

APPEAL NO. 000873

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 22, 2000. The hearing officer determined that the determination of the designated doctor is entitled to presumptive weight; and that the appellant (claimant) reached maximum medical improvement on April 27, 1999, with a 13% impairment rating (IR). In so doing, the hearing officer appeared to have accepted the interpretation 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 the designated doctor made for the cervical range of motion (ROM) tables.

The claimant has appealed and points out that the interpretation of the ROM tables of the AMA Guides that the designated doctor and hearing officer have adopted was expressly rejected by the Appeals Panel. The claimant also questions why there were two sets of ROM for both cervical and lumbar regions, when the first set of three for each met validity criteria. The claimant argues that the hearing officer falsified the date of the CCH in her decision. The respondent (carrier) has responded that the hearing officer has "discretion" to adopt a "rounding up" interpretation of the AMA Guides.

DECISION

We reverse the determination of the hearing officer, finding that the designated doctor's report is not in accordance with the AMA Guides with respect to computation of cervical IR, and remand so that the tables of the cervical ROM may be applied consistent with the applicable Appeals Panel decision discussed herein.

The claimant injured his back and neck on _____. He had lumbar surgery on June 2, 1998. His treating doctor is Dr. C, who also testified at the CCH. Dr. C performed an IR evaluation on the claimant which certified he had a 15% IR. Dr. C's IR consisted of 12% for specific conditions from Table 49 of the AMA Guides, one percent ROM for the lumbar region, and two percent IR for the cervical region. The cervical extension ROM deficit resulted in the entire two percent for that area. A designated doctor, Dr. P, was appointed and assigned a 13% IR for the claimant. This consisted of 11% for the lumbar region (none of which was for ROM) and two percent cervical flexion IR. Comparing the cervical ROM measurements of Dr. C to Dr. P shows that the lateral ROM figures were generally consistent, but they reached almost opposite results with respect to flexion and extension.

Dr. P expressed most of the cervical ROM figures as zero percent. His several explanatory letters indicate that he used Tables 51-53 and considered the figures set out therein as essentially "ranges" of degrees by which an IR was derived. For example, his observed maximum cervical extension angle was 69E, which he stated yielded an IR of zero percent. However, Table 51 shows that the zero percent IR is attributable to a 75E or greater angle. (Dr. P was not consistent—we note that the maximum observed flexion angle

was 44E, which Dr. P stated amounted to a two percent IR, although that is above the 40E shown on the chart opposite the two percent figure.)

Dr. P's underlying figures also showed two pages of ROM trials for each region. For the cervical region, he used the second page of ROM measurements for his maximum angles. The same is true of the lumbar angles.

The hearing officer quoted from one of Dr. P's answers to a letter of clarification that the claimant requested. Essentially, Dr. P concluded he could "round" the cervical ROM figures to a high category based upon the fact that rounding authority was specifically given for upper extremity ROM calculations and implied for lumbar area. Dr. C testified that Dr. P had been furnished the copy of the pertinent Appeals Panel decision which constitutes the interpretation of the AMA Guides to be used by the Texas Workers' Compensation Commission (Commission), but that Dr. P made no comment on this in his decision. Dr. C said that according to Dr. P's figures, the claimant's IR should have been 16% (11% combined with 6% adjusted ROM figures).

First of all, we do not agree that the double sets of measurements were "picked and chosen" from to yield the smaller impairment. In fact, the claimant did not point to where the IR was lower as a result. While we agree the need for duplicating measurements is not clear, when three measurements have been done which are within reproducibility guidelines, the figures used by Dr. P do not appear to have been those from the second measurements which would yield a lower IR.

However, we agree that the ROM has not been properly calculated in accordance with the appropriate tables of the AMA Guides relating to cervical ROM. This goes beyond a simple medical difference of opinion because the Commission has articulated its position on this matter.

In Texas Workers' Compensation Commission Appeal No. 980894, decided June 17, 1998, the Appeals Panel expressly considered the application of tables relating to cervical ROM (Tables 51-53). We held that these tables did not express ranges of degrees to achieve a certain level of impairment; rather, in order to merit the cited degree of impairment, the movement had to achieve at least the stated degree. For example, in Table 52 (looking at right lateral flexion for example), the examined worker had to be able to move 45%, with no lost degrees, in order to be assigned zero degrees impairment. If the measured degree were 35%, the examined worker would still merit a one percent IR (although in excess of the 30E) because he would still have a 10% loss of motion. As stated in the Appeals Panel decision, a given IR can be assigned if, and only if, the examined worker is able to obtain the angle that corresponds to that rating. We specifically held that "rounding up" to the next higher angle on the chart could not be done given the structure of the ROM charts for spinal ROM impairment. This decision overruled contrary decisions that may have been issued earlier.

By contrast, Dr. P has expressly stated his conclusion, although no express instruction to round up is given in the spinal ROM charts, that it is permissible because

other parts of the AMA Guides refer to a rounding up practice. This is exactly contrary to what Appeal No. 980894 states as the interpretation of the AMA Guides that the agency will use.

Consequently, the hearing officer erred by according presumptive weight to Dr. P's 13% IR report and his interpretation of the AMA Guides. We therefore reverse and remand the decision for proper computation of the IR in accordance with Appeal No. 980894. We suggest that this be done by the designated doctor rather than through recomputation by the hearing officer.

Finally, we will assume that the date of the CCH in the decision is a typographical error. Because the proper date is recorded on many of the internal paperwork, including the exhibit list, there could be no benefit to an intentional change in the decision.

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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge