APPEAL NO. 950213

Following a contested case hearing held in (city), Texas, on September 8, 1994, with the record closing on January 17, 1995, the hearing officer, (hearing officer), resolved the single disputed issue by concluding that the impairment rating (IR) of the respondent (claimant) was 15% as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission), and that the other medical evidence was insufficient to overcome the presumptive weight afforded the designated doctor's findings pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 408.125(e) (1989 Act). The appellant (carrier) challenges these conclusions on appeal asserting that the designated doctor failed in two particulars to properly apply the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). No response was filed by the claimant.

DECISION

The decision and order of the hearing officer are reversed and a new decision is rendered that the claimant's IR is 14%.

The parties stipulated that claimant reached maximum medical improvement on February 25, 1994, as certified to by (Dr. AC), the designated doctor. Claimant testified he was personally examined by Dr. AC who had him perform bending motions and that he had no complaints with Dr. AC's exam.

The October 18, 1993, report of (Dr. JGG), who performed an independent medical examination, stated that claimant was hurt on (date of injury), when he slipped off a ladder, that he came under the care of (Dr. JHG), and that he had back surgery in July 1992. Dr. JGG reported claimant's straight leg raise (SLR) as "negative" in the sitting and supine positions, his range of motion (ROM) of the hips as "normal," and that "[h]e did not appear to have any injury from the fall." Dr. JGG assigned claimant an IR of 10%. In a letter dated November 17, 1993, Dr. JHG stated that he felt the 10% IR assigned by Dr. JGG was "appropriate."

Dr. AC's narrative report of February 25, 1994, recited that claimant slipped and fell on the rungs of a ladder and caught himself by his shoulders and described claimant's surgery thusly: "He underwent a two level hemilaminotomy and foraminotomy at L4-L5 and L5-S1 and excision single level disc at L4-L5. The two-level fusion posterolateral, bilateral was completed on 7-27-92." Dr. AC signed a Report of Medical Evaluation (TWCC-69) on February 26, 1994, certifying that claimant reached MMI on February 25, 1994, and assigning an IR of 15% consisting of 12% for specific disorders of the lumbar spine and three percent for abnormal ROM. Although Dr. AC also found certain sensory impairment, it did not increase claimant's whole person IR.

In both a written report dated April 6, 1994, and in his testimony, (Dr. PO) disagreed with Dr AC's IR in two areas. With regard to impairment for claimant's specific spinal

disorder, Dr. PO is of the view that based on his interpretation of Table 49 II of the AMA Guides, for a surgically treated disc lesion with residual symptoms claimant should be assigned 10% IR for the first operative level and an additional one percent for the second operative level for a total of 11% for the specific lumbar spine disorder. In his report of April 27, 1994, responding to Dr. PO's report, Dr. AC stated his opinion that claimant should be assigned an additional one percent for both operative levels for a total of 12%. Dr. AC stated that he read the provision in Table 49 II F-- "add 1%/level" -- to mean "add one percent per level," noting that the provision does not say to add one percent for each "additional" level. Dr. AC indicated that the interpretation of this provision was a matter of some controversy in medical circles. Dr. PO, too, readily acknowledged at the hearing that there was controversy in medical associations regarding the interpretation of this Table 49 provision.

With regard to impairment for claimant's lumbar spine ROM, Dr. PO is of the view that the SLR test (10 degrees rule) invalidated not only claimant's lumbar flexion and extension but also his lateral ROM and therefore that he should not be assigned any impairment for abnormal lumbar spine ROM. Dr. PO repeatedly testified that the Commission had taken the same position on this issue. When the hearing closed on September 8, 1994, the hearing officer stated that he would make an effort to find the Commission policy memo on this issue which was mentioned at the hearing and provide it to the parties for comment. However, the hearing record was closed on January 17, 1995, with no further mention of a Commission memo. With respect to SLRs, Figure 83c (Lumbar ROM) in the AMA Guides provides that "if tightest SLR ROM exceeds sum of Sacral flexion and extension by more than 10%, Lumbar ROM test is invalid." Dr. PO noted, incidentally, that the AMA has published a letter advising that "10%" was a typographical error and should read "10 degrees." Dr. PO stated that Figure 83c "clearly" states that "if the tightest [SLR] exceeds the sum of the sacral flexion and extension by more than 10 degrees, the whole test is invalid, not just one motion." Dr. AC responded that the SLR validity test was discussed both in paragraph 3.3e and in Table 56 of the AMA Guides only in the context of lumbar flexion and extension, not right and left lateral flexion, that Table 57 concerning lateral flexion impairment does not mention the SLR validity criterion, and that the discussion of the two-inclinometer method of measuring lumbosacral lateral flexion in paragraph four, page 92 of the AMA Guides provides that "only the left and right lateral flexion angles need be consistently measured to within + / - 10% or [five degrees], whichever is greater. The final measurement for impairment evaluation is the greater angle measured." Dr AC commented that "the relationship between sacral flexion and extension and straight leg raising can be made. However, the same does not hold true for right and left lateral bend. Therefore, the validity criterion, I believe applies solely to lumbar flexion and extension."

The carrier also introduced the May 27, 1994, report of (Dr. MGG) who stated that he had reviewed Dr. AC's report, Dr. PO's critique, and Dr. AC's response and that he agreed with Dr. PO. Dr. MGG said that while he, too, felt that the SLR rules invalidated the entire lumbar spine ROM, "an argument can be made" that only the flexion and extension ROM is invalidated, not the lateral motions.

The hearing officer in his discussion stated that he did not find the other medical evidence sufficient to overcome the presumptive weight to be accorded to Dr. AC's report under Section 408.125(e). The hearing officer cites to Texas Workers' Compensation Commission Appeal No. 94732, decided July 20, 1994, where the Appeals Panel stated: "In remanding the case, we wish to point out that it is not clear to this panel that the [SLR] test necessarily invalidates lumbar lateral flexion ROM measurements that are otherwise valid (consistently measured to within + / - 10% or 5 [degrees], whichever is greater)." That decision pointed to other decisions where cases were remanded for explanations from designated doctors as to why impairments for lateral flexion ROM were not given despite consistent qualifying measurements. The Appeals Panel in that case went on to observe: "We recognize that, as demonstrated by the differing opinions of Dr. B and Dr. O, there is a split of opinion in the medical community as to the effect of the [SLR] test on lateral flexion ROM measurements. Nonetheless, under Section 408.125(e), the report of the designated doctor, in this case Dr. B, is entitled to presumptive weight unless the 'great weight' of the medical evidence is contrary to his report."

We do not find in this record a basis for determining that Dr. AC has erred in finding that the claimant's lateral motion impairment measurements were not invalidated by the SLR check. However, we do disagree with the Dr. AC's interpretation of Table 49 II. Table 49 II D and E provide specific percentages of impairment for surgically treated disc lesions, with and without residual symptoms, whereas Table 49 II F addresses multiple operative levels with or without residual symptomology and provides for adding one percent per level. We read the provision for adding one percent in the context of the operative levels which are in addition to the surgically treated disc lesion. Accordingly, we find error in Dr. AC's having added one percent to the 10% impairment for the surgically treated disc lesion. The decision and order of the hearing officer are reversed and a new decision is rendered that claimant's IR is 14%.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur in the result. The majority opinion, apparently following precedent of Texas Workers' Compensation Commission Appeal No. 94732, decided July 20, 1994, found no basis in this record for determining that Dr. AC erred. Without saying so, the majority, in my view analyzes this case in terms of the presumptive weight afforded the report of a designated doctor which can only be overcome by the great weight of the medical evidence to the contrary under Section 408.125(e). However, the report of the designated doctor is not being attacked on this basis because there is no dispute about the objective medical evidence. As the carrier points out in its appeal, the question is not where the great weight of the medical evidence lay, but about the correct application of the AMA Guides to a given set of facts. When confronted with similar questions in the past, we have not hesitated to answer them. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 950097, decided March 6, 1995; Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994; and Texas Workers' Compensation Commission Appeal No. 94601, decided June 28, 1994. *But see* Texas Workers' Compensation Commission Appeal No. 950208, March 24, 1995, and cases cited therein. Indeed, the majority is willing in this case to interpret and provide guidance on the correct application of Table 49. I see no reason why we should not also address the issue appealed and determine whether the Guides apply the SLR validation test both to lateral flexion and to lumbar flexion and extension, or only to lumbar flexion and extension.

Alan C. Ernst
Appeals Judge