APPEAL NO. 000134

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 991702, decided September 24, 1999, the Appeals Panel reversed the decision of the hearing officer, which found that the great weight of the other medical evidence on the issue of impairment rating (IR) was contrary to the report of the designated doctor, and remanded this issue for reconsideration of the left knee only component of the IR. The hearing officer made further inquires of the designated doctor and a hearing on remand was held on December 14, 1999. Thereafter, the hearing officer, found that the designated doctor's amended report in response to his inquiries was entitled to presumptive weight and not contrary to the great weight of the other medical evidence. In his amended report, Dr. A, the designated doctor, assigned a 16% IR, which was the same IR assigned by Dr. M, D.C., the treating doctor, and which the hearing officer adopted in his first decision and order. The appellant (carrier) appeals this determination, contending that the second IR of Dr. A was obtained through a "distorted procedure" and there was no reason to seek clarification. The appeals file contains no response from the claimant.

DECISION

Affirmed.

As noted in Appeal No. 991702, Dr. A's left knee diagnoses included a torn meniscus, arthritis/chondromalacia, and anterior cruciate ligament loss. He did not perform a range of motion (ROM) examination of the left knee because he believed, pursuant to Table 36 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), that an IR for ROM cannot be added when there is a chondromalacia diagnosis. We further stated in Appeal No. 991702 that Table 36 of the AMA Guides does not expressly approve or disapprove of assigning an IR component for loss of ROM when at least one of several diagnoses authorizes such an additive, even though another diagnosis does not. Under the circumstances of a lack of a reasonably clear explanation from Dr. A about why he did not include an ROM component in the claimant's IR, we remanded the case "for yet another inquiry of Dr. A about whether he performed a knee ROM examination and to insure that he was aware he could add, if medically indicated, knee ROM, even if one of the diagnoses is chondromalacia." In response to this remand, the hearing officer wrote Dr. A a letter in which he quoted pertinent portions of our decision and asked if he believed ROM measurements were needed to properly assign an IR in this case. The carrier was sent a copy and objected to this letter on the grounds that it failed to point out that the Appeals Panel reversed the hearing officer's finding that the great weight of the other medical evidence was contrary to Dr. A's initial report and was not a direct reversal of Dr. A's 13% IR. Under these circumstances, the carrier argued, Dr. A may have felt "prompted" to recalculate and add an ROM component to his prior knee IR. Dr. A reexamined the claimant and, in an amended Report of Medical Evaluation (TWCC-69), assigned a 16% IR which included an ROM component. The hearing officer then found that this amended report was entitled to statutory presumptive weight under Section 408.125(e) and determined that the claimant's correct IR was 16%.

Both at the hearing and again on appeal, the carrier asserts that the procedure followed by the Texas Workers' Compensation Commission (Commission) which resulted in the amended TWCC-69 was "seriously flawed" essentially for these three reasons: (1) never before had the Appeals Panel inserted itself to this degree into the way a designated doctor exercised discretion in assigning an IR; (2) improper duplication of the ROM process occurs when adding ROM under the circumstances of this case; and (3) the letter sent to Dr. A created a misimpression that he was required to include an ROM component in this IR.

We address the second point first. The carrier argues that certain specific disorders under Table 36 of the AMA Guides include a loss of ROM and that no separate IR for a loss of ROM may be added even when other specific disorders are found that do not preclude a further ROM additive. In several cases the Appeals Panel has affirmed a hearing officer's determination, based on a designated doctor's report, that the correct IR in cases involving specific disorders of the knee which did and did not authorize and separate ROM component included an ROM component. *See* Texas Workers' Compensation Commission Appeal No. 970105, decided February 26, 1997 (Unpublished); Texas Workers' Compensation Commission Appeal No. 961847, decided November 1, 1996 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 961826, decided October 30, 1996. In Appeal No. 970105, *supra*, we further noted that the record did not establish that ROM was "fully accounted for" in those situations where some specific disorders do and some do not allow an additional IR for ROM. Other cases, including some specifically relied on by the carrier, affirmed a hearing officer's determination not to award an additional IR for loss of ROM. *See* Texas Workers' Compensation Commission Appeal No. 941061, decided September 21, 1994; and Texas Workers' Compensation Commission Appeal No. 960940, decided July 1, 1996. These cases, we believe, stand for the proposition that it is ultimately within the discretion of the designated doctor to consider whether or not to include an ROM factor in the IR in circumstances of multiple specific disorders of the knee and that the report of the designated doctor will be accepted unless the great weight of the other medical evidence is to the contrary. Thus, we cannot agree with the abstract proposition of the carrier that an ROM additive is never appropriate when there are multiple diagnoses some of which do and some do not permit a further consideration of ROM under Table 36 of the AMA Guides.

This leads to a consideration of the first point raised by the carrier on appeal, that is, that the Appeals Panel unfairly inserted itself into the business of the designated doctor. To the extent that it is implied by the carrier, we reject any notion that a designated doctor with discretion under the AMA Guides to arrive at an IR in more than one way should be left alone to do this even if he or she appears to be unaware of the alternative means of assigning an IR. Indeed, in the majority of cases reviewed, we believe the alternative approaches to assigning a knee IR were known by or explained to the designated doctor. Thus, it could not be said in these cases that the designated doctor assigned the IR with no awareness of the alternatives. In other cases where the designated doctor declined to add ROM to the IR, the designated doctor provided sufficient explanation for his decision. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 960579, decided April 29,

1996 (Unpublished), where the designated doctor found no loss of ROM, and Texas Workers' Compensation Commission Appeal No. 941061, decided September 21, 1994, where the designated doctor did not consider it appropriate to add ROM where there was a total hip replacement. In the case we now consider, there was extensive communication between the designated doctor and the Commission in the form of four letters over many months. When, as here, there is an ambiguity in AMA Guides and it is not clear that the designated doctor has addressed it and explained why he gave the rating he did, it is appropriate to seek clarification and that would include addressing the question to the designated doctor about a double rating where ROM is given.

Finally, the carrier argues that the wording of the hearing officer's letter to Dr. A in response to our remand decision unfairly prejudiced him for the reasons stated above. The letter advised Dr. A that the Appeals Panel reversed the "matter" of the IR and it was being returned to him for further evaluation. There followed an extensive quote from Appeal No. 991702, *supra*. The carrier would have required that the hearing officer's letter advise Dr. A that what really happened was that the Appeals Panel reversed a decision wherein the hearing officer found the great weight of the other medical evidence contrary to the report of the designated doctor; that Dr. A should have been told that he had "complete discretion to interpret [Table 36 of the AMA Guides] as he saw fit"; and that Dr. A should have been given a complete copy of our decision. We believe that the portion of our decision sent to Dr. A was reasonably complete with regard to the issue before him, that is, the knee portion of the claimant's IR. That portion clearly set out the options available to him in rating the knee and that the IR he assigned was essentially a medical determination. We do not construe this letter as divesting Dr. A of his independent medical judgement in this matter or otherwise misleading him or directing him toward a particular result. The first paragraph of Dr. A's report (presumably the transmittal letter) simply said that the IR was returned for "further evaluation." This is consistent with our remand, which indicated that ROM should be tested if it had not already been done or if otherwise medically indicated.

Finding no merit in the carrier's appeal, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge