

APPEAL NO. 000560

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 March 2, 2000. The issue at the hearing was the appellant-s (claimant) impairment rating (IR). The hearing officer determined that the claimant-s IR was nine percent as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In her appeal, the claimant argues that the hearing officer erred in giving presumptive weight to the designated doctor's IR because the designated doctor failed to properly apply the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) in calculating her IR. In its response, the respondent (carrier) urges affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. J is the designated doctor appointed by the Commission; and that the claimant reached maximum medical improvement (MMI) on July 21, 1999. In a Report of Medical Evaluation (TWCC-69) dated July 26, 1999, Dr. S, the claimant's initial treating doctor, certified that she reached MMI on July 21, 1999, with an IR of 16% for loss of range of motion (ROM) in the cervical spine. In the narrative report accompanying his TWCC-69, Dr. S noted that the claimant's cervical MRI had revealed "no significant abnormalities." Shortly thereafter, the claimant changed treating doctors to Dr. M. Dr. S's certification was disputed and Dr. J was appointed by the Commission to serve as the designated doctor. On August 26, 1999, Dr. J examined the claimant. In a TWCC-69 dated August 28, 1999, Dr. J certified that the claimant reached MMI on July 21, 1999, as Dr. S had certified, and assigned a nine percent IR for loss of cervical ROM. In a letter dated September 1, 1999, Dr. M provided a critique of the designated doctor's IR. Dr. S maintained that Dr. J should have assigned a four percent rating under Table 49 for a specific disorder of the cervical spine and that Dr. J should have assigned a two percent rating for right rotation ROM under Table 53 rather than the one percent he assigned. Dr. M concluded that the designated doctor's rating should have been 14% rather than nine percent. The Commission sent a letter of clarification to the designated doctor, asking him to consider the points raised by Dr. M and to determine their effect, if any, on his certification. On November 16, 1999, Dr. J responded that he stood by his one percent rating under Table 53 for loss of right rotation ROM. In addition, Dr. J maintained that the claimant was not entitled to a rating under Table 49 for a specific disorder of the cervical spine.

The claimant testified at the hearing that the therapist who conducted her ROM testing for Dr. J moved her head himself rather than asking her to move her head on her own as the therapist, who performed the ROM testing for Dr. S, had done. The claimant argued that because the therapist performed the movements for her, the rating assigned did not accurately

reflect her cervical ROM deficits. In addition, she stated that the therapist's movement of her head caused severe pain in her neck such that she felt worse after the designated doctor examination than she had felt immediately after the injury. Ms. M, a friend of the claimant, testified that she accompanied the claimant to the designated doctor examination. Ms. M confirmed that the therapist moved the claimant's head during the ROM testing and that the claimant did not move her head on her own. Ms. M also testified that the claimant was in intense pain after the examination.

In her appeal, the claimant initially argues that Dr. J's rating was not calculated in accordance with the AMA Guides because the therapist who conducted the cervical ROM testing assisted her in moving her head. In this case, as in Texas Workers' Compensation Commission Appeal No. 951227, decided September 6, 1995, and Texas Workers' Compensation Commission Appeal No. 950884, decided July 17, 1995, where we considered the same argument, the claimant did not present any medical evidence to show that such assistance is contrary to the AMA Guides. In Appeal Nos. 951227 and 950884, we determined that in the absence of such evidence, there is no basis for determining that the ROM testing was improperly conducted; thus, we reject the argument that Dr. J's IR was not calculated in accordance with the AMA Guides.

The claimant also asserts that Dr. J's certification is not entitled to presumptive weight because of the "mistakes" identified in Dr. M's letter. Initially, Dr. M contended that Dr. J should have assigned a four percent rating under Table 49 for a specific disorder of the cervical spine. The Commission asked Dr. R to review Dr. M's critique of his IR and to consider its effect, if any, on his certification. In his response, Dr. J stood by his determination that the claimant was not entitled to a rating under Table 49. Dr. M's contrary opinion that such a rating should have been assigned represents a difference of medical opinion as to whether the claimant is or is not entitled to a rating for that component of a cervical spine IR. Dr. M's opinion does not rise to the level of the great weight of the other medical evidence contrary to Dr. J's report. By giving presumptive weight to the designated doctor's report under Sections 408.122(c) and 408.125(e), the legislature has established a procedure where the designated doctor's resolution of such a difference is to be accepted. Accordingly, the hearing officer did not err in determining that Dr. J's decision not to award a rating under Table 49 did not provide a basis for rejecting his certification.

Finally, we consider the assertion that Dr. J erred in awarding a one percent rating for cervical right rotation ROM. Dr. M stated that Dr. J should have assigned a two percent rating in accordance with Table 53 because the claimant's measured angle was 57E rather than 60E, which is the figure that corresponds to a one percent rating in Table 53. When he responded to the clarification request, Dr. J essentially noted that the claimant's 57E right rotation measurement was closer to 60E than 40E; thus, he rounded up and assigned a one percent rating rather than two percent. We have previously determined that the ROM charts for the spine do not provide for rounding. Texas Workers' Compensation Commission Appeal No. 980894, decided June 17, 1998; Texas Workers' Compensation Commission Appeal No.

982038, decided October 1, 1998; Texas Workers' Compensation Commission Appeal No. 992223, decided November 15, 1999; Texas Workers' Compensation Commission Appeal No. 992482, decided December 16, 1999 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 992694, decided January 18, 2000. As such, we agree that Dr. J improperly assigned the one percent rating. In this instance, the claimant's cervical right rotation measurement was 57E and under the guidance of the cases cited above, she was entitled to a two percent rating under Table 53 because she was not able to obtain the 60E measurement that corresponds to that rating and as such, she has lost a larger degree of motion than was reflected in the right rotation rating assigned by Dr. J. In Appeal Nos. 992233 and 992694, *supra*, the hearing officers used the designated doctor's measurements and referred to the ROM tables to determine the IR that corresponded to the measured angles. The Appeals Panel affirmed the action of recalculating the IR using the figures contained in the designated doctor's report. Similarly, in Texas Workers' Compensation Commission Appeal No. 980805, decided June 8, 1998, the Appeals Panel used the designated doctor's figures and added two percent for loss of lumbar lateral flexion ROM based upon the interpretation that the straight leg raise invalidated flexion and extension ROM but not right and left lateral flexion ROM as the designated doctor had determined. In this instance, Dr. J rounded the claimant's measured cervical right rotation angle of 57E to 60E and assigned a one percent rating. Under our reading of the AMA Guides, he was not permitted to do so. Rather, he should have assigned a two percent rating under Table 53 for right rotation. Accordingly, we reverse the determination that the claimant's IR is nine percent and render a new decision that the claimant's IR is 10%, which is comprised of two percent for flexion, two percent for extension, one percent for left lateral flexion, one percent for right lateral flexion, two percent for left rotation and two percent for right rotation.

The hearing officer's decision that the claimant's IR is nine percent is reversed and a new decision is rendered that the claimant's IR is 10%. Accrued and unpaid impairment income benefits should be paid in a lump sum with interest.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge