

APPEAL NO. 950077
FILED FEBRUARY 27, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On September 26, 1994, a hearing was held. He determined that appellant (claimant) has an impairment rating (IR) of eight percent, as found by the designated doctor, (Dr. B). Claimant asserts that Dr. B did not evaluate claimant within the Guides for the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) in that he performed too many repetitions on claimant in order to invalidate range of motion (ROM) impairment. Respondent (carrier) replies that when the hearing officer returned claimant to the designated doctor for retesting, testing complied with the AMA Guides.

DECISION

We affirm.

Claimant worked as an inspector for (employer). He reported an injury to his upper back and neck when moving commodes on _____. The only issue was the amount of IR. The parties stipulated that maximum medical improvement (MMI) had been reached on June 25, 1993, as found by claimant's treating doctor, (Dr. Ba) and agreed with by Dr. B in his report.

The argument presented is that Dr. B did more than six repetitions in measuring claimant's cervical ROM; had he stopped within six repetitions, claimant's cervical ROM would not have been invalidated. While Dr. Ba found an IR of 22%, Dr. B's IR would have been 21% had he counted the ROM rating that appears to have been valid after no more than six repetitions. Dr. Ba testified that the AMA Guides only provided for repetition beyond three if consistency standards were not met.

After hearing all the testimony, the hearing officer returned the claimant to Dr. B for another evaluation in which Dr. B clearly performed no more than six repetitions of cervical ROM and again invalidated the results. (At the second evaluation, Dr. B did not invalidate thoracic ROM for which claimant was given two percent impairment, resulting in an increase in IR from the six percent originally provided, to eight percent, the figure used by the hearing officer in his decision.)

The AMA Guides appear to call for three to six measurements of each ROM (page 72). The Appeals Panel has stated that such repetitions are permissive as to whether a total of six had to be performed when a subject did not meet validity criteria earlier. See Texas Workers' Compensation Commission Appeal No. 941299, decided November 9, 1994. Immediately after the AMA Guides provide this instruction as to the number of

repetitions, they then say that if such testing results in an invalid result, a re-examination at a later date may be accomplished. In this regard, Texas Workers' Compensation Commission Appeal No 94492, decided June 8, 1994, did not find carrier's argument, that IR should be a "snapshot" always taken at the time of MMI, to be persuasive. More importantly, the AMA Guides at page 7 provide that "clinical findings . . . should be replicable in repeated examinations." In addition, the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 94249, decided April 14, 1994, has called for retesting when the facts indicated that the claimant could not perform ROM testing at the time of evaluation.

On September 27, 1994, the hearing officer instructed the designated doctor to retest the claimant. A query to the designated doctor concerning his reason for performing more than six repetitions, prior to ordering a reevaluation, may have been sufficient to answer the question. In Texas Workers' Compensation Commission Appeal No. 94149, decided March 16, 1994, a designated doctor's report showed that measured ratings did not vary sufficiently to result in invalidation; nevertheless, ROM was invalidated; the designated doctor explained that when the claimant was "not aware his movement was being scrutinized" his ROM was greatly in excess of that measured. Had the hearing officer inquired of the designated doctor to explain why the number of repetitions had been used, the explanation, based on his medical judgment, may have been satisfactory without a re-examination.

In the case under review, the treating doctor performed an IR evaluation, which as noted above, was close to the initial one of the designated doctor in total rating had the designated doctor not invalidated ROM. However, the treating doctor's validated cervical ROM figures were only one-half the amount that the designated doctor recorded prior to invalidating. The treating doctor also added seven percent for spondylolisthesis under Part III of Table 49 of the AMA Guides, in addition to the ratings provided under Part II of the same table. Texas Workers' Compensation Commission Appeal No. 94601, decided June 28, 1994, held that such addition "stacks" impairment and is not permitted.

Despite the variance in the cervical ROM recordings entered for claimant by the treating doctor and the designated doctor, the reexamination did provide the claimant an opportunity to exhibit consistency in his testing, as he did in regard to thoracic ROM which was added to his IR.

With the treating doctor's IR defective and not available for use in place of the IR of the designated doctor, with the AMA Guides specifying that repeated examinations should be able to duplicate a former clinical finding (we infer that this refers to a finding that is valid), with past decisions showing that a ROM test may be subject to questioning after three consistent repetitions, with the number of repetitions having been held to be permissive, and with no indication that the designated doctor erred in invalidating the

cervical ROM in the reexamination, no reversible error is found in returning claimant to the designated doctor and using that doctor's subsequent examination.

The other medical evidence to be compared to the designated doctor was the report and testimony of Dr. Ba. While his opinions were not without merit, the determination that they did not reach the great weight of other medical as contrary to the designated doctor's opinion is sufficiently supported by the evidence.

Finding that the decision and order of the hearing officer found at the conclusion of his opinion is sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I dissent. I agree with the claimant that the AMA Guides provide for retesting as a method for obtaining a valid IR for ROM, not for invalidating a valid rating. Once Dr. B obtained a valid rating I believe he should have stopped testing. His failure to do so, in my view, constitutes failure to follow the AMA Guides. I think the hearing officer recognized this by sending the claimant back for retesting. The problem here is that sending the claimant back to the designated doctor for another series of ROM tests only compounds the original error made by the designated doctor. That is to say, that if it is improper to use further testing to invalidate the originally valid ROM tests, then the additional testing ordered by the hearing officer again had the designated doctor using later tests to invalidate the original, valid ROM. In my view, the proper remedy in this case would have been to contact the designated doctor and inform him that once he has validated loss of ROM he may not use subsequent ROM tests to invalidate it. I would have also informed him that unless there was a valid reason under the AMA Guides to not apply the original

ROM that he had validated, he should apply that loss of ROM in determining his impairment rating.

This would have given the designated doctor an opportunity to provide any explanation he might have not to have applied the validated ROM rating (and it is his failure to do so that in my view distinguishes the present case from our decision Appeal No. 94149 cited by the majority). If the designated doctor would not provide a valid explanation for not including the validated loss of ROM in his rating, but still insisted on invalidating it based on subsequent testing, I would have appointed a second designated doctor due to his refusal to follow the AMA Guides in determining the rating. The problem with the procedure followed by the hearing officer in the present case is that we still do not have a rating that complies with the protocols of the AMA Guides, and by ordering more testing, when it is overtesting that the claimant is complaining about, we have only compounded the original error of the designated doctor, putting the claimant in a "heads--you win; tails--I lose" situation.

Gary L. Kilgore
Appeals Judge