APPEAL NO. 94004

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held on December 3, 1993, in (City), Texas, to determine the single issue of claimant's impairment rating (the parties stipulated that the date of maximum medical improvement (MMI) was November 19, 1992). The claimant, who is the appellant in this action, appeals the determination of (hearing officer), that claimant's impairment rating is 14%, as found by the designated doctor appointed by the Texas Workers' Compensation Commission (Commission); the claimant contends that that doctor's impairment rating is incorrect because the doctor failed to obtain a valid range of motion test in accordance with the Guides for the Evaluation of Permanent Impairment, third edition, second printing, published by the American Medical Association (AMA Guides). The carrier responds that the designated doctor's report is valid and is entitled to presumptive weight.

DECISION

We affirm the decision and order of the hearing officer.

The claimant injured his back on _____, in the course and scope of his employment. He was originally seen at the (Healthcare Provider) where he treated with a (Dr. C) until early March. On March 23rd he began treating with (Dr. K). At the carrier's request, claimant was seen by (Dr. J) who reviewed claimant's MRI and other studies, stated claimant's diagnosis as lumbar strain with pre-existing facet arthritis and age related degenerative lumbar disc disease, and determined that claimant had reached MMI on July 15, 1992, with a two percent impairment rating due to the degenerative changes.

On September 1st claimant was seen by (Dr. SM) for a "consultation and report for impairment rating." Dr. SM assigned claimant a 52% impairment rating, 10% of which was attributable to range of motion. However, he did not find that claimant had reached MMI. (The claimant's attorney stated at the hearing that Dr. K filed a Report of Medical Evaluation, TWCC-69, dated October 15, 1992, which was "the result of [Dr. SM's] evaluation"; however, this document was not in evidence.)

Claimant next saw (Dr. SI) as the Commission-appointed designated doctor. Dr. SI completed a TWCC-69 certifying MMI on November 19, 1992, with a 14% impairment rating which was due to "spine range of motion." In an accompanying letter, Dr. SI stated that validity criteria, per the AMA Guides, paragraph 3.3e, were not met in the lumbar evaluation.

On August 23, 1993, Dr. K wrote a Commission benefit review officer stating he had reviewed Dr. SI's letter, and that "the [AMA Guides] direct that if the test is invalid, it must be repeated even to the point of deferring the examination to a later date when valid measurements can be obtained." Dr. K recommended the Commission direct Dr. SI to obtain a valid test, or designate a new doctor.

In response to an inquiry from claimant's attorney, Dr. SM also addressed the question of whether the claimant should be re-tested for range of motion. Dr. SM replied that there were at least two areas in the AMA Guides that give the patient an opportunity to meet valid criteria by re-examination. The first, he said, was Chapter 3.3a which states that "[i]f consistency requirements are not met, perform additional tests up to a maximum of six until reproducibility criteria are satisfied. If testing remains inconsistent after six measurements, consider the test invalid and re-examine at a later date." The second was Chapter 3.3e, which states that "even if this `normal' pattern is seen, the persistence of suboptimal effort of spine motion should result in the examiner deferring the examination to a later date when valid measurements can be obtained (unless the visualized true spine motion is high enough to warrant a 0% impairment)." Dr. SM stated that in his opinion a patient "should always have the benefit of re-examination as provided in the [AMA Guides]. Fear, confusion, intimidation, insecurity, and many other factors may result [sic] invalid criteria, especially if he is not comfortable and has not been properly informed about the examination procedure."

Following a September 8th benefit review conference, the benefit review officer wrote Dr. SI seeking clarification as to: 1. whether claimant did not meet the validity criteria in the lumbar evaluation; 2. if not, why was testing not repeated to obtain valid criteria "as the AMA Guides indicates should be done;" 3. whether claimant should be retested to obtain valid criteria; and 4. what measurements and data were used to arrive at claimant's impairment rating. On September 17th Dr. SI responded in part as follows:

1.Section 3.3a(a)(3) of the AMA Guides requires that three measurements be done, each within plus or minus 10 percent or five degrees. In addition, Section 3.3e cites an additional effort factor for lumbar flexion and extension. "This requires that the sacral flexion plus sacral extension must be within 10 degrees of the tightest straight leg raising. You should note that the three measurements for the tightest straight leg raising must be within the five degree rule as well. Therefore, [claimant] . . . did not meet the validity criteria."

2.The testing was not repeated because the claimant met the "five degree rule" for the three measurements for straight leg raising on the right and the left. The lumbar flexion values also met the "five degree rule" in that they were 35 degrees, 35 degrees, and 33 degrees, although the second reading was 48 degrees. The extension values of 8, 4, 8, 3, and 6 also met the "five degree rule," and the sacral value was 14. Applying the "validity criteria" of Section 3.3e, 48 plus 14 is 62 degrees, which does not come within the tightest straight leg raising of 74 degrees by 10 degrees. "Therefore, the additional validity criterion is not met and lumbar flexion and extension are not counted."

3."I do not believe [claimant] should be retested to obtain valid criteria. He had an opportunity to meet valid criteria and he did meet the five percent rule,[1] but not the validity criterion. In reading Section 3.3e, there is no provision to repeat this study after the individual does come back. As noted in Section 2 on page 90, I do not believe that a suboptimal effort was made, only that he did not meet the validity criteria. Therefore, an additional evaluation is not warranted."

4.The values that were used in the impairment rating were as follows: tightest straight leg raising on the right, 80; tightest on the left, 74. Seventy-four was the tightest straight leg raising. On extension T-12 was 20, sacral was 14; on the left lateral flexion, T-12 is 23, sacral is 7; on the right lateral flexion T-12 is 21, sacral is 3. Claimant was tested throughout both lower extremities for any indication of motor sensory loss and there was no documentation of any objective finding attributable to Table 49. This panel has commented before about range of motion assessments in the context of the AMA Guides. We have stated that:

Specifically with regard to [range of motion] of the spine, the AMA Guides set forth the recommended tests and procedures and provide for calculating variability between these tests to see whether the measurements fall within reproducibility guidelines; if they do not, the test is determined to be invalid . . . [t]hus the AMA Guides contain safeguards to validate the tests and make them more reliable. Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992.

By the same token, this panel has reversed a hearing officer's order that a claimant be retested for cervical spine range of motion until valid results were obtained. Appeal No. 92494, *supra*. That decision stated that the AMA Guides do not suggest that a range of motion test within validity requirements is necessary before a doctor can make an impairment rating and that "[i]t may be that there would never be tests within the validity criteria given the doctor's opinion that there is `obvious symptom magnification.'"

By contrast, the Appeals Panel has reversed and remanded cases for further explanation from designated doctors who found range of motion tests invalid, although their underlying reports contained valid test results. Texas Workers' Compensation Commission Appeal No. 931099, decided January 11, 1994; Texas Workers'

[1]Sic; the hearing officer's Finding of Fact No. 6 also says claimant met the validity criteria referred to as the "five percent (5%) rule." Clearly the hearing officer and Dr. SI in this sentence were referring to the five degree requirement, as stated above. *See* Texas Workers' Compensation Commission Appeal No. 92494, decided October 29, 1992.

Compensation Commission Appeal No. 931085, decided January 4, 1994. In Texas Workers' Compensation Commission Appeal No. 93681, decided September 20, 1993, the designated doctor invalidated the claimant's range of motion tests because of "significant variances." As a result of a request from the Commission, the doctor repeated the range of motion studies and reported that he again found them invalid due to "minimal effort." The hearing officer accepted the zero percent impairment rating of the designated doctor, and this panel affirmed. We noted that the designated doctor's reply addressed the Commission's questions, explained his reasoning and methodology, and again certified that the correct impairment rating was zero percent. As we stated:

> The report of the designated doctor does comply with the AMA Guides and sufficiently explains the basis for the ratings. It was entitled to presumptive weight consideration under the circumstances. As we have stated in past decisions, the designated doctor occupies an important and "unique position" under the 1989 Act and only if the great weight of medical evidence is contrary to the designated doctor's report can it be discarded. (Citations omitted.)

In this case, similar to the situation in Appeal No. 93681, a Commission benefit review officer sought clarification from the designated doctor as to the methodology and reasoning underlying his invalidation of claimant's range of motion. The benefit review officer conceivably could have asked the doctor to retest the claimant but he did not do so, and there is no indication that Dr. SI would not have complied with such a request. *See* Texas Workers' Compensation Commission Appeal No. 93674, decided September 17, 1993 ("while the [AMA Guides] provide that range of motion testing may be invalid, as reported by the designated doctor, the hearing officer is not precluded from inquiring into the feasibility of re-examination `at a later date' when [range of motion] values cannot be obtained on a particular examination"). In addition, we note that Dr. SI clearly did not invalidate all range of motion tests, as his 14% impairment rating indicates. In light of the circumstances of this case, we find, as the panel did in Appeal No. 93681, that the hearing officer did not err in according presumptive weight to the impairment rating of the designated doctor. Section 408.125.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge