APPEAL NO. 991969

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 12, 1999. The single issue concerned the correct impairment rating (IR) of the respondent (claimant), which the hearing officer found to be 15% as certified by a designated doctor. The appellant (carrier) appeals, urging that the report of the designated doctor did not comply with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and that the designated doctor's IR was contrary to the great weight of the other medical evidence. The claimant urges that the designated doctor's report is entitled to presumptive weight as was accorded by the hearing officer and that his decision should be affirmed.

DECISION

Reversed and remanded.

It is only on the very rare occasion that a report of a designated doctor is not accepted and the appointment of a second designated doctor is necessary to establish an IR that conforms to the requirements and guidance of the AMA Guides. Texas Workers' Compensation Commission Appeal No. 941635, decided January 23, 1995. We find such circumstances in this case and accordingly find it necessary that another designated doctor be selected to evaluate the claimant.

The claimant sustained a compensable back injury, a herniated nucleus pulposus at L5-S1 with compression of the left S1 nerve root, from a slip-and-fall incident on December 22, 1997. Claimant initially treated with a chiropractor. He reached maximum medical improvement on August 28, 1998. The claimant has not had any surgery and has undergone conservative treatment. A carrier's medical doctor examined claimant in April 1998 and determined claimant had a zero percent IR, not finding six months of documented pain at the time and invalidating range of motion (ROM) measurements. Dr. C, a chiropractor, was selected as a designated doctor and examined and evaluated the claimant and issued a Report of Medical Evaluation (TWCC-69) dated August 12, 1998, with an IR of 15%. This rating consisted of seven percent for a specific disorder under Table 49 of the AMA Guides and nine percent for decreased ROM of the lumbar spine for a 15% whole person impairment under the combined values chart. The seven percent IR for the specific disorder was agreed and not in dispute. However, according to the documentation attached to Dr. C's report regarding lumbar ROM, in all areas of measurement, flexion, extension, both lateral flexions, and straight leg raise, he took measurements in all areas three different times and his numbers reflect that the measurement numbers were identical in all instances in all areas. That is, lumbar flexion shown over the three separate measurements, 80, 80, 80, and 30, 30, 30, and 50, 50, 50,

lumbar extension showed 20, 20, 20, and 5, 5, 5, and 15, 15, 15, and so on through all the measured areas. The carrier also introduced a video taken prior to the report of the designated doctor showing, among other things, the claimant carrying objects up some outside stairs and on several occasions jumping up the steps two at a time without any problem. He was also shown under a hood apparently repairing a vehicle.

The carrier submitted a review by Dr. S, who stated her uncontested qualifications; that she was a Texas Workers' Compensation Commission (Commission) designated doctor on many occasions; that she had done well over a thousand ROM tests in her practice; that she had reviewed the records concerning claimant's IR and the video; and that she was of the opinion that it was very highly improbable, if not impossible or statistically nil, for the measurements to be identical over three different testing attempts in the various areas measured for ROM. She stated she had never experienced any occasion where numbers over three tests in all areas were identical and she did not feel they were in accord with the requirements of the AMA Guides. She stated that the straight leg raise measurement by Dr. C was inconsistent with claimant's activity on the video, particularly jumping steps two at a time.

The benefit review officer (BRO) wrote to Dr. C on September 10, 1998, sent a copy of the video and asked for Dr. C to review the video as related to his rating. No response was received and in a letter dated October 29, 1998, the BRO wrote another letter referencing his first letter and sending a copy of Dr. S's review and disagreement with the rating and methods used by Dr. C. Apparently Dr. C chose not to respond to this letter until February 2, 1999, as another letter was sent by the BRO on February 3, 1999. On February 2, 1999, Dr. C responded to the letter concerning the video by saying it did not change his opinion, without elaboration or explanation for the activity. After yet another letter from the BRO, Dr. C, in a letter dated April 27, 1999, responded to Dr. S's report indicating he used an inclinometer and that "as far as the values offered, the data is what it is." He opined that Dr. S had a job to do for the carriers, that her questions were valid but without merit, and that he did not feel inclined to change any portion of his rating.

It goes without saying that the multiple identical ROM measurements over three separate testings without a rationalized explanation do not tend to inspire great confidence in a report of any doctor. Further, the extremely prolonged response time from the designated doctor, as well as the brief statements in his response to the legitimate matter raised, does not lend credibility to the designated doctor program, a very critical program under the 1989 Act. *See, generally*, Texas Workers' Compensation Commission Appeal No. 93105, decided March 26, 1993; Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993. Where, as here, there is an unexplained and great probability that measurements stated were not correct and not in compliance with the requirements of the 1989 Act, we conclude that that rare situation has been shown here by the medical evidence and factual circumstances surrounding the ROM measurement that the appointment of a second designated doctor is the most reasonable course of action to take to maintain the confidence in the rating system. In sum, the great weight of the medical evidence is contrary to the report of the designated doctor and the situation here

casts sufficient doubt on the IR rendered that corrective action is virtually mandated. The hearing officer does not address any of these discrepancies in his finding but only summarizes the evidence without any elaboration regarding the obvious inconsistencies pointed out above. Thus, we hold that the hearing officer's decision and order is 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, 176 (Tex. 1986). Accordingly, we reverse the decision and order of the hearing officer and return the case for the appointment of another designated doctor.

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.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Alan C. Ernst
Appeals Judge