

APPEAL NO. 94323

A contested case hearing was held in (city), Texas, on February 14, 1994, with (hearing officer) presiding, to consider the two disputed issues, namely, what is appellant's (claimant) correct maximum medical improvement (MMI) date and what is his correct impairment rating (IR). Finding that the great weight of the other medical evidence was not contrary to the report of the designated doctor appointed by the Texas Workers' Compensation Commission (Commission) and giving that report presumptive weight, the hearing officer concluded that claimant reached MMI on September 21, 1992, with an IR of 14%. At the hearing, claimant accepted the September 21, 1992, MMI date determined by the designated doctor selected by the Commission. In his appeal claimant states his disagreement with the 14% IR, asserting that the designated doctor's report was "partial and incomplete" for failing to assign any impairment for claimant's neck and for his range of motion (ROM). He also adverts to the designated doctor's examination lasting only 15 minutes and to his failing to use an inclinometer to measure ROM. The response filed by the respondent (carrier) asserts that the evidence is sufficient to support the hearing officer's findings and conclusions and requests affirmance.

DECISION

Affirmed.

The parties stipulated that on or about (date of injury), claimant sustained a compensable injury. According to the histories in the medical records, claimant fell about eight feet head first into a pier footing hole while positioning a form at a construction site and landed on his head. Apparently, the form material fell in on top of him hitting the lower back area. Claimant testified that he agreed with the determination of (Dr. A), the designated doctor, that he reached MMI on September 21, 1992, but disagreed with Dr. A's assignment of the 14% contending that his IR should be the 35% determined by his treating doctor, (Dr. N). Claimant testified that Dr. A's examination lasted only about 15 minutes and that he did not use an inclinometer when he had claimant bending over. Claimant acknowledged that in his answers to carrier's interrogatories before the hearing he failed to include among the reasons for his disagreement with Dr. A's 14% IR that Dr. A's examination lasted only about 15 minutes and that Dr. A did not use an inclinometer in measuring claimant's ROM. The carrier complained of this incomplete interrogatory answer asserting it left carrier in the position of not being prepared to address these allegations at the hearing. However, the carrier did not request a continuance to investigate these allegations and in closing argument advised against the hearing officer's contacting the designated doctor about the matters after the hearing, indicating it would be "a waste of time" in that there was already sufficient evidence in the record to support the designated doctor's report.

In his undated Report of Medical Evaluation (TWCC-69), Dr. N stated that his examination revealed continued restriction of cervicothoracolumbar motion with generalized axial skeletal tenderness. He assigned claimant a 35% IR comprised of "28% impairment due to loss of axial skeletal motion based on the AMA guidelines according to a C EDI 320 automatic inclinometer performed at Rehabilitation [rehabilitation center] on 11/12/91" and

"an additional 7% impairment due to the soft tissue injuries to the neck and low back based on Table 49 of the AMA Guides to the Evaluation of the [sic] permanent Impairment." See Section 408.124 which requires the Commission to use the "Guides to the Evaluation of Permanent Impairment," third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), in determining the existence and degree of an employee's permanent impairment.

The carrier requested a second opinion and (Dr. E) was appointed to examine claimant pursuant to a Request for Medical Examination Order (TWCC-22). In an unsigned report of March 8, 1992, which accompanied an unsigned, undated TWCC-69, Dr. E, based on October 11, 1991, MRI studies of claimant then age 49, stated his "impression" as degenerative disc disease at C5-6 and at L4-5 and L5-S1. Dr. E reported that claimant's neck showed a slightly limited ROM in all directions, though he said he did not use the double inclinometer method to determine actual values. Dr. E also reported that he did use that method to determine the lumbar ROM and found flexion to be 60 degrees, extension to be 10 degrees, right lateral bending to be 25 degrees, and left lateral bending to be 20 degrees. Dr. E assigned a seven percent IR which consisted of six percent impairment for the aggravation of a degenerative cervical disc and one percent for the aggravation of one of two low back degenerative discs. He apparently did not assign any impairment due to abnormal ROM of either the cervical or lumbar spine. In a letter of June 3, 1992, Dr. N said he reviewed Dr. E's IR and disagreed with his not including impairment for loss of spinal motion. (Incidentally, Dr. E backed out seven percent from the eight percent he said the AMA Guides provided for the back, saying seven percent was attributable to claimant's (year) back injury. While contribution was not a disputed issue, we observe that the Appeals Panel has had occasion to state that under Section 409.084, it is the Commission, not a doctor, which determines the extent to which any contributing compensable injury is one for which a claimant has already been compensated, and that contribution is accomplished by reducing income benefits, not the IR. See e.g. TWCC Appeal No. 93695, decided September 22, 1993; Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994.)

Dr. A's TWCC-69, signed on September 28, 1992, certified that claimant reached MMI on "9-21-92" with an IR of 14% consisting of seven percent for loss of lumbar flexion and seven percent for low back injury with intervertebral disc injury and muscle spasm for greater than six months. Dr. A's diagnosis included low back injury, intervertebral disc injury L5-S1, post-traumatic arthritis, lumbosacral spine, and degenerative disc disease C5-6. Dr. A's extensive narrative report indicated he reviewed claimant's numerous MRI studies, as well as the IR determinations of Dr. E and Dr. N including the rehabilitation center measurements. He stated that claimant's ROM of his cervical spine was normal and he found no paraspinal muscle spasm in the thoracic or cervical areas. He found claimant to have mild tenderness and minimal muscle spasm at the lumbosacral junction and stated that claimant's lumbosacral ROM was 30 degrees of true lumbar flexion, extension was 25 degrees, and right and left lateral flexion was 25 degrees in each direction.

Section 408.125(e) provides that the report of the designated doctor shall have presumptive weight and that the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. In Texas Workers' Compensation Commission Appeal No. 93411, decided July 8, 1993, a case in which the claimant asserted similar challenges to the designated doctor's report, the Appeals Panel stated that no examination time standards were imposed by the legislature on designated doctors, citing Texas Workers' Compensation Commission Appeal No. 93031, decided February 25, 1993, and that "[t]he hearing officer does not have to assign weight to medical evidence based on the quantity of the evidence or time spent by the particular doctor; on the other hand, the adequacy of the evaluation, or of treatment provided to improve the condition of the claimant, are valid points in considerations of weight and credibility." While observing that "the failure of a doctor to follow the AMA Guides can lead to a determination that the rating was invalid (see Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993)," this opinion further stated that neither party had provided any medical document or other evidence indicating that the designated doctor's report should be invalidated for failing to carry out certain ROM testing, and that the evidence attacking the credibility of the designated doctor's report "is not so strong that the absence of a finding of invalidity is against the great weight and preponderance of the evidence."

In Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993, a doctor who had examined the employee and assigned a 21% IR testified at the hearing criticizing the designated doctor's report (which assigned a five percent IR) as not being in conformance with the AMA Guides including failure to have properly performed ROM examination with the use of an inclinometer. The hearing officer determined that the designated doctor did not perform his examination in accordance with the AMA Guides and used the report of the other doctor. In reversing and remanding the case, the Appeals Panel found "error in [the hearing officer's] rejecting a designated doctor's report without any attempt to explain, clarify or discount the somewhat subjective attacks upon it." The opinion stated that "[w]e have repeatedly emphasized the special and unique status accorded the medical opinion and evaluation of a designated doctor" and cited Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, to the effect that only the great weight of the other medical evidence can outweigh the presumptive weight accorded the designated doctor and that this "is not just equally balancing the evidence or a preponderance of the evidence."

The opinion in Texas Workers' Compensation Commission Appeal No. 93039 also cited Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, where the Appeals Panel stated that it is the responsibility of the Commission to ensure that a designated doctor provides the information required under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1), and that if information is missing or unclear by the time the hearing officer evaluates the designated doctor's report, it is appropriate for the hearing officer to seek additional information. The opinion in Texas Workers' Compensation Commission Appeal No. 93039 also commented on Texas Workers' Compensation Commission Appeal No. 92611, decided December 30, 1992, in which the Appeals Panel indicated that information concerning the designated doctor's report might

be obtained to clarify "significant ambiguities," noting that that "decision did not open a designated doctor's report to unbridled attack or suggest a designated doctor's report can be rejected, absent a substantial basis to do so."

In Texas Workers' Compensation Commission Appeal No. 93483, decided July 26, 1993, another case where the employee attacked the validity of the designated doctor's report based on the employee's testimony that the designated doctor did not use a goniometer or an inclinometer in measuring ROM, the Appeals Panel determined that "the designated doctor's adherence to the [AMA] Guides in conducting a physical examination was a matter for the hearing officer to weigh in determining whether to apply the presumption set forth in Article 8308-4.25 and 4.26 [now Sections 408.122(b) and 408.125(e)] of the 1989 Act." In that case, the Appeals Panel noted that the most significant distinction between the reports of the treating doctor and the designated doctor was not the ROM but the amount of neurological deficit and stated that "we do not see 'a substantial basis' to reject the designated doctor's opinion in the testimony of claimant that certain devices were not used. (See Appeal No. 93039, *supra*.)" Compare Texas Workers' Compensation Commission Appeal No. 93286, decided May 28, 1993, where the Appeals Panel remanded for additional evidence. In that case, the treating doctor testified that he was present for the designated doctor's examination and his testimony "clearly raised a question whether [the designated doctor] failed to fully and correctly apply the specific protocol of the AMA Guides respecting the performance of an impairment evaluation to determine, with inclinometer measurements, claimant's loss of ROM, if any." The opinion stated that "[w]ith the medical evidence in this posture and the questioned validity of [the designated doctor's] report unaddressed by the hearing officer, we must reverse and remand"

In Texas Workers' Compensation Commission Appeal No. 93835, decided November 3, 1993, a case where the employee testified that the designated doctor had her stand and bend over but did not touch her or use any instruments, and the hearing officer adopted another doctor's IR, the Appeals Panel reversed and rendered a new decision that the employee's MMI date and IR were as determined by the designated doctor. In that opinion, the Appeals Panel stated: "The carrier contends that the AMA Guides require the use of an inclinometer to rate impairment, but it has not presented expert evidence to prove this as a matter of fact. Our reading of the AMA Guides, of which the hearing officer took official notice, does not indicate that we are required to hold this as a matter of law. The carrier's failure to present expert evidence on the requirement that an inclinometer must be used to yield a valid rating distinguishes this case from our decision in Texas Workers' Compensation Commission Appeal No. 93286, [*supra*]." That opinion also noted that the designated doctor had said he followed the AMA Guides and the Appeals Panel found no reason to believe otherwise.

In this case we find "no substantial basis" in the record to disturb the hearing officer's having accorded presumptive weight to the designated doctor's report and do not find merit in claimant's complaints regarding the brevity of Dr. A's examination, his alleged failure to use an inclinometer, and his failure to assign any impairment for claimant's neck. Dr. A's report indicates he had the report of Dr. N who relied on "C EDI 320 automatic inclinometer"

measurements, and the report of Dr. E who used the double inclinometer method for his lumbar spine measurements but not for the cervical spine measurements. Dr. N assigned 28% impairment for loss of "axial skeletal motion," apparently based on the rehabilitation center's November 12, 1991, measurements. The "11-12-91" rehabilitation center report in evidence, however, pertained only to the "trunk [ROM]" and stated a total lumbar ROM of 16%. Dr. E assigned no impairment for loss of ROM based on his own March 8, 1992, measurements. Dr. A assigned seven percent impairment for loss of lumbar flexion based on his measurements of September 21, 1992, and stated that claimant's "[t]otal whole person impairment is equal to 14% in accordance with the 'Guides.'" We do not find the hearing officer's determinations in this case to be against the great weight and preponderance of the evidence. 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:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge