APPEAL NO. 94195

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on September 2, 1993, to take evidence on two disputed issues, namely, the correct date that appellant (claimant) reached maximum medical improvement (MMI) and his correct impairment rating (IR). After adjourning the hearing on September 2nd, the hearing officer, (hearing officer), thereafter communicated with the designated doctor selected by the Texas Workers' Compensation Commission (Commission) concerning certain questions she had about his report, provided her communications and the designated doctor's responses to the parties for comment, and closed the hearing record on January 20, 1994. The hearing officer determined that the designated doctor's report, as amended after the hearing, was not contrary to the great weight of the other medical evidence and thus was entitled to presumptive weight. Based on that report, the hearing officer concluded that claimant reached MMI on December 17, 1992, with an IR of 13%. In his appeal claimant challenges the 13% IR asserting that the hearing officer erred in giving it presumptive weight because the designated doctor had conceded that the portion of his IR assigned for claimant's decreased range of motion (ROM) was invalid and, thus, the IR was not determined in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Claimant asks the Commission to adopt the IR of his treating doctor or, alternatively, to remand his case for a new impairment evaluation. The respondent (carrier) filed a response urging the sufficiency of the evidence to support the hearing officer's decision.

DECISION

Affirmed.

Both parties submitted their respective positions on the issues at the hearing with documentary evidence. According to the report of (Dr. M), the designated doctor, claimant related that he injured his low back and right wrist on (date of injury), while trying to move a gate door which had become stuck. The compensability of claimant's injury was not in dispute. Claimant's medical records indicated he was initially seen at (clinic) on February 20, 1991, where he complained of pain in his hand and wrist shooting up the forearm and was assessed to have a "right wrist, crushing injury." When he returned on March 6, 1991, claimant complained of pain shooting up to his right shoulder and of some right lumbosacral pain. According to his records, claimant commenced treatment with (Dr. H) on March 19, 1991, and Dr. H diagnosed lumbar discogenic syndrome, lumbar spondylolisthesis, and carpal tunnel syndrome (CTS). Claimant's medical records indicated that an MRI revealed he had no herniated disc and that he had CTS surgery by (Dr. V) sometime in the summer of 1991, though no surgical report was in evidence.

In his Report of Medical Evaluation (TWCC-69), signed on December 17, 1992, Dr. M stated that claimant reached MMI on "12/17/92" with an IR of 29% consisting of 25% for degenerative disc disease and five percent for the right wrist. The carrier contended that

Dr. M's report was contrary to the great weight of the other medical evidence for two reasons. First, the report plainly stated that Dr. M used "the AMA Guides to Evaluation of Permanent Impairment, Third Edition revised," whereas Section 408.124 requires that the Commission base the determination of an injured employee's IR on the aforementioned AMA Guides. Second, Dr. M's report was flawed since it stated that claimant's sacral ROM consisted of five degrees of flexion and one degree of extension (totaling six degrees of sacral ROM) and that claimant's straight leg raising (SLR) was positive bilaterally at 30 degrees in the supine position. The carrier maintained that the AMA Guides provide that the SLR test is a validation test for sacral ROM and that if the SLR on the tightest side exceeds the sum of sacral flexion and extension by more than 10 degrees, the sacral ROM measurement is to be considered invalid. Thus, argued the carrier, to the extent that Dr. M's report assigned claimant a rating for abnormal lumbosacral ROM, it was invalid.

Paragraph 3.3e of the AMA Guides states that "[a] comparison of hip flexion to [SLR] on the tightest side offers a validation measure independent of reproducibility" and sets forth an additional "effort factor" to validate lumbar spine flexion by providing, in essence, that if the tightest SLR exceeds the sum of hip flexion and hip extension by more than 10 degrees, the measurement is invalid and the test must be repeated.

In Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992, the Appeals Panel discussed the assignment of IRs and ROM assessments in the context of the AMA Guides, noted that the AMA Guides address both the protocols for measurements and the evaluative processes, and stated:

Specifically with regard to ROM of the spine, the 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 . . . . Thus the AMA Guides contain safeguards to validate the tests and make them more reliable.

In Texas Workers' Compensation Commission Appeal No. 93676, decided September 17, 1993, the Appeals Panel stated that the "AMA Guides themselves contemplate the invalidation of ROM tests on certain grounds, as a safeguard to ensure the tests' reliability." *See also* Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993.

Claimant did not argue the issue of the validity of Dr. M's rating for lumbosacral ROM at the hearing. His position was that Dr. M's report was valid because it did refer to AMA Guides, albeit the "third edition revised." Claimant's alternative position was that if the hearing officer had concern about the validity of Dr. M's report insofar as lumbosacral ROM was concerned, she should adopt the report of claimant's treating doctor, Dr. H, which stated that claimant reached MMI on November 11, 1992, with an IR of 18% for his "whole person." Dr. H's report assigned claimant eight percent impairment for lumbar ROM, five percent for his lumbar spinal disorder, and six percent for right CTS which, using the Combined Values Chart, equated to an 18% whole body IR. The carrier argued against adopting Dr. H's

report because it, too, purported to assign impairment for lumbosacral ROM despite invalid measurements, i.e. the SLR on the tightest side exceeded the sum of sacral flexion and extension by more than 10 degrees.

The carrier asked the hearing officer to adopt the report of its doctor, (Dr.P). Dr. P's report stated that claimant was seen for evaluation of post-traumatic lumbosacral pain, associated right leg pain, and right wrist/hand pain, "a result of an injury at work on (date of injury), when he was pushing and pulling a heavy steel door which came off the rails." According to this report, claimant, by history, twisted the lumbosacral area and suffered CTS which had been treated surgically and has improved. Dr. P determined that claimant reached MMI on "8-12-92" with an IR of 14% for "low back and right leg pain." Dr. P did not indicate whether any of the 14% was attributable to abnormal ROM. Dr. P did report that an MRI disclosed degenerative disc disease but no herniated discs, and that claimant has residual episodic lumbosacral pain with paresthesias and S1 radicular pains. Specifically regarding ROM, Dr. P stated: "The lumbosacral [ROM] is decreased at 50 degrees in all directions." However, Dr. P's report provided no specific measurements of claimant's sacral flexion and extension or his SLR motions. Claimant contended that the hearing officer should not adopt Dr. P's report because it failed to assign any impairment for his wrist.

At the conclusion of the hearing, the hearing officer took official notice of the AMA Guides, said she had questions concerning Dr. M's report, and indicated she would send copies of her communications with Dr. M and his responses to the parties. The hearing officer wrote Dr. M on September 2, 1993, pointing out that he appeared to have used the "third edition, revised" of the AMA Guides and asking whether his IR would change using the correct version. The hearing officer further queried as to whether Dr. M's 25% IR for degenerative disc disease was for a work-related injury, and whether Dr. M had used the ROM validity criteria in Table 56 (Impairment Due to Abnormal Motion of the Lumbosacral Region--Flexion/Extension) of the AMA Guides, which specifies: "Use only if the sum of hip flexion plus hip extension angles is within 10 degrees of the [SLR] angle on the tightest side--the validity criterion." Dr. M's September 15, 1993, response stated that claimant's whole body IR of 29% consisted of five percent for an unoperated intervertebral disc and 25% for decreased lumbar spine ROM which combined to 25% impairment for his lumbar spine, using the Combined Values Chart, and five percent for claimant's right wrist injury which, using the Combined Values Chart, equated to "29% total body partial permanent impairment."

Upon receiving a copy of Dr. M's letter, the carrier responded pointing out that Dr. M's letter failed to address both whether he had used the mandated version of the AMA Guides and the problem with the lumbar spine ROM validity criteria. The carrier also asserted that Dr. H's report was flawed for the same reasons and urged the hearing officer to adopt Dr. P's report as the only rating based on the mandated AMA Guides. On October 12, 1993, the hearing officer again wrote Dr. M asking that he respond to her prior queries concerning his rating and also pointing out that her reading of the combined values chart had 24% and five percent combining to 28% and not 29%.

On November 8, 1993, Dr. M signed both an amended TWCC-69 stating that claimant reached MMI on "12/17/92" with a whole body IR of 13% and a letter to the hearing officer. (The Appeals Panel has previously said that a designated doctor can under appropriate and proper circumstances amend and correct his or her report. *See e.g*. Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992.) The hearing officer sent Dr. M's correspondence to the parties on January 6, 1994, indicating she had just that day received it from Dr. M's office. According to his amended TWCC-69 and letter, Dr. M conceded he had not initially applied the validity criteria in the AMA Guides for measuring lumbar ROM. He stated that he recalculated claimant's IR to be 13% under the "AMA Guides to Evaluation of Permanent Impairment, Third Edition" (both parties treated this statement as a reference to the AMA Guides) and that his amended IR consisted of eight percent for claimant's wrist and five percent for his spine. Upon receiving a copy of Dr. M's amended report the claimant wrote the hearing officer suggesting that since Dr. M conceded he had not used the validity criteria per Table 56 of the AMA Guides, the Commission should send claimant "for recalculation of [ROM]," and that "disability benefits should be restarted until a decision is made." In her statement of the evidence, the hearing officer addressed claimant's proposal as follows:

> However, a reading of [Dr. M's] letter indicates that he went back to CLAIMANT'S [ROM] measurements, applied the validity criteria not previously done, and determined that the [ROM] measurements were not valid. Therefore, there need be no further testing.

No subsequent hearing was convened nor did any subsequent correspondence from the parties accompany the record to the Appeals Panel. There is no appealed issue relating to the hearing officer's post-hearing procedures.

The hearing officer found, among other things, that Dr. M determined that claimant reached MMI on December 17, 1992, with a 29% IR, that Dr. M subsequently determined he had not properly applied the AMA Guides and filed an amended TWCC-69 establishing that claimant reached MMI on December 17, 1992, with a 13% IR, and that Dr. M's amended report "has presumptive weight and is not contrary to the great weight of the other medical evidence." Based on these findings, the hearing officer concluded that claimant reached MMI on December 17, 1992, with an IR of 13%.

Claimant asserts on appeal that since Dr. M determined that the portion of impairment he had previously assigned for ROM was invalid and since he recalculated claimant's IR to so reflect, Dr. M's IR "is suspect and the proper testing needs to be done to determine impairment. . . . [Dr. M's IR] is not correct and certainly incomplete." As noted, claimant did not testify at the hearing and he does not specify or point to evidence as to just how Dr. M's testing was not proper, not correct, and not complete. Claimant asks the Commission to adopt Dr. H's IR or "in the alternative a new [IR] should be given after a complete new examination."

Concerning MMI and IR, Sections 408.122(b) and 408.125(e) of the 1989 Act provide that a Commission-selected designated doctor's report is entitled to presumptive weight unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has said that the designated doctor occupies a "unique position" under the 1989 Act (Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992; Texas Workers' Compensation Commission Appeal No. 92686, decided February 3, 1993) and that it is only when the great weight of the other medical evidence is to the contrary that the designated doctor's report can be discarded. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. Further, the report of the designated doctor should not be replaced "absent a substantial basis to do so" (Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993), and we find none in this case.

Aside from Dr. M's initial failure to apply the validity criteria for lumbosacral ROM, which he corrected in his amended TWCC-69, Dr. M's reports do "not reflect that any tests were in any way improperly administered or invalidated in a manner contrary to the AMA Guides." *See* Texas Workers' Compensation Commission Appeal No. 93676, decided September 17, 1993. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. It is for the hearing officer to resolve conflicts and inconsistencies in the evidence including expert medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We are satisfied that the evidence sufficiently supports the hearing officer's findings and conclusions and that they are not so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge