APPEAL NO. 94328

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 February 12, 1994, with (hearing officer) presiding as hearing officer to determine claimant's date of maximum medical improvement (MMI) and impairment rating (IR). The carrier, who is the appellant in this action, appeals the hearing officer's determination that the claimant reached MMI statutorily, on August 17, 1993, with a 21% IR as found by the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). In its appeal the carrier contends the designated doctor's report is invalid in that it fails to establish that the date of MMI was based upon reasonable medical probability, and because that doctor's calculation of an IR was not reached in accordance with the provisions of the Guides for the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). In his response, the claimant basically contends that the designated doctor's opinion was entitled to presumptive weight and that the hearing officer's decision and order should be affirmed.

DECISION

We reverse the decision and order of the hearing officer and remand to allow the designated doctor to provide further information.

The claimant suffered a compensable back injury on (date of injury), while working for (employer). He originally saw (Dr. A) and was later referred to Dr. C and (Dr. G), who became his treating doctor.

He was found to have a bulging disk at the lumbosacral joint and Dr. G recommended surgery, but the claimant declined. On May 13, 1993, the claimant was certified as having reached MMI on April 16, 1993, with a five percent IR (no impairment was given for range of motion due to the fact that attempts to get claimant in to the office for measurements were unsuccessful). The Report of Medical Evaluation (Form TWCC-69) was signed by (Dr. C), Dr. G's associate, whom claimant said he had never seen. Carrier's adjuster, (Ms. B), testified at the hearing that she inquired about an illegible signature below Dr. C's on the TWCC-69 and was told by a nurse that the signature was that of Dr. G.

The claimant disputed the IR and (Dr. T) was appointed designated doctor. In a narrative dated September 7, 1993, Dr. T found claimant to have reached MMI on September 3, 1993, the date of his examination, with a 19% whole body IR (comprised of 15% due to range of motion and five percent due to the specific disorder of the spine, using the combined values chart).

On September 15th carrier's doctor, (Dr. H), reviewed the reports of Dr. C and Dr. T. Regarding the latter, Dr. H apparently had no dispute with the five percent for specific disorder. However, Dr. H took issue with Dr. T's range of motion IR, of which Dr. T had written:

The range of movement was carried out cautiously on three occasions with an inclinometer, and it was noted that the patient had only a 40 degree flexion, a 10 degree extension, and 10 degree (sic) of lateral flexion in both directions. . . . A neurological examination revealed the left Achilles reflex is somewhat diminished with the remaining reflexes equal and active. The sensation over the lower extremity also was checked and it was noted that there was some diminished sensation over the medial aspect of the shin. Also the medial aspect of the left foot. Straight leg raising could be carried out to only 40 degrees on the left and 45 degrees on the right with possible Lasegue and Kernig's on the left side.

As a result of the foregoing, Dr. T assigned four percent for limitation of flexion, five percent for limitation of extension and three percent due to limitation of lateral flexion in both directions. In his September 15th letter, however, Dr. H found Dr. T's measurements to be "suspect" because Dr. T did not give the actual three measurements of range of motion as stated in the AMA Guides, and because all his measurements were in multiples of 10 "whereas with the use of an inclinometer it is possible to measure range of motion to within a precision of [one degree]." He also pointed out that, using the combined values chart of the AMA Guides, the claimant's IR should have been 18% rather than 19%.

Following a discussion of Dr. T's report at a benefit review conference, the benefit review officer (BRO) on October 20th wrote Dr. T asking for further information as follows:

1. The BRO asked whether Dr. T was aware that Dr. C had certified MMI on April 16, 1993, and whether in Dr. T's opinion the claimant reached MMI on that date or at a later time. (The BRO noted that claimant had reached statutory MMI on August 18, 1993).

2. On September 21st Dr. T had responded by letter to a telephone call from the carrier by sending his work sheets for claimant's inclinometer measurements. The BRO noted that the measurements for lumbar extension and lumbar right and left lateral flexion were either incomplete or missing, [1] and he asked Dr. T to furnish such measurements so they could be compared with Table 56 of the AMA Guides.

3. The BRO asked Dr. T to address the issue raised by the carrier as to the range of motion measurements being in multiples of 10 degrees.

On November 8th Dr. T responded by filing a supplemental report which was prepared following a re-examination of the claimant. Dr. T attached another lumbar range

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[1] In an October 4th letter Dr. H said that based upon the work sheet, Dr. T had provided documentation only to justify a four percent IR for loss of lumbar flexion which, when added to the five percent for specific disorder, would give the claimant a nine percent IR.

of motion work sheet and stated that it had been his practice to do three to four or more tests for range of motion "and settling on the average." Upon re-examination claimant was found to have an eight degree true lumbar flexion angle, for an eight percent impairment; a 10 degree extension angle, for a five percent impairment; and lateral flexion of 15 degrees to the right and to the left, for two percent impairment in both directions. Dr. T concluded this would give a total of 17% IR due to range of motion which, combined with the five percent for specific disorder, gave a 21% whole body impairment. Dr. T also noted that the claimant was possibly stiffer on this examination due to the fact that he had traveled from A. Dr. T also continued to find that the claimant had reached MMI as of September 3rd.

Following issuance of Dr. T's supplemental report, another carrier doctor, (Dr. GR), critiqued the report as follows:

1. Dr. T recorded sacral range of motion as zero in calculating lumbar extension, lumbar right lateral flexion, and lumbar left lateral flexion; Dr. GR stated he found it "impossible to believe" that claimant was incapable of any lumbar extension or right or left lateral flexion when there is 27 degrees flexion noted in the hips.

2. With no sacral range of motion measurements, Dr. T found it "impossible" to calculate true lumbar extension angle or lumbar right and left lateral flexion angles.

3. Dr. T's total body impairment of 17 percent "has no meaning" since the sacral range of motion readings are erroneous.

4. In some instances Dr. T chooses the maximum figure in a group of measurements as is prescribed by the AMA Guides, whereas in other series he chooses a minimum figure.

5. The measurements of sacral range of motion used in calculating lumbar flexion do not pass the variability test for validity (e.g., 27 for sacral range of motion minus 15 equals 12, which is more than five degrees or 10% from the maximum or median reading).

The hearing officer found that the designated doctor's determination as amended on November 8, 1993, of a 21% IR, was not contrary to the great weight of the other medical evidence, and as such was entitled to presumptive weight. The hearing officer also found that the claimant reached MMI statutorily, on August 17, 1993.

In its appeal the carrier contends Dr. T's report is invalid, largely based upon the points raised in Dr. GR's letter. Each of these is addressed below.

Carrier contends, citing Dr. GR, that a zero percent sacral range of motion (recorded by Dr. T in evaluating lumbar extension and lumbar right and left lateral flexion, although not

in lumbar flexion) is "impossible to believe" given a 27 degree flexion noted in the hips. It also argues that in some instances Dr. T chose the maximum figure in a series of measurements, while in others he chooses a minimum or intermediate figure. (Dr. T's response was that he used the average reading.) However, without further argument, demonstrating that a specific provision of the AMA Guides was violated, we find that these alone are insufficient reasons to say that Dr. T's range of motion measurements were invalid. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 93835, decided November 3, 1993.

The carrier also contends that the sacral range of motion measurements used in calculating lumbar flexion are invalid. These measurements were given as 27, 15, and 15, and the carrier contends that the AMA Guides requires that the examiner perform at least three measurements of each range of motion and calculate the permitted variability (plus or minus 10% or five degrees) based on either the maximum or median motion values. "That is, check whether all three measurements fall within reproducibility guidelines by varying less than those amounts from either the maximum or median value." The carrier argues that "basic arithmetic" indicates a 12 degree difference between 27 and 15, and that thus the lumbar flexion values are invalid. This issue having been timely raised and preserved on appeal, we believe it is appropriate to reverse and remand to allow the hearing officer to ask the designated doctor to address the validity criteria contained on page 72 of the AMA Guides and allow him to state why, in his professional opinion, the range of motion values are valid, or, in the alternative, to invalidate such measurements if he believes such is warranted. This opinion should not be read, however, to change the weight given to the designated doctor's report. Section 408.125(e).

Finally, the carrier contends that by selecting the date of examination, September 3, 1993, as the date of MMI, Dr. T did not base his determination of MMI upon reasonable medical probability as required by the statute, Section 401.011(30)(a). The Appeals Panel has held that while there is nothing in the 1989 Act that restricts a doctor to certifying MMI only as of the date of his or her examination of the claimant, Texas Workers' Compensation Commission Appeal No. 92453, decided October 12, 1992, neither is there any provision to compel such a finding. We note that in this case the BRO asked the designated doctor to reconsider his date of MMI in light of the date chosen by the treating doctor, and that the designated doctor chose to stand by his original certification. Under these circumstances, we cannot say that the hearing officer erred in not determining that the great weight of the medical evidence indicated the earlier date. *See* Texas Workers' Compensation Commission Appeal No. 931190, decided February 8, 1994, and cases cited therein (pointing out that while a doctor can select an MMI date that is earlier than a claimant's examination, the most important consideration is that the date reflect the doctor's professional judgment based upon examination and review of the medical evidence).

The decision and order of the hearing officer are reversed and remanded to allow the designated doctor to provide further information on the validity of claimant's range of motion values, as provided herein and, if appropriate, to revise his IR. (We stress that under the circumstances of this case, the claimant need not be examined a third time.) Pending

resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge