle and the loss of one hand at or above the wrist;
>
> (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, and one arm and one leg: or
>
> (6) an injury to the skull resulting in incurable insanity or imbecility.
>
> (b) For purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part.

The corresponding provision in prior law which described injured workers who had injuries that were conclusively totally and permanently disabling (thus entitling them to LIBS) was Acts 1927, p. 41 (repealed 1989) and which prior to repeal was commonly cited as TEX. REV. CIV. STAT. ANN. art. 8306 ? 11a (Vernon 1967). This section reads in relevant part:

> Sec. 11a. Injuries constituting total and permanent incapacity. In cases of the following injuries, the incapacity shall conclusively be held to be total and permanent, to-wit:
>
> (1) The total and permanent loss of the sight of both eyes.
> (2) The loss of both feet at or above the ankle.
>
> (3) The loss of both hands at or above the wrist.
>
> (4) A similar loss of one hand and one foot.
>
> (5) An injury to the spine resulting in permanent and complete paralysis of both arms or both legs or of one arm and one leg.
>
> (6) An injury to the skull resulting in incurable insanity or

imbecility.

In any of the above enumerated cases it shall be considered that the total loss of the use of a member shall be equivalent to and draw the same compensation during the time of such total loss of the use thereof as for the total and permanent loss of such member.

Obviously these two provisions are very similar and in fact virtually identical in equating the loss of use of member with its loss. This would indicate that the Texas Legislature in enacting the 1989 Act did not intend to change the substantive law in this area. This view is further supported in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4B.31 at 4-134-5 (1991):

Commentary - Section 4.31

* * * *

b. Section 4.31(b): Definition of loss. A key term in the determination of lifetime income benefits is "loss." Under Section 4.31(b) the total and permanent loss of use of member is considered to be the same as the loss of that member. "Total loss" appears to be the same concept as "total loss of use," a concept for determining benefits for specific injuries under prior law.

Montford then cites with approval the following prior law definition of total loss of use found in the Texas Pattern Jury Charges:

"Total loss of use" of member of the body exists whenever by reason of injury such member no longer possesses any substantial utility as a member of the body or the condition of the injured member is such that the worker cannot get and keep employment requiring the use of such member. 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4B.31 at 4-135 footnote 468.

That this definition of total loss of use, which was applied by a number of Texas Courts of Civil Appeals prior to being approved by the Texas Supreme Court in the case of Travelers Insurance Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962), after which it was consistently applied (*See* Texas Employer's Insurance Association v. Sauceda, 636 S.W.2d 494 (Tex. App.-San Antonio 1982, no writ), should apply to the 1989 Act is consistent with our decision in Texas Workers' Compensation Commission Appeal No. 94430, decided May 23, 1994. In Appeal No. 94430, while declining to explicitly holding that this standard applied to the 1989 Act as the claimant failed to prove total loss of use under the standard, we analyzed the claimant's assertion of total loss of use in light of this definition. We now hold that based upon the comparison of the plain language of the prior and present law as well as Montford's observation as to legislative intent that this definition

applies to the 1989 Act.

Under the prior law this definition of loss of use has been applied to cases where the claimant asserted loss of use of the legs due to a spinal injury. *See, e.g.*, Service Lloyds Insurance Company v. Slay, 800 S.W.2d 359 (Tex. App.-El Paso 1990, writ denied). Thus we hold in the present case that the correct standard in determining whether the claimant is entitled to LIBS is whether her legs no longer possess any substantial utility as members of her body or whether the condition of her legs is such that she cannot get and keep employment requiring the use of legs.

Here we cannot say that the hearing officer did not subsume the definition of loss of use embodied in case law under the prior law in his findings and conclusion that the claimant had not suffered total paralysis of both legs. Normally using the words of the applicable statutory provision in findings of fact and conclusions of law is appropriate to show that required considerations were taken into account. However, as this panel has never previously held whether the case law under prior law regarding loss of use is applicable under the 1989 Act and this case law is critical in the proper interpretation of "permanent and complete paralysis of both arms or both legs or of one arm and one leg," we cannot be certain that the proper standard was applied in determining whether the claimant is entitled to LIBS. We therefore remand the case to the hearing officer to make explicit findings as to, by reason of her injury, whether claimant's legs no longer possess any substantial utility and whether the claimant can get and keep employment that requires the use of her legs.

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.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge