

APPEAL NUMBER 94980  
FILED AUGUST 31, 1994

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* On June 22, 1994, a contested case hearing was held in (City), Texas, with (hearing officer) presiding. He determined that appellant (claimant) has an impairment rating (IR) of 14%, as found by the designated doctor, and that his average weekly wage (AWW) was \$426.35. Claimant asserts that the decision as to IR is against the great weight of the evidence stating that the designated doctor did not properly repeat range of motion (ROM) that was found to be invalid. Respondent (carrier) replies the designated doctor indicated that he complied with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

DECISION

Affirmed.

Claimant worked for (employer) as a salesman when on \_\_\_\_\_, he fell injuring his back while showering in a motel room. He reached statutory maximum medical improvement (MMI) on October 27, 1993. One of two issues at the hearing was claimant's AWW; the decision found AWW to be \$426.35, and this determination was not appealed. The only other issue was the amount of IR, which has been appealed.

Claimant had surgery, according to the reports of Dr. R, on behalf of the carrier, and Dr. H, the designated doctor, to the L4-5 disc on February 25, 1993. Claimant states that the surgery was done by Dr. F.

Dr. F provided a Report of Medical Evaluation (TWCC-69) (the copy of which in the record is very faint in places) which appears to state that MMI was reached on July 27, 1993, with 16% IR. The objective findings listed thereon were stated to be "restricted [ROM]." Specific body parts providing a rating over five percent were stated to be "lumbar spine 16%." No other report or narrative explains the evaluation that resulted in Dr. F's 16%.

According to claimant, Dr. W was his treating doctor, and he never officially changed treating doctors. He saw Dr. F for such an extended period that claimant thought of him as his treating doctor. Dr. W is said by the hearing officer to have given the claimant a 16% IR too, but the hearing exhibits contain no report of IR by Dr. W. Dr. S to whom claimant was referred by Dr. W, and who referred claimant to Dr. F, rated claimant as 15% impaired. Dr. S's report shows as the objective basis for the rating, "lumbar radiculopathy post excision of lumbar disc with loss of motion." For the body part breakdown, he wrote, "lumbar spine 15%."

Dr. H, as the designated doctor, concluded that claimant should get 10% for the specific disorder "surgically treated disc lesion, with residual symptoms" in the lumbar area. He added four percent for neurological deficit, totalling 14% whole body IR. Dr. H stated that he was providing no ROM rating because claimant had invalidated the testing; Dr. H cited the correct paragraph for validation of lumbar ROM in the AMA Guides in this regard. The benefit review officer wrote to Dr. H on March 3, 1994, asking for his comment about medical information either not available or generated after his examination; no question was asked about why Dr. H did not have the claimant return for re-examination of the invalidated ROM. Dr. H answered the question asked in a two page letter which called attention to the small difference in all ratings accomplished - 14% to 16%.

Claimant cites Texas Workers' Compensation Commission Appeal No. 93837, decided October 29, 1993, which commended action by a hearing officer for inquiring of a designated doctor whether a re-examination could be accomplished in regard to a claimant who had invalidated a ROM. (The re-examination took place and an amount for ROM was assigned.) We agree with the expression contained in that appeal, but it did not hold that the designated doctor had a duty to re-examine at a later date regardless of the circumstances.

More recently, Texas Workers' Compensation Commission Appeal No. 94839, decided August 11, 1994, reversed a hearing officer who found the great weight of other medical evidence was contrary to the designated doctor's opinion. That case dealt with whether ankylosis could be used to provide an amount of impairment when ROM was not validated; the AMA Guides contained some language supportive of the position of the designated doctor and some supportive of the physician who criticized the designated doctor's interpretation. The criticism was found on appeal not to constitute the great weight of medical evidence sufficient to outweigh the designated doctor.

In the case before us, we have no medical evidence attacking the designated doctor for not following the AMA Guides. Dr. F and Dr. S do provide slightly different amounts of IR in their TWCC-69's, but neither of their impairment evaluations are thorough, and Dr. F's is not specific about the basis for his rating. See Texas Workers' Compensation Commission Appeal No. 93119, decided March 29, 1993, which discussed weighing medical evidence. In addition, while the language of the AMA Guides is not clearly contradictory on the point of repeated testing, paragraph 3.3a on page 71, under General Principles of Measurement, says:

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.

This instruction allows, but does not require, that measurements be made up to six times. It does not provide for leaving part of the evaluation open for re-examination later but

concludes that the measurements are invalid "if inconsistency persists." We note that the portion of the AMA Guides relied upon by the claimant on page 72, under Principles for Calculating Impairment, after referring to an invalid ROM test says, "and re-examine at a later date." In this regard, Texas Workers' Compensation Commission Appeal No. 93382, decided June 24, 1993, stated that the Appeals Panel would not hold as a matter of law that measurements must be repeated until valid measurements can be obtained.

With no medical evidence stating that the AMA Guides require repeated ROM testing, the record contains only argument as to what the AMA Guides state as requirements. In addition, Appeal No. 93382, *supra*, pointed out in that case that no specific protocol was attacked therein, such as failing to use an inclinometer. The implication of that reference in Appeal No. 93382 was that failure to adhere to a protocol could be more substantial than the question of whether a claimant should be scheduled for re-examination when ROM is invalidated. Texas Workers' Compensation Commission Appeal No. 93483, decided July 26, 1993, stated that there should be a "substantial basis" to reject the designated doctor's opinion. While a hearing officer's request to a designated *supra* doctor to consider re-examination was justifiably commended in Appeal No. 93837, *supra*, the Appeals Panel has not found that failure to re-examine an invalidated ROM at a later date, alone, was a substantial basis for rejecting a designated doctor's opinion.

The findings of fact and conclusions of law are sufficiently supported by the evidence, and the decision and order are affirmed. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge