

## APPEAL NO. 93890

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 401.011 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). At a contested case hearing held in (city), Texas, on September 1, 1993, the hearing officer, (hearing officer), considered the sole disputed issue, namely, the correct impairment rating for the appellant (claimant). Finding, among other things, that the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission) was not contrary to the great weight of the other medical evidence, the hearing officer concluded that claimant's correct impairment rating was seven percent. Claimant has appealed asserting that the designated doctor's failure to assign any impairment rating for his loss of lumbar spine range of motion (ROM) was incorrect and failed to follow the requirements of the "Guides to the Evaluation of Permanent Impairment," third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) as mandated by Section 408.124. The respondent (carrier) has filed a response contending that claimant failed to meet his burden to show both that the designated doctor failed to follow the AMA Guides in determining impairment attributable to claimant's loss of ROM and that the designated doctor's report was against the great weight of the other medical evidence.

### DECISION

Finding the evidence sufficient to support the challenged finding and conclusion, we affirm.

Both parties submitted their cases to the hearing officer based solely upon documentary evidence and stipulated that on (date of injury), claimant sustained a compensable injury while in the course and scope of his employment with (employer). The report of claimant's initial January 27, 1992, visit to his treating doctor, (Dr. AH), an orthopedic surgeon, to whom he had been referred by (Dr. M), reflected that claimant, then 57 years of age, had immediate onset of pain, but without radiation of pain into his legs or numbness, while lifting a bucket of water at work on (date of injury). Other medical records indicated, however, that claimant had slipped and fallen on a wet floor. Dr. AH's initial diagnosis included thoracic sprain, lumbar discogenic syndrome, and thoracolumbar spondylosis for which he initiated a course of conservative treatment. Although a February 1992 report stated that an MRI report showed no disc abnormality but did show lumbar spondylosis, all of Dr. AH's later reports omitted the diagnosis of thoracolumbar spondylosis and his letter of August 19, 1993, to claimant stated the diagnosis as a thoracic sprain and lumbar discogenic syndrome.

Dr. AH signed a Report of Medical Evaluation (TWCC-69) stating that claimant reached maximum medical improvement (MMI) on "2/24/92" with a whole body impairment rating of zero percent. There was no disputed issue in this case concerning MMI. Dr. AH's records indicated that in April 1992 claimant returned to Dr. AH complaining of pain and other symptoms; that in May he was taken off work; that in June he completed a functional capacity evaluation, which indicated he could not return to the type of work he had previously performed, and that he was recommended for a work hardening program; that in June an

MRI report revealed no abnormalities of the thoracic spine, a mild anterior compression at T-12, arthritic changes at L2-3, and degenerative disc disease at T11-12, L2-3, and L5-S1. Dr. AH's reports in June, July and September 1992 stated that claimant's straight leg raising (SLR) elicited low back pain.

In a second TWCC-69 report, Dr. AH stated that claimant reached MMI on "10/12/92 with an 18% impairment rating." This report reflected claimant's maximum angles for true lumbar flexion and extension, as well as those for lumbar right lateral and left lateral flexion, and went on to state that claimant's lumbar spine ROM impairment was 12%, that his diagnosis-based impairment was seven percent, and that his combined whole body impairment rating was 18%. This report did not identify the body part/system for which the seven percent diagnosis-based impairment was given. It was apparently accompanied by a lumbar ROM chart from the (Center A), prepared on August 20, 1992, which contained certain lumbar spine ROM and SLR data.

In his August 19, 1993, letter, Dr. AH stated that he felt his 18% impairment rating was in accordance with the AMA Guides and accurate, that the 14% rating assigned to claimant by the carrier's doctor, (Dr. DC), was "very close" to his 18%, but that the seven percent rating of the designated doctor, (Dr. GH), "appears to be quite out of the range of the other two."

In a third TWCC-69 report, Dr. AH stated that a "new evaluation being done, as new measurements performed on 8/27/83," and that claimant reached MMI on "8/27/93" with a "whole body" impairment rating of 23%. This report did not identify a specific body part/system for the diagnosis-based impairment rating but did recite a new set of lumbar spine ROM angles which it said constituted a 17% ROM impairment which, when combined with the seven percent diagnosis-based impairment, yielded a whole body impairment rating of 23%. This report also stated that the new rating was done at the request of claimant and his attorney by Center A, that the current ROM measurements were performed according to the AMA Guides, and that the previous ROM measurements apparently did not meet the criteria of the AMA Guides. Among claimant's records was a lumbar ROM chart from Center A reflecting new measurements taken on August 20, 1993, which differed from those taken by Center A on August 20, 1992.

Curiously, the hearing officer found (Finding of Fact No. 4) that Dr. AH "certified that CLAIMANT reached [MMI] on October 12, 1992, with an 18% whole body impairment rating." The hearing officer's decision does not indicate why the finding concerning Dr. AH's impairment rating was based on the earlier TWCC-69 nor was this matter addressed at the hearing or in the appellate documents. Since this finding was not appealed, we need not discuss it further though we are mindful that all of Dr. AH's TWCC-69 forms, along with all other medical evidence, are a part of the medical evidence to be considered in determining whether the designated doctor's report is contrary to the great weight of the other medical evidence.

In his TWCC-69 report, Dr. DC, whose medical specialty is not indicated in the

record, stated that claimant reached MMI on "12-22-92" with a whole body impairment rating of 14% for "lumbar spine." Dr. DC's narrative report of (date), contained the diagnosis of lumbosacral strain, degenerative lumbar disc disease, and fibromyalgia of the lumbar musculature. This report also stated, at one point, the following: "his impairment rating is based upon structural changes of his lumbar spine and loss of [ROM]. The, overall, impairment rating is 14 percent; 7 percent for loss of lumbar motion (according to measurements taken today); 7 percent for structural changes at the degenerative levels of L2-3, L3-4, L4-5, and S1." Later in the report, however, Dr. DC stated: "I assess his impairment based upon structural changes in the lumbar spine of the soft tissue and vertebral bodies and his change in [ROM] of the lumbar and thoracic spine." (Emphasis supplied.) Neither of Dr. DC's reports mentioned whether he used the AMA Guides. We have observed that the Commission's rules do not require such a statement and the absence thereof does not establish that the AMA Guides were not used. See Texas Workers' Compensation Commission Appeal No. 92393, decided September 17, 1992. Dr. DC's narrative report also noted that with respect to claimant's movements, he moved his thoracolumbar trunk very little, that his recovery [from motion] was normal, and that he was "inappropriate and quite dramatic."

In a letter of January 26, 1993, to the carrier, Dr. AH indicated his disagreement with Dr. DC's report and asserted that the measurements in his, Dr. AH's, TWCC-69 were performed by a physical therapist using the double inclinometer method and "gives a correct AMA Guideline impairment rating of 18%."

Claimant was seen by Dr. GH, the designated doctor on March 12, 1993. In his detailed narrative report of March 12, 1993, Dr. GH set forth the results of his physical examination of claimant. He described the results of various ROM testing including flexion, extension, lateral flexion, and SLR testing. He also described other physical examination results such as motor power tests of the lower extremities. Dr. GH's impression was post-traumatic thoracic and lumbar syndrome with a compression fracture (of indeterminate age) at T12, together with functional overlay.

In his undated TWCC-69 report, Dr. GH certified that claimant had reached MMI on "12-22-92" with a "7% whole body medical impairment." This report also stated that claimant had spondylosis at the L2-3, 3-4, and 4-5 levels, and that Dr. GH assigned five percent for one level and additional percentages for another two levels yielding a total whole body impairment rating of seven percent. Dr. GH, an orthopedic surgeon, also made the following observation: "Reports of previous spinal measurements at [Center A] do not appear to me to be valid. The sum of sacral flexion and extension is 20 degrees. The patient's tightest [SLR] is 40 degrees. These would render these measurements invalid." The report also stated that Dr. GH had asked claimant to undergo spinal measurements, that claimant attempted to do so but they "were invalid," and that "[t]he patient has not been able to attain valid spinal measurements in testing which would give zero percent disability for loss of [ROM.]"

Included with the exhibit containing Dr. GH's narrative report and TWCC-69 form was

a single page lumbar ROM chart from the (Center B), dated March 18, 1993. This chart contained three measurements each of lumbar flexion, lumbar extension, and right SLR, the latter noted to be "invalid," but contained no measurements for the left SLR testing or for the lateral flexions. It would appear from the face of this chart that ROM testing was discontinued after the invalid right SLR test. At the bottom of the chart were the notations, "Sacral ROM - 1 + 1 = 2," "Not Valid," and "No repeat needed," above the initials of the physical therapist.

Claimant introduced his attorney's letter of September 1, 1993, to the hearing officer which stated that in June 1993, claimant brought to the Commission's attention "the improper measuring methods" used by Dr. GH's physical therapist to obtain claimant's spinal ROM measurements, that claimant had been advised by Commission personnel in July 1993 that "similar complaints had been lodged," and that claimant desired to undertake discovery of such other complaints in order to "help establish that [Dr. GH's] impairment rating is the product of improper methodology" and to help overcome the "designated doctor presumption." Attached to this letter was claimant's letter of June 10th stating that when he was examined by Dr. GH's therapist on March 18th, he was told to bend over backwards, that he attempted to do so but could not get to the point desired because of his pain, that the therapist became annoyed and told him to lay on the bed, that he then grabbed claimant's left foot and lifted it hard making claimant scream from pain, that claimant was then told he would have to return at another time or he would not be given a disability, but that a short time later he was told he need not return.

In an affidavit dated September 1, 1993, Dr. GH stated that he had examined claimant "using standard and accepted procedure according to the A.M.A. guidelines," and that claimant's examination was similar to those given all patients with a spinal condition.

Section 408.125 provides that if an impairment rating is disputed, the Commission shall direct the employee to be examined by a designated doctor and that if the designated doctor is chosen by the Commission, as was apparently the case here, the Commission shall base the impairment rating on such report unless the great weight of the other medical evidence is to the contrary in which case the Commission shall adopt the rating of one of the other doctors. See Texas Workers' Compensation Commission Appeal No. 93105, decided March 26, 1993, for discussion of the designated doctor mechanism. Section 408.124(b) provides that for the determination of the existence and degree of an employee's impairment, the Commission shall use the AMA Guides. *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(e) (Rule 130.1(e)); Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992.

Claimant has argued that Dr. GH's report is against the great weight of the other medical evidence because it does not contain an impairment rating for ROM and is therefore incomplete. Claimant further asserted that the AMA Guides provide for two elements to a whole body impairment rating for a spinal injury, that is, the specific or diagnosis-related disorder and the abnormal ROM factor. He said his evidence of the deficiency of Dr. GH's report consisted of the reports of Dr. AH and Dr. DC which did assign an impairment rating

for ROM thus proving by expert evidence, in effect, that the AMA Guides require the assignment of impairment ratings for both the specific spinal disorder and for abnormal ROM. He noted that all three doctors arrived at a seven percent impairment rating for claimant's specific disorder but that while both Dr. AH and Dr. DC were able to assign additional impairment for ROM, Dr. GH was not. Claimant contended that before deciding not to assign any impairment for ROM, and consistent with the AMA Guides, Dr. GH should have had claimant retested for ROM after the initial effort resulted in invalid results, that his failure to do so resulted in an incomplete rating, and that such incomplete report was thus against the great weight of the other medical evidence.

Claimant has challenged on appeal the specific factual finding that Dr. GH's report was not contrary to the great weight of the other medical evidence as well as the conclusion that claimant's correct impairment rating is seven percent. In addressing general principles of measurement for the spine, Chapter 3, Section 3.3, of the AMA Guides provides the following:

Reproducibility of abnormal motion is currently the only known way to validate optimum effort. The examiner must take at least three consecutive mobility measurements, which must fall within  $\pm 10\%$  or 5 [degrees] (whichever is greater) of each other to be considered consistent. Measurements may be repeated up to six times until consecutive measurements fall within this guideline. However, if inconsistency persists, the measurements are invalid and that portion of the examination is then disqualified.

As for the principles for calculating impairment, Section 3.3 provides that "[e]valuation of impairment of the spine involves both diagnosis-related factors (i.e. structural abnormalities), and musculoskeletal/neurological factors that require physiological measurements." This section goes on to state that in addition to considering the diagnosis-based factors, which are set forth in Table 49 (Impairment Due to Specific Disorders of the Spine), the technique for performing ROM measurements of the spine using inclinometers is described, and that, in addition the evaluator should consult the appropriate sections dealing with the evaluation of the upper and lower extremities "for assessment of radiculopathies associated with spine impairment." Apparently none of the three doctors in this case factored in any impairment for radiculopathy. Section 3.3 further provides, with respect to testing the regional ROM to obtain the percentage of impairment due to abnormal motion or ankylosis, that the evaluator should perform at least three measurements of each ROM and calculate the permitted variability; and that if consistency requirements are not met, perform up to a maximum of six additional tests until the reproduction criteria are met. "If testing remains inconsistent after six measurements, consider the test invalid and re-examine at a later date." Section 3.3e, AMA Guides, *supra*. The section goes on to state that with respect to checking lumbar spine flexion, an additional "effort factor" is available, namely, the SLR test; and that a comparison of hip flexion to SLR on the tightest side provides a validation measure independent of reproducibility. This section further states the validation criterion and notes that "[i]f repeat flexion measures otherwise reproducible are consistently associated with abnormal hip/SLR patterns, the measures are not valid."

It appears that claimant's contention that Dr. GH's report failed to follow the AMA Guides with respect to repeating ROM testing and retesting focuses on the chart from Center B of March 18, 1993, containing the notes that the testing was not valid and that "no repeat [was] needed." However, it is clear from reading Dr. GH's narrative report of March 12, 1993, that he did his own ROM testing, including SLR testing, on that date. In addition, he subsequently referred claimant to Center B where ROM measurements were again attempted. We are not persuaded by the content of Dr. GH's reports and the other evidence that Dr. GH's ROM testing did not sufficiently comply with the AMA Guides, and we cannot be unmindful of his affidavit that his examination of claimant did

comport with the AMA Guides. However, we make clear that we would have no hesitancy in remanding this case for additional evaluation by Dr GH of claimant's ROM were the only ROM testing done by Dr. GH the obviously incomplete, single effort made by Center B on March 18, 1993.

We have said that the great weight of the other medical evidence necessary to outweigh the presumptive weight accorded a designated doctor's report requires more than a mere balancing or preponderance. See Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. In Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992, a case which we remanded for further consideration, the designated doctor assigned the employee a seven percent impairment rating for his spinal injury whereas the treating doctor had assigned 29%, both ratings were apparently based on the AMA Guides, and both doctors were orthopedic specialists. While observing that it was not unusual to have disagreement or some degree of disparity between the reports of the various doctors who have examined or treated an injured employee, we found no apparent explanation or rationale in the record to account for the 22% disparity between these two specialists for the same injury. That opinion stated the following:

While we by no means hold it necessary that differences in impairment ratings be explained any time there is some disparity, in the circumstances found in this case we believe it appropriate and helpful to have the matter developed in the evidence, if reasonably possible. This is not intended to detract in any way from our previous holdings which acknowledge and accord the special consideration given the opinions of designated doctors, . . . (Citations omitted.) Rather, it is an attempt to remove speculation and conjecture in deciding an issue in a critical area and, hopefully, to resolve what appears on the surface to be significant irreconcilably diverse opinions of two specialists utilizing the same objective guidelines. Too, we cannot, under the circumstances, rule out the possibility of mistake or error occurring during the process of assigning the impairment ratings in this case.

When that case returned to us upon remand, we reversed and rendered because of the misapplication of the AMA Guides. See Texas Workers' Compensation Commission

Appeal No. 93296, decided May 28, 1993.

In our view, the case under consideration is distinguishable from that discussed in Appeal No. 92651 and Appeal No. 93296, *supra*, and the hearing officer's finding that Dr. GH's report was not against the great weight of the other medical evidence is sufficiently supported by the evidence. We note that both Dr. AH and Dr. GH are orthopedic surgeons and that there is substantial disparity in their respective impairment ratings. However, we believe the record indicates the rationale for such disparity. Dr. GH stated that he reviewed the ROM measurements data obtained by Dr. AH from Center A and that he disagreed with them. Further, Dr. AH in his January 26, 1993, letter, stated that Center A's ROM measurements were correct and resulted in his 18% rating, and in his August 19, 1993, letter again stated that he thought the 18% rating was in accordance with the AMA Guides. However, as above noted, in his third TWCC-69 form changing his impairment rating from 18% to 23%, Dr. AH stated that the previous ROM measurements "apparently, by mistake, did not meet criteria." Further, while the record does not indicate whether Dr. GH reviewed Dr. DC's ROM measurements and his report in which he assigned a 14% rating, we have noted the apparent discrepancy in Dr. DC's narrative report regarding whether any impairment rating was given for claimant's thoracic spine in addition to his lumbar spine. *Compare* Texas Workers' Compensation Commission Appeal No. 93105, decided March 26, 1993, where we were able to affirm despite the disparity in impairment ratings (40% vs. 15% vs. eight percent), Texas Workers' Compensation Commission Appeal No. 93382, decided June 5, 1993, where we were able to affirm despite the disparity in impairment ratings (29% vs. five percent), and Texas Workers' Compensation Commission Appeal No. 93210, decided April 29, 1993, where we were able to affirm despite the disparity in impairment ratings (29% vs. seven percent). *Compare also* Texas Workers' Compensation Commission Appeal No. 93192, decided April 28, 1993, where we remanded to remove speculation and conjecture from the record regarding the impairment rating disparity (42% vs. six percent). *See also* Texas Workers' Compensation Commission Appeal No. 93190, decided April 28, 1993. A designated doctor's report should not be rejected "absent a substantial basis to do so." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993.

We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding the evidence sufficient to support the challenged finding and conclusion, the decision of the hearing officer is affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Joe Sebesta  
Appeals Judge