APPEAL NO. 950332

A contested case hearing was originally held in (city), Texas, on March 3, 1994, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) with (hearing officer) presiding as hearing officer. In Texas Workers' Compensation Commission Appeal No. 94750, decided July 18, 1994, the Appeals Panel reversed the decision of the hearing officer and remanded for the hearing officer to determine whether the testimony of (Mr. A), a physician's assistant, who is the general manager of an impairment rating (IR) company, is medical evidence and whether the great weight of the other medical evidence is contrary to the report of the designated doctor. On remand the hearing officer determined that the testimony is medical evidence and that the great weight of the other medical evidence is not sufficient to overcome the presumptive weight afforded to the designated doctor's findings. The appellant (carrier) requested review urging that the great weight of the other medical evidence is contrary to the IR assigned by the designated doctor. The respondent (claimant) urges that we affirm the decision of the hearing officer because it is not against the great weight and preponderance of the evidence.

DECISION

We reverse and render.

The facts of this case are set forth in Appeal No. 94750, *supra*, and relevant parts will be briefly summarized. A Texas Workers' Compensation Commission (Commission)-selected designated doctor certified that the claimant's IR for her back injury is 22%. Attached to the Report of Medical Evaluation (TWCC-69) is a two page report from a physical therapist indicating hip flexion of 60°, hip extension of 6°, straight leg raises of 84° right and 82° left, and a 22% IR comprised of 11% for a specific injury and 12% for loss of range of motion (ROM). Considering prior Appeals Panel decisions concerning the need for medical testimony to overcome the presumptive weight of the report of the designated doctor concerning an IR, the carrier called Mr. A to testify that the results of the tests reported by the physical therapist and adopted by the designated doctor do not meet the validity test set forth in the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Specifically, Mr. A testified that the ROM test is invalid if the difference between the tightest straight leg raise and the combination of the hip flexion and hip extension is greater then ten degrees. He went on to explain that adding the 60° hip flexion, to the 6° hip extension, results in a total of 66°, and that adding the 10° difference permitted results in a total of 76° which is less than the 82° degrees in the report and even the 78° that the designated doctor mentioned in a letter to the Commission dated October 15, 1993. In that letter the designated doctor wrote that the validity testing was met, but did not explain how it was met. In the remand we noted that the hearing officer was not precluded from seeking additional clarification from the designated doctor; however, he elected not to do so. In Texas Workers' Compensation Commission Appeal No. 94056, decided February 24, 1994, where the carrier established that the sum of the hip flexion and hip extension angles (60°)

exceeded the straight leg raise on the tightest side (49°) by 11°, the Appeals Panel said that it was compelled to accept the carrier's argument that the ROM test is invalid. In the case we here consider, the TWCC-69 signed by the designated doctor has brief entries and itself appears to be valid. However, the report of the physical therapist attached to the TWCC-69 has lumbar flexion and extension numbers, and Mr. A testified that these numbers and the values for the straight leg raises in the same report invalidate the flexion and extension ROM tests. The statement of the designated doctor that "the validity testing was met" without an explanation as to how the validity testing was met is not enough to establish the validity. As in Appeal No. 94056, *supra*, the flexion and extension ROM test adopted by the designated doctor is not valid and cannot provide the basis for impairment of lumbar flexion and extension motion.

Both the treating doctor and the designated doctor assigned an 11% IR for a specific spinal disorder under the provisions of Table 49, II Intervertebral disc or other soft tissue lesions, of the AMA Guides by assigning 10% for the surgically treated disc lesion with residual symptoms and adding one percent for the second level of the surgery. The treating doctor noted that the claimant had reached maximum medical improvement by operation of law, that there was little evidence of fusion mass in the lateral quarters from L4 to S1, and that the claimant has spinal stenosis at L5-S1. He also assigned a 13% IR under Table 49, IV Spinal stenosis, segmental instability, or spondylolisthesis, operated, by assigning 12% for single level operation, with residual symptoms and adding 1% for the second level of surgery. He invalidated the flexion and extension ROM tests and awarded three percent IR for lateral flexion. In Texas Workers' Compensation Commission Appeal No. 950213, decided March 30, 1995, the Appeals Panel held that the straight leg raise test does not invalidate lateral flexion ROM measurements. In the report of the physical therapist attached to the TWCC-69 of the designated doctor, the physical therapist stated that medical records of the treating doctor were used and that muscle spasms from the lower back began radiating into the mid-thoracic and right scapular area for about two months ago and are intermittent and not consistent with position and movements. (Dr. B), a radiologist, reported "little evidence of union L4 to L5 except for a thin strip of bone on the left" and "fusion of the interbody fusion graft elements L4-L5 with non union at L5-S1." (Dr. Y), an orthopedic surgeon, recommended "[t]his patient might be a candidate for exploration of the L5/S1 interspace and the fusion mass from L4 thru S1 with possible further grafting."

We have held that the Commission is to adopt the IR of a doctor, usually the IR of either the designated doctor, the treating doctor, or the required medical examination doctor who examined the claimant at the request of the carrier; and that a hearing officer may not pick and choose parts of the report of the designated doctor in regard to the IR. Texas Workers' Compensation Commission Appeal No. 94646, decided July 5, 1994. However, in Texas Workers' Compensation Commission Appeal No. 94056, *supra*, after considering a decision of a hearing officer rendered after a remand, the Appeals Panel noted that the 1989 Act provides that the Appeals Panel may not remand a case more than once, reversed the part of the decision that provided that the claimant had a 14% IR and rendered a decision

that the claimant's IR was five percent without specifically affording presumptive weight to part of an IR of a designated doctor.

Considering all of the medical evidence in the record, it appears that the treating doctor was correct in assigning 13% IR under Table 49 IV and three percent for loss of lateral flexion motion. However, it is not appropriate to combine the 11% IR he assigned under Table 49 II with the 13% IR under Table 49 IV. Using the report of the treating doctor and adding the 13% IR assigned under Table 49 IV to the three percent assigned for lateral flexion and extension ROM results in a 16% IR.

We reverse the decision of the hearing officer and render a decision that the claimant's IR is 16%.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge