

## APPEAL NO. 950209

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on January 10, 1995, to determine the claimant's correct impairment rating (IR). The carrier appeals from the determination of the hearing officer, (hearing officer), that the claimant's IR is 47%, as found by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The carrier contends that the designated doctor did not use the correct version of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) and that thus his IR is invalid; it asks that the Appeals Panel reverse and remand for the appointment of a new designated doctor. The appeals file does not contain a response from the claimant.

### DECISION

The hearing officer's decision is reversed and remanded.

The claimant, who worked as a night watchman for (employer), suffered an injury to his back and knee on (date of injury), when he fell into an open manhole. He was 75 years old at the time of the injury. According to the medical evidence he had surgery to repair torn medial and lateral menisci, and an MRI of the cervical spine showed a herniated disc at C3-4 and C4-5 with degenerative changes; a lumbar MRI showed degenerative changes but no herniation.

In April of 1993 the claimant was seen by (Dr. KE) at the carrier's request. In a report dated April 14, 1993, Dr. KE wrote that he would assess the claimant a 35% IR based upon impairment to the claimant's knee, neck, and lumbar spine, including loss of range of motion (ROM). On January 10, 1994, Dr. KE re-examined claimant and completed a Report of Medical Evaluation (Form TWCC-69); he determined claimant had reached maximum medical improvement (MMI) (although he did not give a date), and repeated his determination that claimant's IR was 35%. Thereafter, claimant's treating doctor, (Dr. D), wrote that he agreed with Dr. KE's assessment.

At the carrier's request, (Dr. S) reviewed Dr. KE's report and stated that she found it to contain several errors, including the fact that the lower extremity impairment was incomplete (as no ROM of the knees was included), and that the cervical ROM did not meet the AMA Guides' consistency criteria. Based on assumptions contained in her report (Dr. S did not examine the claimant), she stated that her "best estimate" of claimant's IR would be 16%.

Because the carrier disputed Dr. KE's IR, the Commission selected (Dr. KR) as designated doctor. Dr. KR initially completed a TWCC-69 giving the claimant's date of MMI as May 5, 1994 (the date to which the parties stipulated at the hearing), along with an IR of 58% based upon ROM of the cervical spine (18%), ROM of the lumbar spine (14%), and impairment of the knee (10% for the lower extremities and 16% due to extension of the

knee). Dr. KR's report states that his rating was taken from the statutorily mandated version of the AMA Guides. See Section 408.124(b), which provides that the third edition, second printing, dated February 1989 "shall" be used.

Following a benefit review conference, a Commission benefit review officer (BRO) on July 20, 1994 wrote to Dr. KR inquiring whether he arrived at the final rating using the combined values chart in the AMA Guides; he also referred to the proper edition of the AMA Guides and asked that Dr. KR provide copies of all work sheets and charts identifying any pages or tables from the Guides which were used to arrive at the IR. Dr. KR replied that his rating was derived from the combined values chart of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, and stated that the answer to the second question could be found in his report, which referenced the appropriate charts and tables from the AMA Guides. Thereafter, the BRO again wrote Dr. KR, stating that using the figures supplied by Dr. KR and the combined values chart of the Guides yielded an IR of 47%; he also again requested Dr. KR's work sheets or any other supporting documentation used in preparing the designated doctor's final report. Dr. KR replied that his report had been in error because he failed to apply the combined values chart and the claimant's IR was indeed 47%; he enclosed a revised TWCC-69 to reflect this change but did not reference any work sheets.

The carrier's deposition upon written questions of Dr. KR was part of the record below. With regard to questions concerning the designated doctor's objective clinical or laboratory findings, his ROM measurements, and the testing measurement for each repetition of each movement, Dr. KR referred to his original report as well as handwritten notes from which the report apparently was prepared. He stated that he measured ROM using inclinometers and that he performed each test three times. He also stated, in response to a question, that the combined value charts appears on pages 254, 255 and 256 of the AMA Guides. In addition, the carrier posed the following question:

Q. In your May 23, 1994, report you cited tables 55, 56, and 57 s [sic] being used to assess [claimant's] lumbar ROM impairment percentage; and table 40, page 68 as being used to evaluate [claimant's] knee impairment. These table numbers do not appear to correspond to the applicable table for whole body regions in [the AMA Guides]. Please explain this discrepancy.

Dr. KR responded as follows:

A. If you will read carefully my typewritten report paragraph 2 and 3 will correct your mis-interpretation, or any discrepancies that may exist in your mind.

The carrier also introduced into evidence the appropriate pages from the statutorily required version of the AMA Guides to show that the tables and charts corresponding to lumbar, cervical, and lower extremity impairment did not match those used by Dr. KR.

In her discussion, the hearing officer wrote:

An examination of the medical evidence included in the record of the CCH indicates that, as Carrier argued, [Dr. KR] could not have used the statutorily mandated version of the AMA Guides, since his references to Table and page numbers of the Guides do not correspond to the appropriate portions of the correct version of the Guides. However, the hearing officer's attempt to duplicate [Dr. KR's] procedure by applying his ROM findings to the correct version of the Guides conservatively yielded a forty-five percent whole body impairment. Therefore, it appears that [Dr. KR] would have arrived at the forty-seven percent whole body impairment he assessed even if he had used to [sic] the correct version of the Guides. While it would have been helpful for [Dr. KR] to have furnished to the Commission copies of any worksheets he used in evaluating Claimant's condition and arriving at the impairment rating he assessed, such failure is not necessarily fatal to the validity of his evaluation, since nothing in his evaluation indicates that he used an incorrect method of assessing Claimant's ROM. In addition, it is noted that [Dr. KE], a doctor chosen by Carrier, indicated that Claimant had a thirty-five percent whole body impairment, and the only shortcoming evident in [Dr. KE's] report is that he uses the word "disability" instead of "impairment."

For the reasons discussed above, it appears appropriate to decide that Claimant has a forty-seven percent whole body impairment, as certified by the Commission-appointed designated doctor.

Based upon the discussion quoted above, the hearing officer acknowledged that the designated doctor did not use the version of the AMA Guides mandated by the 1989 Act, Section 408.124(b). However, she appears to state that this error is curable by applying Dr. KR's bottom line figures against the correct version of the Guides. We have allowed for the possibility that another version of the Guides could be proven through expert testimony to be identical to or not significantly different from the methodologies found in the 1989 Act's version. Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992. In this case, however, no such evidence was developed, and under these facts we find it was not appropriate for the hearing officer to attempt to validate Dr. KR's IR by comparing it to the correct version of the Guides. See Texas Workers' Compensation Commission Appeal No. 941622, decided January 20, 1995, where we wrote that, "Where there may be some instances in which a hearing officer could fill in an obvious gap within a designated doctor's opinion and report, the numerical IR must be the product of the doctor's expertise." We thus distinguish this case from those in which a hearing officer in addressing a doctor's report performed recalculations which were merely mathematical and did not involve the exercise of any independent judgment. See Texas Workers' Compensation Commission Appeal No. 94618, decided June 22, 1994; *Compare* Texas Workers'

Compensation Commission Appeal No. 941208, decided October 26, 1994; Texas Workers' Compensation Commission Appeal No. 941276, decided October 31, 1994.

The evidence shows that Dr. KR did not use the correct version of the Guides, rendering his report invalid; while the BRO informed him that the statutorily mandated version of the Guides will be used, he continued to insist he had done so, while demonstrating otherwise through page and table references. We have previously held that appointing a second designated doctor should be undertaken only in limited circumstances, such as, for example, where the original doctor cannot or refuses to comply with the requirements of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. We believe that the circumstances of the instant case would merit appointment of a second designated doctor where, as here, correspondence with the original designated doctor over a period of several months has not yielded a report in compliance with the Act. We therefore reverse the hearing officer's decision and order and remand for the expeditious appointment of a second designated doctor to determine claimant's IR.

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.

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Lynda H. Neseholtz  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Alan C. Ernst  
Appeals Judge