APPEAL NO. 990889

On March 25, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were maximum medical improvement (MMI) and impairment rating (IR). The appellant (claimant) requests reversal of the hearing officer's decision that he reached MMI on March 4, 1998, with an 11% IR and requests that we render a decision that he reached MMI on July 29, 1998, with a 22% IR as reported by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission). The respondent (carrier) requests affirmance of the hearing officer's decision.

DECISION

Affirmed.

It is undisputed that claimant sustained a lower back injury at work on _____, while lifting equipment. An MRI of claimant's lumbar spine done on January 31, 1997, showed a herniated disc at L5-S1. Claimant was examined by Dr. G, an orthopedic surgeon, at carrier's request on June 2, 1997, and Dr. G reported that claimant had not reached MMI at that time and that it would be another four months before MMI could be decided.

Dr. J, D.C., claimant's treating doctor, referred claimant to Dr. R), a neurosurgeon, and Dr. R examined claimant and reported in June 1997 that claimant complained of pain in the low back and left leg and diagnosed him as having a disc protrusion at L5-S1 with left lumbar radiculopathy. Dr. R wrote that he discussed with claimant several alternatives, including that claimant could live with his pain as best he could, that claimant could have injections, and that claimant could have further diagnostic testing to rule out nerve root compression. Dr. R wrote that claimant would think over his alternatives.

Dr. G reexamined claimant at carrier's request on March 4, 1998, and certified in a Report of Medical Evaluation (TWCC-69) dated March 11, 1998, that claimant reached MMI on March 4, 1998, with an 11% IR. With regard to MMI, Dr. G noted that claimant complained of constant low back pain, that claimant indicated that he had not improved in the last four to six months, and that epidural steroid injections had failed to make any significant improvement. Section 408.124(b) provides that the Commission shall use the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the AMA Guides) for determining the existence and degree of an employee's impairment. Dr. G noted that he used the AMA Guides in assigning the 11% IR. Dr. G assigned impairment of five percent for a specific disorder of the lumbar spine under Table 49 and six percent for loss of lumbar lateral flexion range of motion (ROM), three percent on the right and three percent on the left. Dr. G noted that flexion and extension ROM was invalid under the straight leg raising (SLR) test and thus did not assign any impairment for flexion and extension ROM, but, as

noted, did assign impairment for lateral flexion ROM. A review of ROM measurements attached to Dr. G's report reflects that claimant did not meet the SLR test.

Dr. R examined claimant again on March 9, 1998, and noted that physical therapy had helped claimant, that three lumbar epidural steroid injections had not helped him, that he continued to see Dr. J for conservative treatment, that he remained overweight, that he was not on medications, and that he complained of increased pain in the low back, hips, and legs. Dr. R also noted that claimant had signs of lumbar facet irritation and was thus scheduled for lumbar facet injections in April 1998, that he was again advised to lose weight, that he was to continue care with Dr. J, and that a very sedentary job could be considered if one were available. Dr. R saw claimant again on May 15, 1998, and reported that claimant continued to complain of pain in his back and left leg and was admitted to a hospital in May 1998 for lumbar facet injections.

The parties stipulated that Dr. B, D.C., was chosen by the Commission as the designated doctor. Dr. B examined claimant on July 29, 1998, and in a TWCC-69 dated July 31, 1998, certified that claimant reached MMI on July 29, 1998, with a 22% IR. Dr. J indicated her agreement with Dr. B's certification of MMI and IR. Claimant said that Dr. R has recommended that he have surgery but that Dr. R said he needs to lose weight first. Claimant said that he is going to have to consider having surgery because he is getting worse. Dr. B noted in the history section of his report that surgery had not been recommended because of claimant's weight, that claimant is attempting to lose weight, but that claimant had had a weight increase since the beginning of his attempted weight loss program. Dr. B wrote that under the AMA Guides claimant has a 22% IR, consisting of impairment of five percent for a specific disorder of the lumbar spine under Table 49 and 18% for loss of lumbar ROM. Under the Combined Values Chart 18% and five percent combine for 22%. With regard to ROM, Dr. B assigned impairment of seven percent for loss of lumbar flexion, five percent for loss of lumbar extension, and six percent for loss of lateral flexion, three percent on the right and three percent on the left.

Dr. S reviewed claimant's medical reports, including the reports of Dr. B and Dr. G, at carrier's request, but did not examine claimant. Dr. S reported that Dr. B's IR should not be considered accurate and gave several reasons for his opinion, including that according to Dr. B's measurements, claimant did not meet the SLR test. Dr. S also wrote that a fair and reasonable IR would be 11% as assigned by Dr. G.

Dr. B responded to Dr. S's report, stating, among other things, that since Dr. S had not examined claimant, it would be impossible for him to have a valid opinion and that Figure 83c, page 77, of the AMA Guides states that the SLR value must not exceed the sacral ROM value by 10 degrees and that in this case 20 degrees (SLR) did not exceed the sacral ROM of 40 degrees. Dr. B stated that he stands by his findings.

Dr. S testified at the CCH that he is on the Commission designated doctor list (as apparently is Dr. B), that he does IRs for the Commission and for carriers, that he did not examine claimant but did a "peer review," and that the measurements taken by Dr. B did

not meet the SLR test and thus the flexion and extension values should not be used. He also testified that Dr. G's 11% IR is a valid certification of IR.

With regard to the MMI issue, MMI is defined in Section 401.011(30). Section 408.122(c) provides in part that the report of the designated doctor has presumptive weight and the Commission shall base its determination of whether the employee has reached MMI on the report unless the great weight of the other medical evidence is to the contrary. While claimant appeals the hearing officer's finding that Dr. B's finding of an MMI date of July 29, 1998, is contrary to the great weight of the medical evidence and that Dr. G made a valid certification that claimant reached MMI on March 4, 1998, and also appeals the hearing officer's decision that claimant reached MMI on March 4, 1998, claimant's arguments on appeal are focused on the IR issue. It is not disputed that claimant has reached MMI. Whether the great weight of the medical evidence is contrary to Dr. B's certification of a July 29, 1998, MMI date was essentially a fact question for the hearing officer to determine from the evidence presented. The hearing officer could consider indications in medical reports that claimant has not been improving for some time and Dr. G's report of an earlier MMI date of March 4, 1998. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). We conclude that the hearing officer's decision on the MMI issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the IR issue, impairment and IR are defined in Sections 401.011(23) and (24). Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Claimant appeals the hearing officer's findings that Dr. B's ROM findings are not in accordance with the AMA Guides, that Dr. B's finding of a 22% IR is contrary to the great weight of the medical evidence, and that Dr. G made a valid certification that the claimant has an 11% IR, and claimant also appeals the hearing officer's decision that he has an 11% IR.

Table 56 of the AMA Guides is for impairment due to abnormal motion of the lumbosacral region - flexion/extension, and it states "(*Use only if the sum of hip flexion plus hip extension angles is within 10E of the straight leg raising angle on tightest side - the validity criterion*)." According to Dr. B, the sum of hip flexion plus hip extension angles was 40 degrees and the SLR angle on the tightest side was 20 degrees. Claimant points out that paragraph 3.3e on page 89 of the AMA Guides provides that the test is invalid and must be repeated if the following criterion is not met: Tightest SLR - (hip flexion plus hip extension is less than or equal to 10 degrees; that page 91 of the AMA Guides provides that if the SLR exceeds total sacral (hip) motion by more than 10 degrees the test is invalid and should be repeated; and that Figure 83c on page 77 of the AMA Guides states that if

the tightest SLR ROM exceeds the sum of sacral flexion and extension by more than 10%, lumbar ROM test is invalid (in Texas Workers' Compensation Commission Appeal No. 94131, decided March 16, 1994, the Appeals Panel noted that the reference to 10% in Figure 83c was inconsistent with the written text of the AMA Guides and that the comparison factor should be 10 degrees). The claimant contends that since 20 degrees does not exceed 40 degrees by more than 10 degrees and that since 20 degrees minus 40 degrees is less than or equal to 10 degrees, the ROM testing conducted by Dr. B is valid. Claimant states that the plain meaning of "exceeds" is "to go or be beyond the limit of, surpass."

In Texas Workers' Compensation Commission Appeal No. 94056, decided February 24, 1994, the Appeals Panel considered the provisions of the AMA Guides cited by claimant along with the instruction contained in Table 56. In that case, a carrier contended that a claimant's ROM impairment as found by a designated doctor was invalid because the sum of hip flexion and hip extension was 60 degrees and the SLR angle on the tightest side was 49 degrees, resulting in a difference of 11 degrees, but the hearing officer held that the ROM testing was valid because the tightest SLR (49 degrees) did not exceed the sum of sacral flexion and extension (60 degrees) by 10 degrees and accepted the designated doctor's IR. The Appeals Panel reversed the hearing officer's decision and held that under the AMA Guides lumbar ROM measurements are valid if the sum of hip flexion and extension is within 10 degrees of the tightest SLR angle and that the measurements are invalid if those two measurements are not within 10 degrees of each other. In Texas Workers' Compensation Commission Appeal No. 962163, decided December 13, 1996, the Appeals Panel noted that it had previously held that, with regard to the SLR test on page 91 of the AMA Guides, the word "exceeds" does not only mean "greater than," but refers to more than a 10-degree variation. Appeal No. 94056, *supra*, is dispositive of claimant's contention concerning whether he met the SLR test.

Since the sum of hip flexion and hip extension (40 degrees) was not within 10 degrees of the SLR angle on the tightest side (20 degrees) claimant did not meet the SLR validity criteria and thus Dr. B erred in assigning 12% impairment for loss of lumbar flexion and extension ROM (in Texas Workers' Compensation Commission Appeal No. 950472, decided May 8, 1995, the Appeals Panel held that failure to meet the SLR validity criteria does not invalidate lumbar lateral flexion measurements under the AMA Guides). We conclude that the hearing officer's finding that Dr. B's ROM findings were not in accordance with the AMA Guides and the hearing officer's finding that the 22% IR assigned by Dr. B is contrary to the great weight of the medical evidence are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. We also conclude that the hearing officer's finding that Dr. G made a valid certification that claimant has an 11% IR and his decision that claimant has an 11% IR are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. We note that without the invalid 12% IR for flexion and extension ROM, the IR assigned by Dr. B would also have been 11%.

Claimant contends in the alternative that he be sent back to Dr. B for a reexamination to confirm the IR previously assessed by Dr. B. This case does not involve a failure to meet consistency validity criteria in ROM measurements, which could result in retesting; rather it involves a failure to meet the SLR test and Dr. B's report reflects that three measurements of each motion, including SLR on each side, were taken. Claimant has not shown a basis for reexamination by the designated doctor.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge